Opinions of the Supreme Court of Texas

Fiscal Year 2014

(September 1, 2013 – August 31, 2014)

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FISCAL YEAR 2014 OPINIONS

(SEPTEMBER 1, 2013 – AUGUST 31, 2014)

IN THE SUPREME COURT OF TEXAS

NO. 07-0010

GALVESTON CENTRAL APPRAISAL DISTRICT, PETITIONER,

v.

TRQ CAPTAIN'S LANDING, A TEXAS LIMITED PARTNERSHIP AND AMERICAN HOUSING FOUNDATION, A TEXAS NON-PROFIT CORPORATION, RESPONDENTS

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

Argued January 15, 2008

CHIEF JUSTICE HECHT delivered the opinion of the Court.

This case, like *AHF-Arbors at Huntsville I, LLC v. Walker County Appraisal District*,[1] concerns the ad valorem tax exemption available under section 11.182 of the Texas Tax Code for property that a community housing development organization ("CHDO") "owns". One issue, as in *AHF-Arbors*, is whether a CHDO must have legal title to the property to qualify for the exemption. We held in *AHF-Arbors* that equitable title is sufficient. Another issue, not present in *AHF-Arbors*, is whether the CHDO's application for an exemption was timely. We hold that it was. Accordingly, we affirm the judgment of the court of appeals and remand this case to the trial court.[2]

[1] 410 S.W.3d 831 (Tex. 2012).

[2] 212 S.W.3d 726 (Tex. App.–Houston [1st Dist.] 2006).

TRQ Captain's Landing, L.P., has legal title to Captain's Landing Apartments. American Housing Foundation formed and became the sole member of CD Captain's Landing, LLC, which in turn acquired TRQ by purchasing the limited partners' 99% interest and acquiring TRQ's general partner, which owns 1% of the limited partnership. Thus, the Foundation completely controls the LLC, which owns and controls the LP, which owns the apartments.

The Foundation, a Texas nonprofit corporation, is a CHDO; the LLC and the LP are not.[3] The LLC, the day it acquired the LP, applied for a tax exemption under section 11.182. Section 11.182(b) states that "[a]n organization is entitled to an exemption from taxation of improved or unimproved real property it owns" if the organization is a CHDO and meets certain other

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[3] As we explained in *AHF-Arbors*:

> CHDOs are a creation of the Cranston-Gonzalez National Affordable Housing Act of 1990, as amended. NAHA authorized the United States Department of Housing and Urban Development's HOME Investment Partnerships Program, which uses block grants to leverage local government and private funds to provide decent and affordable housing for low-income families. A portion of the grants must be set aside for CHDOs. As defined by Section 12704 of the Act, a CHDO is a nonprofit corporation that
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> > (A) has among its purposes the provision of decent housing that is affordable to low-income and moderate-income persons;
> >
> > (B) maintains, through significant representation on the organization's governing board and otherwise, accountability to low-income community residents and, to the extent practicable, low-income beneficiaries with regard to decisions on the design, siting, development, and management of affordable housing;
> >
> > (C) has a demonstrated capacity for carrying out activities assisted under this Act; and
> >
> > (D) has a history of serving the local community or communities within which housing to be assisted under this Act is to be located.

410 S.W.3d at 832-833 (quoting 42 U.S.C. § 12704(6) (footnotes and parentheticals omitted)).

requirements.[4] The Galveston Central Appraisal District denied the exemption on the ground that the LLC did not own the property. The LP filed a notice of protest, providing records to show the relationship between the property, the LP, the LLC, and the Foundation, and the Foundation's status as a CHDO, but the Appraisal Review Board denied the protest. The Foundation and the LP then sued for a declaration that they are entitled to the exemption. The trial court granted summary judgment for the District and denied the plaintiffs' motion for partial summary judgment.

A divided court of appeals reversed, holding that "an otherwise qualified equitable property owner may obtain an exemption from ad valorem taxes pursuant to subsection 11.182(b)",[5] and that plaintiffs' application for an exemption was timely under section 11.436.[6] We granted the District's petition for review,[7] but after we heard oral argument, the Foundation sought protection in

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[4] Section 11.182(b) states in full:

> An organization is entitled to an exemption from taxation of improved or unimproved real property it owns if the organization:
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> (1) is organized as a community housing development organization;
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> (2) meets the requirements of a charitable organization provided by Sections 11.18(e) and (f);
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> (3) owns the property for the purpose of building or repairing housing on the property to sell without profit to a low-income or moderate-income individual or family satisfying the organization's eligibility requirements or to rent without profit to such an individual or family; and
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> (4) engages exclusively in the building, repair, and sale or rental of housing as described by Subdivision (3) and related activities.

TEX. TAX CODE § 11.182(b).

[5] 212 S.W.3d at 736.

[6] *Id.* at 737.

[7] 51 Tex. Sup. Ct. J. 32 (Tex. Oct. 12, 2007).

bankruptcy, and we abated the case.[8] The bankruptcy trustee and the District now agree that this case is no longer stayed. We therefore vacate our order abating this cause and reinstate this matter on the active docket.

While the case was abated, we addressed section 11.182(b)'s ownership requirement in *AHF-Arbors*. The CHDO in that case was Atlantic Housing Foundation, Inc., a South Carolina nonprofit corporation.[9] Atlantic was the sole member of two limited liability companies — the "Arbors" — each of which owned an apartment complex as its sole asset.[10] The Arbors unsuccessfully applied for the tax exemptions available to a CHDO, and sought judical review.[11] We held that a CHDO's equitable ownership of property qualifies for an exemption under section 11.182(b), specifically noting our agreement with the reasoning of the court of appeals in the case now before us.[12] *AHF-Arbors* is thus dispositive of the ownership issue in the present case.

The District here additionally contends that the application for an exemption was untimely. Generally, eligibility for an exemption is determined as of January 1 of the year in which the exemption is sought, and a person must apply for the exemption before May 1 of that year.[13] Because the plaintiffs did not apply for an exemption until December of the year at issue, on the day

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[8] 52 Tex. Sup. Ct. J. 1153 (Tex. Aug. 28, 2009).

[9] 410 S.W.3d at 834.

[10] *Id*.

[11] *Id.*

[12] *Id.* at 838.

[13] TEX. TAX CODE §§ 11.42(a), 11.43(d).

the Foundation's LLC acquired the LP, the District argues that the application was late. But section 11.436(a) provided at the time:

> An organization that acquires property that qualifies for an exemption under Section 11.181(a) or 11.182(a) may apply for the exemption for the year of acquisition not later than the 30th day after the date the organization acquires the property, and the deadline provided by Section 11.43(d) does not apply to the application for that year.[14]

The District argues that the relevant occurrence was not the LLC's acquisition of the LP but the LP's acquisition of the apartments years earlier. We agree with the court of appeals that this argument is based on the District's position that an exemption must be based only on legal title, which we have rejected. Under section 11.436, the Foundation's application, made within thirty days of the date it acquired equitable title to the apartments, was timely.

Accordingly, the judgment of the court of appeals is

Affirmed.

Nathan L. Hecht
Chief Justice

Opinion delivered: January 17, 2014

[14] TEX. TAX CODE § 11.436(a). This section was amended, effective 2004, in a way not relevant to this case. Act of June 1, 2003, 78th Leg., R.S., ch. 1156, § 4, 2003 Tex. Gen. Law 3256, 3260 (replacing references to section 11.182 with references to section 11.1825).

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

Supplemental Opinion on Motion for Rehearing

The Finance Commission and the Credit Union Commission have not moved for rehearing. Neither have respondent Homeowners. The Texas Bankers Association has moved for rehearing, in part seeking clarification of several matters. A number of amici curiae have filed briefs in support of TBA's motion.[1]

Article XVI, Section 50(a)(6)(E) of the Texas Constitution caps "fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service" a home equity loan, not including "any interest", at 3% of principal.[2] In this case, we hold that "interest" as used in this provision does not mean compensation for the use, forbearance, or detention of money, as in the

[1] They are AmeriFirst Financial, Inc.; Independent Bankers Association of Texas; PrimeLending, a Plains Capital Company; Texas Mortgage Bankers Association; United Services Automobile Association; and Robert Wisner.

[2] TEX. CONST. art. XVI, § 50(a)(6)(E).

usury context, but "the amount determined by multiplying the loan principal by the interest rate."[3] This definition provides the protection to borrowers the provision is intended to afford.

We added this note in the margin: "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."[4] Focusing on the time payment is made, TBA and the amici question whether interest paid at closing falls outside the definition. For example, they explain, interest is sometimes paid at closing for part of a payment period, calculated per diem, until the regular payment date. Further, a borrower may pay discount points at closing to lower the interest rate for the term of the loan. The Homeowners respond that our opinion is clear: neither prepaid, per diem interest nor legitimate discount points are subject to the 3% cap. We agree with TBA, the amici, and the Homeowners that per diem interest is still interest, though prepaid; it is calculated by applying a rate to principal over a period of time. Legitimate discount points to lower the loan interest rate, in effect, substitute for interest. We also agree with the Homeowners that true discount points are not fees "necessary to originate, evaluate, maintain, record, insure, or service" but are an option available to the borrower and thus not subject to the 3% cap.

We also hold that Section 50(a)(6)(N), which provides that a loan may be "closed only at the office of the lender, an attorney at law, or a title company", precludes a borrower from closing the loan through an attorney-in-fact under a power of attorney not itself executed at one of the three prescribed locations. We reasoned that executing a power of attorney is "part of the closing

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[3] *Ante* at ___.

[4] *Ante* at ___ n.104.

process", and that not to restrict the use of a power of attorney would impair the undisputed purpose of the provision, which is "to prohibit the coercive closing of an equity loan at the home of the owner."[5] TBA and the amici object that closing is an event, not a process, and that to consider closing as beginning with the execution of a power of attorney leads to absurd results and problems in applying deadlines prescribed by the constitutional provisions.

By "process", we did not intend something temporally protracted, though we agree that confusion is understandable. We agree with TBA and the amici that the closing is the occurrence that consummates the transaction. But a power of attorney must be part of the closing to show the attorney-in-fact's authority to act. Section 50(a)(6)(N) does not suggest that the timing of the power of attorney is important, or that it cannot be used to close a home equity loan if executed before the borrower applied for the loan. But as we have explained, we think that the provision requires a formality to the closing that prevents coercive practices. The concern is that a borrower may be persuaded to sign papers around his kitchen table collateralizing his homestead when he would have second thoughts in a lender's, lawyer's, or title company's office. To allow the borrower to sign a power of attorney at the kitchen table raises the same concern. Requiring an attorney-in-fact to sign all loan documents in an office does nothing to sober the borrower's decision, which is the purpose of the constitutional provision.

TBA and the amici argue that requiring a power of attorney, like other closing documents, to be executed "at the office of the lender, an attorney at law, or a title company" works a hardship on borrowers for whom such locations are not readily accessible, such as military persons stationed

[5] *Ante* at ___.

overseas, others employed in other countries, the elderly, and the infirm. For the military, the Judge Advocate General Corps provides lawyers here and abroad. We recognize that JAG lawyers may not be as accessible to military personnel as civilian lawyers are to most people owning homes in Texas, but we also recognize that soldiers and sailors in harm's way are no less susceptible to being pressured to borrow money and jeopardizing their homes than people in more secure circumstances. TBA and the amici argue that the fiduciary duty owed by an attorney-in-fact affords sufficient protection against unfair pressure and unwise decisions, but a suit for breach of fiduciary duty may be a hollow remedy and certainly cannot recover a home properly pledged as collateral. In any event, "[w]hether so stringent a restriction [as limiting the locations where a home equity loan can be closed and, we think, a power of attorney executed] is good policy is not an issue for the Commissions or this Court to consider."[6] Whether the constitutional provision's intended protection is worth the hardship or could be more fairly or effectively provided by some other method is a matter that must be left to the framers and ratifiers of the Constitution.

With these clarifications, we overrule TBA's motion for rehearing.

Nathan L. Hecht
Chief Justice

Opinion delivered: January 24, 2014

[6] *Ante* at ___.

IN THE SUPREME COURT OF TEXAS

NO. 10-0567

TEXAS DEPARTMENT OF HUMAN SERVICES, PETITIONER,

v.

OLIVER OKOLI, RESPONDENT

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

Argued October 9, 2013

JUSTICE BROWN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE GUZMAN joined.

JUSTICE DEVINE filed a dissenting opinion, in which JUSTICE WILLETT and JUSTICE LEHRMANN joined.

JUSTICE BOYD did not participate in the decision.

The Texas Whistleblower Act protects public employees who in good faith report violations of law to an appropriate law-enforcement authority. TEX. GOV'T CODE § 554.002(a). In this case, an employee reported wrongdoing to his supervisor, who was required to forward the report to a part of the agency with outward-looking law-enforcement authority. We find this case indistinguishable from our previous cases interpreting the Act that hold reports of wrongdoing to a supervisor are not

good-faith reports to an appropriate law-enforcement authority. Therefore, we reverse the court of appeals and hold the trial court lacks subject-matter jurisdiction over this whistleblower claim.

I

Oliver Okoli was an employee of the Texas Department of Human Services (TDHS) from 1990 to 1998. At the time, TDHS was charged with administering welfare programs, such as the issuance of Medicaid benefits and food stamps. Okoli's duties included interviewing clients, determining benefits, explaining program benefits and requirements, and evaluating clients' eligibility for continuing services. Okoli was promoted on at least a couple of occasions, but was also cited several times, as far back as 1994, for faulty documentation.

According to Okoli, TDHS trained its employees in how to report illegal acts by other employees. Okoli asserts that TDHS instructed him to report such acts first to an immediate supervisor, and then up the chain of command if the first supervisor's response was unsatisfactory. This procedure was re-affirmed for Okoli when he reported a supervisor's harassment to the regional director and was told to go back and start with his immediate supervisor. In addition to the training Okoli received, TDHS also circulated an internal memorandum in 1994 entitled "Work Rule Violations." TDHS required Okoli to sign the memorandum, acknowledging that he had received it and discussed it with his supervisor.

The memorandum provided that TDHS employees are prohibited from making false statements relating to employment and job assignments, including "falsifying file dates on applications" and "intentionally making a false alteration of dates or codes on [TDHS] forms." The memorandum further provided that any employee or supervisor found to have violated, encouraged

a violation of, or failed to report such a violation would "be subject to disciplinary action up to and including dismissal." Additionally, the memorandum provided that for any violation amounting to a crime under the Penal Code, "a referral to [TDHS's Office of Inspector General] will be made for possible prosecution." TDHS's Office of Inspector General (OIG) is responsible "for the prevention, detection, audit, inspection, review, and investigation of fraud, waste, and abuse in the provision and delivery of all health and human services in the state," and for "enforcement of state law relating to the provision of those services." TEX. GOV'T CODE § 531.102(a). In the memorandum, Okoli was not given any instruction on whether he should or should not report unlawful conduct directly to the OIG.

In 1997, Okoli was assigned to a new supervisor. According to Okoli, this new supervisor often falsified dates on TDHS benefits forms to avoid delinquencies. When Okoli first complained of the fraudulent activity to the supervisor herself, she allegedly disciplined him, placing him on a "three-month corrective action plan." Okoli then reported the wrongdoing to the supervisor's supervisor. After receiving another unsatisfactory response, Okoli reported the "illegalities" even higher up the chain of command, to the Lead Program Manager. After following this course, Okoli was terminated. Okoli never reported the fraudulent activity to anyone within the OIG. Okoli pursued an administrative-grievance procedure to contest the termination, but the termination decision was sustained.

Okoli then sued TDHS under the Texas Whistleblower Act, alleging that he was terminated for reporting that his supervisor falsified dates and documents. In response, TDHS filed a plea to the jurisdiction, claiming the trial court lacked jurisdiction because Okoli failed to make a good-faith

report of a violation of law to an appropriate law-enforcement authority. *See* TEX. GOV'T CODE § 554.0035 ("Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter."). The trial court denied TDHS's plea to the jurisdiction, and TDHS appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting appeal from an interlocutory order that denies a plea to the jurisdiction by a governmental unit). The court of appeals affirmed, holding that the whistleblower statute did not require Okoli to raise a fact issue on the merits of the claim in order to show jurisdiction. *See Tex. Dep't of Human Servs. v. Okoli*, 263 S.W.3d 275, 281 (Tex. App.—Houston [1st Dist.] 2007, pet. granted). We reversed the court of appeals' decision and remanded the case for consideration under this Court's holding in *State v. Lueck*, 290 S.W.3d 876, 883 (Tex. 2009). *Tex. Dep't of Health & Human Servs. v. Okoli*, 295 S.W.3d 667, 668 (Tex. 2009) (per curiam).

On remand, the court of appeals held that because Okoli testified he was required by TDHS policy to report "up the chain of command," the supervisors were appropriate law-enforcement authorities within TDHS, and, alternatively, Okoli had a good-faith belief that he was reporting to appropriate law-enforcement authorities. *Tex. Dep't of Human Servs. v. Okoli*, 317 S.W.3d 800, 809–10 (Tex. App.—Houston [1st Dist.] 2010, pet. granted). The court of appeals again affirmed the trial court's order, and TDHS filed a second petition for review with this Court. Here, we consider whether Okoli made a report "to an appropriate law[-]enforcement authority," as defined by the Whistleblower Act, when he followed department policy and reported to his supervisors up the chain of command. TEX. GOV'T CODE § 554.002(b).

II

The Whistleblower Act prohibits a state or local governmental entity from taking adverse personnel action against "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law[-]enforcement authority." TEX. GOV'T CODE § 554.002(a). In 1995, the Legislature amended the statute to define "appropriate law[-]enforcement authority":

> [A] report is made to an appropriate law[-]enforcement authority if the authority is part of a state or local governmental entity or 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.

TEX. GOV'T CODE § 554.002(b).

This Court first interpreted what it means to be an "appropriate law[-]enforcement authority" under the amended statute in *Texas Department of Transportation v. Needham*, 82 S.W.3d 314 (Tex. 2002). To satisfy this requirement, a plaintiff seeking the Act's protection must prove that the report was made to an appropriate law-enforcement authority, or that the employee had a good-faith belief that it was. *Id.* at 320. An employee's belief is in good faith if: (1) the employee believed the governmental entity qualified, and (2) the employee's belief was reasonable in light of the employee's training and experience. *Id.* at 321. While the first element is subjective, the second element is an objective one: the reporting employee only receives Whistleblower Act protection if a reasonably prudent employee in similar circumstances would have believed the governmental entity to which he reported a violation of law was an appropriate law-enforcement authority. *Id.* at 320–21. Whether an employee has a good-faith belief that the entity is an appropriate law-

enforcement authority "turns on more than an employee's *personal* belief, however strongly felt or sincerely held." *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Gentilello*, 398 S.W.3d 680, 683 (Tex. 2013) (emphasis in original).

Since *Needham*, this Court has spoken several more times to what constitutes a good-faith report to an appropriate law-enforcement authority. In each instance, we have held that reports up the chain of command are insufficient to trigger the Act's protections. *See Ysleta Indep. Sch. Dist. v. Franco*, 417 S.W.3d 443, 445–46 (Tex. 2013) (per curiam); *Canutillo Indep. Sch. Dist. v. Farran*, 409 S.W.3d 653, 655 (Tex. 2013) (per curiam); *Univ. of Houston v. Barth*, 403 S.W.3d 851, 855–58 (Tex. 2013) (per curiam); *Tex. A & M Univ.—Kingsville v. Moreno*, 399 S.W.3d 128, 130 (Tex. 2013) (per curiam); *Gentilello*, 398 S.W.3d at 689; *Lueck*, 290 S.W.3d at 885–86. In *Gentilello*, we noted that we had consistently declined on previous occasions "to remove the objective element and protect internal reports to workplace supervisors who lacked the Act's specified powers." 398 S.W.3d at 683. The facts of Okoli's case do not merit a departure from this precedent.

III

The 1994 memorandum regarding how TDHS employees should report wrongdoing includes a purported assurance that violations of the Penal Code would be reported to OIG. TDHS does not dispute that its OIG is an appropriate law-enforcement authority under the Whistleblower Act, as it is charged with investigating and enforcing violations of law or fraud: "The commission's office of inspector general is responsible for the prevention, detection, audit, inspection, review, and investigation of fraud, waste, and abuse in the provision and delivery of all health and human services in the state . . . ." TEX. GOV'T CODE § 531.102(a). However, because Okoli did not make

a report directly to the OIG, we must consider whether the reports to Okoli's supervisors—who work to administer TDHS programs—satisfy the Act's requirements.

When an employee reports wrongdoing internally with the knowledge that the report will have to be forwarded elsewhere for regulation, enforcement, investigation, or prosecution, then the employee is not reporting "*to* an appropriate law[-]enforcement authority." TEX. GOV'T CODE § 554.002 (emphasis added). We have made this clear in previous decisions interpreting the "appropriate law[-]enforcement authority" requirement. In both *Needham* and *Lueck*, for instance, we denied Whistleblower Act protection to Texas Department of Transportation (TxDOT) employees who reported violations of law to supervisors within the department because those supervisors lacked appropriate law-enforcement authority. *Lueck*, 290 S.W.3d at 885–86 (holding the head of a division within TxDOT could not regulate or enforce federal traffic data-collection regulations); *Needham*, 82 S.W.3d at 320–21 (holding TxDOT could only internally discipline an employee who violated drunk-driving laws).

Importantly, in both *Needham* and *Lueck*, the whistleblowers had been made aware that their supervisors lacked law-enforcement authority. In *Lueck*, an e-mail revealed that the whistleblower knew his supervisor would have to refer the violation elsewhere. We held that this conclusively established that the employee could not have formed a good-faith belief that his supervisor was an appropriate law-enforcement authority. *Lueck*, 290 S.W.3d at 885–86; *see also Needham*, 82 S.W.3d at 321 (holding that employee's participation in TxDOT's internal disciplinary process was insufficient to support finding of good faith belief that he reported to proper authority).

In this case, for Okoli's reports of wrongdoing to have reached an appropriate law-enforcement authority, Okoli's supervisors would have had to forward them to OIG for prosecution. Further, like the e-mail in *Lueck*, the 1994 memorandum in this case spells out for Okoli that his supervisor would have to refer his report elsewhere. While the TDHS memo requires employees to report all work-rule violations, it also informs employees that if the violations constitute a violation of the Penal Code, "a referral to OIG will be made for possible prosecution." Like the employees in *Needham* and *Lueck*, Okoli did not report to an appropriate law-enforcement authority, nor could he have had a good-faith belief that he did so.

We reaffirmed our *Lueck* holding in *Barth* and *Gentilello*. *See Barth*, 403 S.W.3d at 857–58; *Gentilello*, 398 S.W.3d at 687. *Barth*, which we decided less than a year ago, is particularly analogous to this case. In *Barth*, a university professor reported violations of law by his college's dean to the university's general counsel, chief financial officer, internal auditor, and associate provost. 403 S.W.3d at 853. We held that because "none of the four people that Barth reported to regarding alleged violations of the Penal Code . . . could have investigated or prosecuted criminal law violations against third parties," he failed to satisfy section 554.002(b) of the Texas Government Code. *Id.* at 857–58. Barth also reported the violations to the university's police department, but not until after alleged retaliatory acts against him had already occurred. *Id.* at 857. We pointed out that Barth's report to the police may have been sufficient had it preceded the retaliatory action. *Id.*

In *Gentilello,* we held that a medical-school faculty member who oversaw internal compliance with federal regulations did not have "law-enforcement authority status" for reports of violations of federal laws. 398 S.W.3d at 686–87 ("A supervisor looking into and addressing

possible noncompliance in-house bears little resemblance to a law-enforcement official formally investigating or prosecuting the noncompliance on behalf of the public, or a regulatory authority charged with promulgating or enforcing regulations applicable to third parties generally."). In that case, the whistleblower acknowledged that the faculty member had only inward-looking authority and would have to refer suspected illegality "to whoever is in charge of enforcing the law." *Id.* at 688.

In spite of this line of authority, Okoli urges us to find his up-the-chain-of-command report satisfies the Act. This case can be distinguished from *Barth* and the others, Okoli insists, because TDHS had developed a process for collecting criminal reports within the agency: employees were trained to refer wrongdoing to department supervisors up the chain of command, who would then forward possible criminal violations to the OIG.

As to the training Okoli received, we have rejected the notion that a departmental policy requiring employees to report wrongdoing to their supervisors is sufficient to form a good-faith belief. The plaintiffs in *Barth*, *Gentilello*, and *Needham* were complying with similar instructions when they made their reports. *See Barth*, 403 S.W.3d at 857; *Gentilello*, 398 S.W.3d at 688; *Needham*, 82 S.W.3d at 314.

We have rejected this argument even when those who receive the report are also administratively obligated to report the alleged violations to an appropriate law-enforcement authority. We held that Barth's reports were insufficient, even though he argued that in reporting the violations as he did, he was complying with the university's internal administrative policy, and that university policy further required all the administrators who received such reports to forward them

to the university police. *See Barth*, 403 S.W.3d at 857–58. Similarly, we did not find a good-faith belief that the report made in *Needham* was made to an appropriate law-enforcement authority when the plaintiff there believed it would be forwarded to another entity that could prosecute the alleged violation. 82 S.W.3d at 321. Because these arguments are directly analogous to those Okoli makes in this case, we again hold that a departmental process that channels reports of wrongdoing to appropriate law-enforcement authorities does not make every report one that is "*to* an appropriate law[-]enforcement authority." *See* TEX. GOV'T CODE § 554.002(b) (emphasis added).

The fact that the OIG is an internal division of TDHS does not change the analysis. There is no reason why a TDHS supervisor is any more likely to pass on a report to OIG than the university administrators in *Gentilello* were to pass on reports of violations of federal law to federal authorities, or the administrators in *Barth* were to pass on reports of state-law offenses to the police.

In so holding, however, we decline, as we did in *Gentilello*, to say that no internal report could ever merit protection under the Act. *See* 398 S.W.3d at 686. In *Gentilello*, we posited this hypothetical:

> 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 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.

Id. (emphasis in original).

The whistleblower in the *Gentilello* hypothetical is reporting a violation of law to a police officer. Whether a member of the narcotics division or the internal-affairs division, a police officer is authorized to investigate violations of law and to cite or arrest persons suspected of committing such violations. Okoli's supervisors, like the supervisors and administrators in *Gentilello*, *Moreno*, *Barth*, *Needham*, and *Lueck*, have no such authority.

To satisfy the Act's requirements, a report must be made to (1) an individual person who possesses the law-enforcement powers specified under the Act, or (2) someone who, like a police-intake clerk, works for a governmental arm specifically charged with exercising such powers. This would include someone within an OIG or even an OIG within the same agency as the whistleblower, so long as the OIG has outward-looking law-enforcement authority. It would not include someone, like Okoli's supervisors, who does not work within a governmental arm so charged and would have to refer the report of wrongdoing to such an arm.

* * *

Because Okoli neither reported the alleged violations he witnessed to an appropriate law-enforcement authority nor in good faith could have believed he had, he is not entitled to the protections of the Whistleblower Act. TEX. GOV'T CODE § 554.002(a). Therefore, we reverse the court of appeals' judgment and dismiss Okoli's claims for lack of jurisdiction.

Jeffrey V. Brown
Justice

OPINION DELIVERED: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 10-0567

TEXAS DEPARTMENT OF HUMAN SERVICES, PETITIONER,

v.

OLIVER OKOLI, RESPONDENT

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

JUSTICE DEVINE, joined by JUSTICE WILLETT and JUSTICE LEHRMANN, dissenting.

The Texas Whistleblower Act prohibits a governmental entity from suspending or terminating a public employee, who in good faith reports another public employee's violation of law to an appropriate law enforcement authority. TEX. GOV'T CODE § 554.002(a). "[A] report is made to an appropriate law enforcement authority if the authority is a part of a . . . governmental entity . . . that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law." *Id.* § 554.002(b). Although the agency to whom Okoli reported the wrongdoing clearly possesses the powers enumerated above, the Court nevertheless concludes that Okoli's report was not made to an appropriate law enforcement authority because the individuals in that agency to whom he reported did not themselves possess these powers. The Court's focus on individual authority rather than the authority of the governmental entity receiving the report is a departure from prior case law, and its

opinion parses the whistleblower statute so finely as to eliminate any good-faith standard. Because statutory good faith has no meaning under the Court's writing, I dissent.

Since 2002, we have issued eight opinions shaping the contours of a good-faith report to an "appropriate law enforcement authority." *Ysleta Indep. Sch. Dist. v. Franco*, 417 S.W.3d 443 (Tex. 2013) (per curiam); *Canutillo Indep. Sch. Dist. v. Farran*, 409 S.W.3d 653 (Tex. 2013) (per curiam); *Univ. of Hous. v. Barth*, 403 S.W.3d 851 (Tex. 2013) (per curiam); *Tex. A & M Univ.–Kingsville v. Moreno*, 399 S.W.3d 128 (Tex. 2013) (per curiam); *Univ. of Tex. Sw. Med. Ctr. v. Gentilello*, 398 S.W.3d 680 (Tex. 2013); *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 624 (Tex. 2010) (per curiam); *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009); *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314 (Tex. 2002). In each of these cases, the Court ruled against the whistleblower, observing that internal agency reports to a supervisor were not whistleblower reports to an appropriate law enforcement authority because the agency itself generally lacked authority to investigate or prosecute criminal conduct or otherwise regulate conduct outside the agency involved. In short, the governmental entity receiving the report was not an appropriate law enforcement authority because it was powerless to act on the report beyond matters of internal discipline.

For example, in *Texas Department of Transportation v. Needham*, a TxDOT employee reported to two TxDOT supervisors and a human resources employee that another TxDOT worker was driving drunk during a work assignment. 82 S.W.3d at 316. We reasoned that an authorized law enforcement authority was a governmental entity with the power to regulate outside itself. We further concluded that TxDOT was not such an entity because it lacked "authority to regulate under or enforce the Texas' driving while intoxicated laws" or "to investigate or prosecute these criminal

laws." *Id*. at 320. Similarly, *State v. Lueck* involved another TxDOT employee who claimed that an email to his supervisor was an appropriate report, and again we held that the plaintiff did not allege a whistleblower claim because the report to TxDOT was not made to an authorized law enforcement authority. 290 S.W.3d at 885-86. Thereafter, several cases, decided in 2013, elaborated further on the statute's requirement of a good-faith report to an appropriate law enforcement authority. *See Barth*, 403 S.W.3d 851; *Moreno*, 399 S.W.3d 128; *Gentilello*, 398 S.W.3d 680.

In *Gentilello*, a professor of surgery at a state medical school complained to his supervisors that medical residents were not being supervised properly. 398 S.W.3d at 682. The professor subsequently sued his employer, alleging retaliation for his report. *Id.* We concluded that because the professor's supervisors could only ensure internal compliance, and not regulate under or enforce the law against third parties outside the medical school, the plaintiff could not pursue his claim. *Id*. at 687-88. We explained that an authorized law enforcement authority was a governmental entity that possessed outward-looking enforcement or regulatory powers but that an employee's internal report to such an entity could, under the appropriate circumstances, still be a good faith report to an authorized law enforcement authority:

> 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.
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> * * *
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> 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.
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> * * *
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> 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.

Id. at 685-86.

Two *per curiam* opinions promptly followed *Gentilello*. *Moreno* held that a plaintiff's internal report to her supervisors cannot comply with the Act "if the supervisor's power extends no further than ensuring the governmental body *itself* complies with the law." 399 S.W.3d at 130 (quoting *Gentilello*, 398 S.W.3d at 689). *Barth* similarly involved another purely internal report within a university alleging "questionable accounting practices" and the like. 403 S.W.3d at 853. We held that Barth's report (even if he alleged a violation of law) was not sufficient because there was no evidence, given Barth's training and experience, of his objective good-faith belief that he was reporting violations of law to an entity that could have enforced, investigated, or prosecuted similar violations against third parties. *Id*. at 857-58.

The above authorities make clear that the Whistleblower Act does not protect a public employee who makes a purely internal report to an entity that does not have authority to enforce or regulate under the law against those outside the employee's agency. But when a report is made internally to an entity that possesses the authority to enforce or investigate violations by others than

just its own employees, the report can form the foundation for a whistleblower complaint if there is evidence of good faith.

Okoli's former employer, the Texas Department of Human Services (TDHS), possesses such outward-looking authority. It has its own Office of Inspector General (OIG) with specific statutory authority to enforce and investigate violations of law, not just by TDHS employees but by others outside the agency as well. *See* TEX. GOV'T CODE § 531.102. It has its own regulations in the *Texas Administrative Code* which codify its responsibilities "for the enforcement of state law relating to the provision of health and human services in Medicaid and other HHS programs." 1 Tex. Admin. Code § 371.11(a). And, it possesses specific statutory authority to conduct civil and criminal investigations, not only of TDHS personnel, but also of those outside the agency. TEX. GOV'T CODE §§ 531.102, .1021, .103; *see also* Tex. Admin. Code §§ 371.11, .1603. Assuming that Okoli's report to an entity possessing law enforcement authority was not alone sufficient to invoke the protections of the Whistleblower Act, the issue remains as to whether his report was nevertheless in good faith.

Even when a plaintiff fails to report directly to an appropriate law enforcement authority, the plaintiff is not without recourse. The Act protects public employees who believe in good faith that their reports were to an authorized law enforcement authority, even though their belief may turn out to be incorrect. To determine "good faith," we have fashioned a two-part test with both subjective and objective components. *Needham*, 82 S.W.3d at 321. This good-faith test requires that the employee demonstrate that (1) he or she believed the report was to an authorized law enforcement authority and (2) such "belief was reasonable in light of the employee's training and experience." *Id*. Under the subjective test, the employee must think he or she is reporting to an authorized law

enforcement authority. Under the objective test, the belief cannot be absurd; it must be one that would be shared by a reasonable employee. *See id.* at 320-21.

In *Gentilello*, we held that, given his training and expertise, the plaintiff should have known that his reports were not made to an appropriate law enforcement authority because he knew his supervisor could only ensure internal compliance with the law. 398 S.W.3d at 688. Similarly, the plaintiff in *Moreno* demonstrated that her supervisor and agency were charged simply with ensuring internal compliance and not with external enforcement of the law. 399 S.W.3d at 129-30. She could therefore not show a good-faith belief that she had reported to an appropriate law enforcement authority.

Barth involved a University of Houston professor who reported questionable accounting practices and mishandled funds by a university dean to the university's CFO, general counsel, an internal auditor, and an associate provost. 403 S.W.3d at 853. We concluded the Act did not protect Barth, who was also trained as an attorney, because the individuals to whom Barth reported were charged only with the university's internal regulation and lacked the traditional, outward-looking law enforcement authority required by the Act. *Id.* at 857-58. The case is perhaps most similar to Okoli's in that the University, like TDHS, has an internal law-enforcement department—the university police. We concluded, however, that "given Barth's legal training and experience as a practicing attorney," there was no evidence of "the objective component of the good-faith test for reporting a violation of law to an appropriate law enforcement authority." *Id*. at 858. *Barth* is therefore factually distinguishable from this case in that Okoli's training and experience support rather than negate his good-faith belief that his reports were to an authorized law enforcement authority.

Two key pieces of evidence establish at least a fact question on the issue of Okoli's subjective-and-objective reasonableness as compared to a reasonable employee with similar training and experience. First, Okoli presented documentary evidence that, as part of his job, he received specific training that his chain of command could and would determine to whom to refer his complaint within the agency, including to those within the agency with civil and criminal law authority to act within or outside the agency. Okoli further presented evidence of a prior unrelated incident in which he failed to follow his training when making a report of wrongdoing and was reprimanded to follow agency protocol. There is evidence then of an internal agency policy establishing a mandatory and exclusive avenue to reach an outward-looking, but also internal, law enforcement authority and that reports made via this established policy could reasonably be considered to be direct reports to the enforcement arm of the state agency. In short, there is evidence that Okoli's chain of command functioned as an intake clerk for the OIG, thus substantiating Okoli's good-faith belief that a report to his supervisor under institutional protocol was in fact a report to the OIG. Second, there is no dispute but that the OIG was the appropriate place for such complaints.

This case is quite old, but procedurally it remains an infant, frozen in time by the State's preliminary plea to the jurisdiction. Although the trial court denied that plea almost eight years ago, the State appealed, and the State's appeal has bounced between the court of appeals and this Court ever since. The court of appeals has twice affirmed the trial court's interlocutory order denying the jurisdictional plea, and this is our second look at the plea. Such a plea may be granted only if the plaintiff's pleadings "affirmatively negate the existence of jurisdiction" or the jurisdictional facts are not in dispute. *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 227 (Tex. 2004).

Further, a court must indulge every reasonable inference and resolve any doubts in favor of the party resisting the plea. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009). Under that standard and this record, the trial court did not err in denying the State's preliminary plea.

It may be that a court or jury will ultimately find Okoli's reliance on his training and experience unconvincing or his purported belief in what he was told objectively unreasonable. But, for purposes of evaluating the jurisdictional facts, I cannot agree with the Court that there is no evidence of Okoli's good faith. In *Gentilello*, we left open the door that good faith might bridge the gap between internal agency reports and reports to an appropriate law enforcement authority in limited circumstances. Today, the Court closes that door, and with it any meaning the Legislature might have intended for "good faith."

Because there is some evidence that the defendant did require and train Okoli to submit whistleblower claims to his chain of command for investigation, regulation, enforcement, or prosecution by the OIG, I conclude there exists a fact question of Okoli's good faith, which supports the lower courts' decisions to deny the plea to the jurisdiction. I would accordingly affirm the court of appeals' judgment and allow the case to proceed in the trial court. Because the Court instead renders judgment for the State on its jurisdictional plea, I respectfully dissent.

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John P. Devine
Justice

Opinion Delivered: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 10-0775

SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN BOSTIC, DECEASED; HELEN DONNAHOE; AND KYLE ANTHONY BOSTIC, PETITIONERS,

v.

GEORGIA-PACIFIC CORPORATION, RESPONDENT

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

Argued September 9, 2013

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE BROWN joined, and in all but Parts II.A.3 and II.B of which JUSTICE GUZMAN joined.

JUSTICE GUZMAN filed a concurring opinion.

JUSTICE LEHRMANN filed a dissenting opinion, in which JUSTICE BOYD and JUSTICE DEVINE joined.

In *Borg-Warner Corp. v. Flores*,[1] we addressed standards imposed by Texas law for establishing causation in asbestos-disease cases. *Flores* concerned a plaintiff suffering from asbestosis. In today's case, the plaintiffs sued for damages resulting from the suffering and death

[1] 232 S.W.3d 765 (Tex. 2007).

of a family member, Timothy Bostic (Bostic), who succumbed to mesothelioma. We hold that the standard of substantial factor causation recognized in *Flores* applies to mesothelioma cases, and write on the meaning of substantial factor causation in this context. We further hold that the plaintiffs were not required to prove that but for Bostic's exposure to Defendant Georgia-Pacific Corporation's asbestos-containing joint compound, Bostic would not have contracted mesothelioma. In this regard, we disagree with language in the court of appeals' decision. However, we agree with that court that the plaintiffs failed to offer legally sufficient evidence of causation, and accordingly affirm the court of appeals' judgment.

I. Background

In 2002 Bostic was diagnosed with mesothelioma. He was 40 years old, and died of the disease in 2003. Mesothelioma is a rare cancer of a lining of the body's internal organs. There is no dispute that asbestos, when breathed into the lungs, can cause mesothelioma. Bostic's relatives, individually and on behalf of Bostic's estate (Plaintiffs), sued Georgia-Pacific and 39 other defendants, alleging that the defendants' products exposed Bostic to asbestos and caused his disease. Plaintiffs alleged causes of action for negligence and products liability. Plaintiffs claimed that as a child and teenager Bostic had been exposed to asbestos while using Georgia-Pacific drywall joint compound.

The case went to trial in 2006. The jury found Georgia-Pacific liable under negligence and marketing defect theories, and was asked to allocate causation among numerous entities. The jury assessed 25% of the causation to Knox Glass Company, a former employer who had settled with Bostic, and 75% to Georgia-Pacific.

The trial court signed an amended judgment awarding Plaintiffs approximately $6.8 million in compensatory damages and approximately $4.8 million in punitive damages. The court of appeals concluded that the evidence of causation was legally insufficient and rendered a take-nothing judgment.[2]

II. Discussion

A. Proof of Causation in Mesothelioma Cases

The Plaintiffs contend the court of appeals erred in holding that the causation evidence was legally insufficient. In conducting a legal sufficiency review, the final test "must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review."[3] "We must view the evidence in the light most favorable to the verdict and 'must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.'"[4]

1. *Flores*

Flores concerned proof of causation in a case where Flores, a brake mechanic, allegedly suffering from asbestosis, sued Borg-Warner, a brake pad manufacturer. The jury found that Flores suffered from asbestos-related disease and apportioned to Borg-Warner 37% of the causation.[5] We

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[2] 320 S.W.3d 588, 590, 602.

[3] *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

[4] *Id.* (footnote omitted) (quoting *City of Keller*, 168 S.W.3d at 827).

[5] *Flores*, 232 S.W.3d at 768.

concluded that the causation evidence was legally insufficient.[6] We held, consistent with section 431 of the Restatement Second of Torts, that to establish causation in fact the plaintiff must prove that the defendant's product was a substantial factor in causing the disease, and that mere proof that the plaintiff was exposed to "some" respirable fibers traceable to the defendant was insufficient.[7] "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred."[8] We held the evidence legally insufficient because the record revealed "nothing about how much asbestos Flores might have inhaled."[9] We held that "while some respirable fibers may be released upon grinding some brake pads, the sparse record here contains no evidence of the approximate quantum of Borg-Warner fibers to which Flores was exposed, and whether this sufficiently contributed to the aggregate dose of asbestos Flores inhaled, such that it could be considered a substantial factor in causing his asbestosis."[10]

On further analysis, we held that "proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support

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[6] *Id.* at 774.

[7] *Id.* at 766, 770.

[8] *Id.* at 770 (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)).

[9] *Id.* at 771.

[10] *Id.* at 772.

causation under Texas law."[11] While the plaintiff was not required to establish causation with "mathematical precision," we required "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease."[12] In rejecting a standard that "some" exposure would suffice, the Court recognized: "As one commentator notes, '[i]t is not adequate to simply establish that 'some' exposure occurred. Because most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred."[13]

Plaintiffs urge that the standards established in *Flores* are not fully applicable because today's case is a mesothelioma case and *Flores* was an asbestosis case. They contend that a key factual distinction between the two diseases is that relatively minute quantities of asbestos can result in mesothelioma. In *Flores*, we noted that the development of asbestosis requires a heavy exposure to asbestos, while mesothelioma may result from low levels of exposure.[14] Plaintiffs presented evidence of this same distinction.[15]

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[11] *Id.*

[12] *Id.* at 773.

[13] *Id.*

[14] *Id.* at 771.

[15] For example, one of Plaintiffs' experts, Dr. Brody, testified that "there's no safe level for mesothelioma. In other words, no one's ever been able to show a level that will prevent everyone from getting mesothelioma. Now, you can do that for asbestosis, and you can get pretty close probably for most lung cancer cases, but for mesothelioma, no one's ever shown a safe level."

While *Flores* left open the prospect of treating asbestosis and mesothelioma cases differently, we decline to do so. We believe the *Flores* framework for reviewing the legal sufficiency of causation evidence lends itself to both types of cases. In particular, we hold that even in mesothelioma cases proof of "some exposure" or "any exposure" alone will not suffice to establish causation. While the experts in this case testified that small amounts of asbestos exposure can result in mesothelioma, that fact alone does not merit a different analysis. With both asbestosis and mesothelioma, the likelihood of contracting the disease increases with the dose. As to asbestosis, we noted in *Flores* that this disease "appears to be dose-related, so that the more one is exposed, the more likely the disease is to occur, and the higher the exposure the more severe the disease is likely to be."[16] As to asbestos-related cancer, in *Flores* we discussed the California Supreme Court's decision in *Rutherford v. Owens-Illinois, Inc.*[17] That case described how expert testimony was presented from both sides establishing "that the plaintiffs' asbestos-related disease was 'dose-related'—i.e., that the risk of developing asbestos-related cancer increased as the total occupational dose of inhaled asbestos fibers increased."[18] And in today's case, Plaintiffs' experts consistently testified that all asbestos-related diseases are dose-related.[19] Plaintiffs' experts Brody, Lemen, and Hammar relied in part on the "Helsinki Conference" report,[20] a report stating that "[m]esothelioma

[16] 232 S.W.3d at 771 (internal quotation marks omitted).

[17] 941 P.2d 1203 (Cal. 1997), *discussed in Flores*, 232 S.W.3d at 772–73.

[18] *Rutherford*, 941 P.2d at 1209.

[19] *See infra* note 96.

[20] *See infra* notes 99–100 an accompanying text.

can occur in cases with low asbestos exposure. However, very low background environmental exposures carry only an extremely low risk."

If any exposure at all were sufficient to cause mesothelioma, everyone would suffer from it or at least be at risk of contracting the disease. In *Flores* we noted that one of the plaintiff's experts acknowledged that "everyone is exposed to asbestos in the ambient air" and that "it's very plentiful in the environment, if you're a typical urban dweller."[21] In today's case, one of Plaintiffs' experts, Dr. Brody, confirmed that "[w]e all have some asbestos" in our lungs. He then explained that background levels are sufficiently low that they do not cause disease,[22] and that "multiples of fibers many times over" were required to cause mesothelioma.[23] Acceptance of an any exposure theory

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[21] 232 S.W.3d at 767.

[22] Brody testified:

> Well, so when we're talking about background, we're talking about what we all have. And it's just a fact of modern society as materials that contain asbestos break down or if you live in an area where there's naturally occurring asbestos, that asbestos will accumulate in the lung to some level, which does not produce disease. That's not a level that anyone can measure disease.

[23] Brody testified:

> Q: Can one fiber of chrysotile [asbestos] or one fiber of amosite [asbestos] cause mesothelioma?
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> A: No.
>
> Q: Okay, Do you have to have more than one?
>
> A: Yeah, of course. I mean a single fiber can cause a genetic error, but I told you that that's not enough to cause disease.
>
> Q: Okay. You have to have more than one, some number greater than one to actually cause these mutations that actually . . . cause the uncontrolled cell growth that you talked about?
>
> A: Oh, yes, you have to have many—
>
> Q: Okay.

would contradict the testimony of plaintiffs' own expert, ignore the importance of dose in determining a causative link, and impose liability even where, for all the jury can tell, the plaintiff might have become ill from his exposure to background levels of asbestos or for some other reason.[24]

More fundamentally, if we were to adopt a less demanding standard for mesothelioma cases and accept that any exposure to asbestos is sufficient to establish liability, the result essentially would be not just strict liability but absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime. However, "[w]e have recognized that '[e]xposure to asbestos, a known carcinogen, is never healthy but fortunately does not always result in disease.'"[25] And we have never embraced the concept of industry-wide liability on grounds that proof of causation might be difficult. Instead, we have rejected such thinking and held firm to the principle that liability in tort must be based on proof of causation by a preponderance of the evidence. In a mesothelioma case, we rejected theories of collective liability—alternative liability, concert of action, enterprise liability, and market share liability—and held instead: "A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product that caused the injury."[26] *Merrell Dow Pharmaceuticals, Inc. v. Havner*, another toxic tort case, further explains:

A: — multiples of fibers many times over to get those kinds of changes.

[24] *See Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 878 n.9 (S.D. Ohio 2010) ("[S]ince benzene is ubiquitous, causation under the one-hit theory could not be established because it would be just as likely that ambient benzene was the cause of Plaintiffs' illnesses."), *aff'd*, 533 F. App'x 509 (6th Cir. 2013).

[25] *Flores*, 232 S.W.3d at 770–71.

[26] *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989).

> Others have argued that liability should not be allocated only on the basis of reliable proof of fault because legal rules should have the goals of "risk spreading, deterrence, allocating costs to the cheapest cost-avoider, and encouraging socially favored activities," and because "consumers of American justice want people compensated." It has been contended that "[f]or some cases that very well may mean creating a compensatory mechanism even in the absence of clear scientific proof of cause and effect" . . . . We expressly reject these views. Our legal system requires that claimants prove their cases by a preponderance of the evidence. . . . As Judge Posner has said, "[l]aw lags science; it does not lead it."[27]

If an "any exposure" theory of liability is accepted for mesothelioma cases because science has been unable to establish a dose below which the risk of disease disappears, the same theory would arguably apply to *all* carcinogens. Dr. Lemen, Plaintiffs' epidemiologist and a former Assistant Surgeon General, testified that for all carcinogens the threshold at which the risk falls to zero is unknown.[28]

The any exposure theory effectively accepts that a failure of science to determine the maximum safe dose of a toxin necessarily means that every exposure, regardless of amount, is a

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[27] 953 S.W.2d 706, 728 (Tex. 1997) (citations omitted).

[28] Lemen testified:

> Q: And isn't it true that this principle that we don't know of any safe level of exposure is true for any carcinogen?
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> A: At the present time, we aren't able to identify the carcinogenic compounds, what is safe and what is not safe. And that is true pretty much across the board for things that cause cancer.
>
> Q: So for anything on this list of carcinogens that we'll talk about later, your answer is true that if it is on the list of carcinogens, it's not just asbestos, it's the entire list that you would say we know of no safe level of exposure to it, correct?
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> A: Basically that's correct.
>
> Q: Even if it's used even today day-in and day-out in industrial and consumer products?
>
> A: That's correct. . . .

substantial factor in causing the plaintiff's illness. This approach negates the plaintiff's burden to prove causation by a preponderance of the evidence. As a federal district court reasoned in excluding the testimony of Dr. Hammar, Plaintiffs' expert on specific causation in today's case:

> Rule 702 and *Daubert* recognize above all else that to be useful to a jury an expert's opinion must be based on sufficient facts and data. The every exposure theory is based on the opposite: a lack of facts and data. . . . It seeks to avoid not only the rules of evidence but more importantly the burden of proof. . . . Dr. Hammar wants to be allowed to tell a jury that all of the plaintiff's *possible* exposures to asbestos during his entire life were contributing causes of the plaintiff's cancer, and, therefore, sufficient to support a finding of legal liability as to the manufacturer of each asbestos containing product, without regard to dosage or how long ago the exposure occurred. Just because we cannot rule anything out does not mean we can rule everything in.[29]

Further, there are cases where a plaintiff's exposure to asbestos can be tied to a defendant, but that exposure is minuscule as compared to the exposure resulting from other sources. Proof of any exposure at all from a defendant should not end the inquiry and result in automatic liability. The Restatement Third of Torts provides that "[w]hen an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm under § 27 [addressing multiple sufficient causes], the harm is not within the scope of the actor's liability."[30] In *Flores* we held the causation evidence legally insufficient because the record revealed "nothing about how much asbestos Flores might have inhaled" but also because Flores did not "introduce evidence regarding what percentage of that indeterminate amount may have originated in Borg-Warner products."[31] And

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[29] *Smith v. Ford Motor Co.*, 2013 WL 214378, at *2–3 (D. Utah Jan. 18, 2013) (emphasis in original).

[30] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 36 (2010).

[31] 232 S.W.3d at 771–72.

in *Havner* we held that "if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty."[32] That statement requires some explication in cases involving multiple exposures to the same toxin, as we discuss below, but here it properly stands for the proposition that, even in mesothelioma cases, liability cannot be imposed on every conceivable defendant whose product exposed the plaintiff to some unquantified amount of asbestos, without proof of something more. "The recent, increasingly strict exposure cases . . . reflect a welcome realization by state courts that holding defendants liable for causing asbestos-related disease when their products were responsible for only de minimis exposure to asbestos, and other parties were responsible for far greater exposure, is not just . . . ."[33]

The any exposure theory is also illogical in mesothelioma cases, where a small exposure can result in disease, because it posits that any exposure from a defendant above background levels should impose liability, while the background level of asbestos should be ignored. But the expert testimony in this case was undisputed that the background level varies considerably from location to location. We fail to see how the theory can, as a matter of logic, exclude higher than normal background levels as the cause of the plaintiff's disease, but accept that any exposure from an individual defendant, no matter how small, should be accepted as a cause in fact of the disease. Under the any exposure theory a background dose of 20 does not cause cancer, but a defendant's dose of 2 plus a background dose of 5 does.

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[32] *Havner*, 953 S.W.2d at 720.

[33] David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 59 (2008).

For these reasons, we extend the reasoning and holdings of *Flores* to mesothelioma cases, including our rejection of the "any exposure" theory of liability, with the clarifications discussed below.

2. But For Causation

Plaintiffs complain that the court of appeals erred in requiring them to prove but for causation in addition to substantial factor causation. The term "but for causation" may encompass several meanings. As we attempt to clarify, "but for" and "substantial factor" are overlapping concepts and, to the extent they embody different tests, application of those tests usually lead to the same result. But here we are concerned that the court of appeals' decision might be read to require satisfying a proof requirement that but for Bostic's exposure to Georgia-Pacific's products, he would not have contracted mesothelioma. We agree with Plaintiffs that language in the court of appeals' decision appears to require such proof. The court stated that "[b]oth producing and proximate cause contain the cause-in-fact element, which requires that the defendant's act be a substantial factor in bringing about the injury and without which the harm would not have occurred."[34] It stated, "'In asbestos cases, then, we must determine whether the asbestos in the defendant's product was a substantial factor in bringing about the plaintiff's injuries,' and without which the injuries would not have occurred."[35] In doing so, the court of appeals quoted from *Flores* but appended but for language to the end of its sentence. The court expressly disagreed with Plaintiffs' assertion that *Flores* did not

[34] 320 S.W.3d at 596 (quoting *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835 (Tex. 2009) (internal quotation marks omitted)).

[35] *Id.* (quoting *Flores*, 232 S.W.3d at 770).

require proof of but for causation.[36] It then concluded that the testimony of Dr. Hammar was wanting because "he could not opine that Timothy would not have developed mesothelioma absent exposure to Georgia-Pacific asbestos-containing joint compound."[37]

To a point, we agree with Georgia-Pacific that but for causation is a recognized standard for proof of producing cause, also known as causation in fact,[38] applicable to this products liability case.[39] We have often recognized but for causation, alone or in combination with substantial factor causation, as the standard for establishing causation in fact.[40] Indeed, "to say of a cause of an injury

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[36] *Id.* ("[Plaintiffs] assert that *Flores* does not require 'but-for' causation in proving specific causation and that *Flores* requires only that [Plaintiffs] prove Timothy's exposure to Georgia-Pacific asbestos-containing joint compound was a 'substantial factor' in contributing to his risk of mesothelioma. We disagree.").

[37] *Id.*

[38] *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 223 (Tex. 2010) (recognizing that "the producing cause inquiry is conceptually identical to that of cause in fact").

[39] Producing cause is the level of causation applicable to products liability cases. *See, e.g.*, *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975). Plaintiffs sued under theories of negligence and products liability, the latter being based on a marketing defect theory. However, Plaintiffs concede that but for causation was required under their negligence theory of liability because the jury was instructed that proximate cause, a necessary element of negligence liability, required proof of but for causation. The jury was instructed that proximate cause "means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred." *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000) ("Since neither party objected to this instruction, we are bound to review the evidence in light of this definition.").

[40] *E.g.*, *Crump*, 330 S.W.3d at 222–23 ("Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred.") (quoting *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004)); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) ("The test for cause in fact, or 'but for causation,' is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'"); *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995) ("Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred."); *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex. 1993) (holding that to establish causation in fact element common to both negligence and products liability causes of action, "plaintiffs must show that but for GM's omission the accident would not have occurred").

that it is one 'but for which the injury would not have happened' is to repeat something already included in the usual and ordinary meaning of the word 'cause.'"[41]

Nor is there anything unusual in our recognizing but for causation as the causation standard in tort cases. The Restatement Second of Torts in section 431 generally recognizes that an "actor's negligent conduct is a legal cause of harm to another if [] his conduct is a substantial factor in bringing about the harm."[42] Comment *a* to this section makes clear that, as a general proposition, substantial factor causation incorporates the concept of but for causation: "In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. Except as stated in § 432(2), this is necessary, but it is not of itself sufficient."[43] Hence, the comment indicates that but for causation is generally a component of substantial factor causation.

The Restatement Third of Torts likewise embraces but for causation as the general causation standard in tort cases. Section 26 of the subtitle on Liability for Physical and Emotional Harm

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[41] *Tex. Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026, 1030 (Tex. 1940) (quoting *Tex. & Pac. Ry. v. Short*, 62 S.W.2d 995, 999 (Tex. App.—Eastland 1933, writ ref'd)).

[42] RESTATEMENT (SECOND) OF TORTS § 431 (1965). This provision addresses negligence liability, and as noted today's case is, for our purposes, a products liability case. *See supra* note 39. However, the element of causation in fact is the same under the two theories of liability. To recover under a negligence theory, the plaintiff must establish proximate causation, while recovery under a products liability theory requires proof of producing causation. Proximate cause and producing cause share the common element of causation in fact, with proximate cause including the additional element of foreseeability. *See Crump*, 330 S.W.3d at 222–23; *Flores*, 232 S.W.3d at 770; *Union Pump*, 898 S.W.2d at 775; *Saenz*, 873 S.W.2d at 356; *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 (1998) ("Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort."); RESTATEMENT (SECOND) OF TORTS § 431 cmt. e (1965) ("Although the rules stated in this Section are stated in terms of the actor's negligent conduct, they are equally applicable where the conduct is intended to cause harm, or where it is such as to result in strict liability.").

[43] RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965).

provides: "Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."[44] The Restatement Third not only embraces but for causation, but includes some criticism of the substantial factor test.[45]

However, we follow *Flores* and conclude that in products liability cases where the plaintiff was exposed to multiple sources of asbestos, substantial factor causation is the appropriate basic standard of causation without including as a separate requirement that the plaintiff meet a strict but for causation test. Due to the nature of the disease process, which can occur over decades and involve multiple sources of exposure, establishing which fibers from which defendant actually caused the disease is not always humanly possible. Even if the exposure from a particular defendant was by itself sufficient to cause the disease, in multiple-exposure cases the plaintiff may find it impossible to show that he would not have become ill but for the exposure from that defendant.

In *Flores* we recognized "the proof difficulties accompanying asbestos claims. The long latency period for asbestos-related diseases, coupled with the inability to trace precisely which fibers caused disease and from whose product they emanated, make this process inexact."[46] Along similar lines, the Virginia Supreme Court recently observed that "if the traditional but-for definition of proximate cause was invoked, the injured party would virtually never be able to recover for damages

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[44] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (2010).

[45] *See id.*§ 26 cmt. j.

[46] 232 S.W.3d at 772.

arising from mesothelioma in the context of multiple exposures . . . ."[47] Further, in *Flores* we quoted from *Rutherford*:

> Plaintiffs cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber. . . . Instead, we can bridge this gap in the humanly knowable by holding that plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth.[48]

This language is inconsistent with a strict requirement of proving that but for the particular fibers traceable to the sued defendant, the plaintiff would not have become ill. In *Flores* we keyed on substantial factor causation, and did not require proof of but for causation. The absence of but for language in *Flores* was not inadvertent.

Again, our approach did not break new ground. While but for causation is a core concept in tort law, it yields to the more general substantial factor causation in situations where proof of but for causation is not practically possible or such proof otherwise should not be required. A leading treatise has observed that the substantial factor approach "in the great majority of cases . . . produces the same legal conclusion as the but-for test," but "was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the

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[47] *Boomer v. Ford Motor Co.*,736 S.E.2d 724, 729 (Va. 2013).

[48] 941 P.2d at 1219 (footnote omitted) (emphasis in original), *quoted in Flores*, 232 S.W.3d at 772–73.

conduct of one or more others would have been sufficient to produce the same result."[49] Likewise, *Rutherford* reasoned that "[t]he substantial factor standard generally produces the same results as does the 'but for' rule of causation," but the substantial factor test "has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact."[50] This problem arises in toxic tort cases such as *Flores*, *Boomer*, *Rutherford*, and today's case, where the plaintiff has suffered exposure from multiple sources.

The Restatement Second of Torts likewise recognizes an alternative to strict but for causation in certain cases involving multiple causes of injury. While, as noted, section 431 and its comment *a* generally require but for causation, comment *a* further notes that this rule applies "[e]xcept as stated in § 432(2)." Section 432(2) addresses cases involving multiple causation: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."[51] Section 432(2) recognizes a scenario where the actor's conduct is not, strictly speaking, a but for cause, because another force would have caused the harm anyway.

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[49] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984).

[50] 941 P.2d at 1214.

[51] RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

Likewise, while the Restatement Third generally embraces but for causation in section 26,[52] as noted above, it elsewhere still recognizes substantial factor causation in some products liability cases[53] and in a sense recognizes the converse of substantial factor causation, by providing in section 36 that "[w]hen an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm under § 27, the harm is not within the scope of the actor's liability."[54] So while not requiring substantial factor causation in section 26, which sets out the general causation standard, it recognizes in the negative that a trivial contribution to causation will not suffice. This rule hardly represents a sea change, as section 433(a) of the Restatement and Restatement Second have long stated that, in making a substantial factor determination, an important consideration is "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it."[55] Further, while section 26 moves away from the substantial factor standard, comment *j* to that section explains its particular usefulness in certain multiple-causation cases.[56]

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[52] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (2010).

[53] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16(a) (1998) ("When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.").

[54] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 36 (2010).

[55] RESTATEMENT (SECOND) OF TORTS § 433(a) (1965); RESTATEMENT OF TORTS § 433(a) (1934).

[56] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. j (2010) (stating that the "primary function" of the substantial-factor test "was to permit the factfinder to decide that factual cause existed when there were multiple sufficient causes—each of two separate causal chains sufficient to bring about the plaintiff's harm, thereby rendering neither a but-for cause").

Moreover, the Restatement Third, like the earlier Restatements, does not require strict but for causation in a toxic tort multiple-exposure case like today's case. Section 26 generally requires but for causation, by stating that "[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct." However, section 26 ends by stating that "[t]ortious conduct may also be a factual cause of harm under section 27." Section 27 addresses cases of multiple causation and states: "If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."[57] Read in a vacuum, sections 26 and 27 might appear to require strict but for causation for each defendant in a multiple-exposure case where the exposures did not occur "at the same time," the position we understand Georgia-Pacific to take. These sections are fraught with complexities and what if scenarios, set out in many comments and illustrations. Comment *f* to section 27 states:

> In some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm. . . . The fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability of this Section.[58]

And comment *g* posits the scenario closest to our case:

> [T]he situation addressed in Comment *f* has occurred most frequently in cases in which persons have been exposed to multiple doses of a toxic agent. When a person contracts a disease such as cancer, and sues multiple actors claiming that each provided some dose of a toxic substance that caused the disease, the question of the

[57] *Id.* § 27.

[58] *Id.* § 27 cmt. f.

> causal role of each defendant's toxic substance arises. Assuming that there is some threshold dose sufficient to cause the disease, the person may have been exposed to doses in excess of the threshold before contracting the disease. Thus, some or all of the person's exposures may not have been but-for causes of the disease. Nevertheless, each of the exposures prior to the person's contracting the disease . . . is a factual cause of the person's disease under the rule in this Section.[59]

In short, we do not think the Restatements, in their attempts to synthesize many decades of tort law, would require the plaintiffs to meet a strict but for causation test in a case like today's case. More importantly, our controlling decision in *Flores* does not impose this requirement. Accordingly, we hold that Plaintiffs were required to establish substantial factor causation, but were not required to prove that but for Bostic's exposure to Georgia-Pacific's products, he would not have contracted mesothelioma. The court of appeals erred insofar as it stated otherwise.

3. Further Analysis, under *Havner*, of Substantial Causation in Asbestos Cases

We write further on the meaning of substantial factor causation in asbestos cases. First, we note that for all the refinements *Flores* places on the substantial causation standard, we also believe that some discretion must be ceded to the trier of fact in determining whether the plaintiff met that standard. One respected treatise has opined that it is "neither possible nor desirable to reduce [substantial factor] to any lower terms."[60]

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[59] *Id.* § 27 cmt. g.

[60] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984); *see also id.* § 41, at n.30 ("Hart and Honoré . . . object strongly to the phrase as undefinable. So, Green suggests is 'reasonable,' but that does not prevent its use to pose an issue for the jury.").

We recognized a quantitative approach to causation in *Merrell Dow Pharmaceuticals, Inc. v. Havner*,[61] and Georgia-Pacific urges use of that approach in today's case. *Havner* provides useful insights that should be integrated with our analysis here.

In *Havner*, the plaintiffs sued on behalf of a child born with birth defects allegedly caused by a drug, Bendectin, taken by the mother while she was pregnant. The Court held that the expert testimony, which relied in part on epidemiological studies, was legally insufficient to establish causation.[62] We recognized that epidemiological studies showing that the population exposed to a toxin faced more than double the risk of injury facing the unexposed or general population could be used to establish causation.[63]

While recognizing that causation might be established through epidemiological studies showing more than a doubling of the risk, also described as a relative risk of more than 2.0,[64] we recognized that this requirement was not a "litmus test" or "bright-line boundary" and that a single study would not suffice to establish legal causation.[65] We discussed several other indicia of scientific validity. A claimant must show that his circumstances are similar to the group analyzed in the study.[66] We observed that scientific studies also consider the "significance level" or "confidence

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[61] 953 S.W.2d 706 (Tex. 1997).

[62] *Id.* at 708, 730.

[63] *Id.* at 717–18.

[64] *See id.* at 718; *see also id.* at 721 ("For the result to indicate a doubling of the risk, the relative risk must be greater than 2.0.").

[65] *Id.* at 718–19, 727.

[66] *Id.* at 720.

level," that the generally accepted confidence level is 95%,[67] and that statistical significance also requires a "confidence interval" that does not include the number 1.[68] We noted that "[t]here are many other factors to consider in evaluating the reliability of a scientific study including, but certainly not limited to, the sample size of the study, the power of the study, confounding variables, and whether there was selection bias."[69] We also noted that courts must be "especially skeptical of scientific evidence that has not been published or subjected to peer review,"[70] and that "[a] related factor . . . is whether the study was prepared only for litigation."[71]

Havner is a foundational part of our jurisprudence. We have never held that it applies universally to all tort cases where causation is an issue.[72] It offers an alternative method of establishing causation "[i]n the absence of direct, scientifically reliable proof of causation."[73] To some extent *Havner*'s discussion of the use of scientific studies addressed whether those studies

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[67] *Id.* at 723–24.

[68] *Id.* at 723.

[69] *Id.* at 724.

[70] *Id.* at 727 (internal quotation marks omitted); *see also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (holding that one factor in deciding reliability of expert testimony is "whether the theory has been subjected to peer review and/or publication").

[71] *Havner*, 953 S.W.2d at 726.

[72] For example, we noted in *Flores* that epidemiological studies discussed in *Havner* "are not necessary to prove causation" though properly designed studies can serve as part of the evidence establishing causation. *Flores*, 232 S.W.3d at 772.

[73] *Havner*, 953 S.W.2d at 715.

supported general causation—the issue of whether Bendectin was capable of causing birth defects.[74] Epidemiological studies by their nature address general causation by analyzing a cohort of individuals,[75] rather than specific causation—the jury issue of whether the defendant's product caused the specific injury in issue,[76] but these studies are sometimes used effectively by experts to help establish specific causation, as *Havner* recognized.[77] In today's case, general causation is not an issue. Georgia-Pacific does not dispute, for purposes of this appeal, that exposure to asbestos fibers can cause mesothelioma.[78]

Despite differences between *Havner* and today's case, *Havner*'s focus on proof of more than a doubling of risk, as established by scientifically reliable studies, is premised on fundamental principles of tort law that have application here. *Havner*'s discussion of epidemiological studies was based on the tenet in our law that expert testimony on causation must be scientifically reliable. "If

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[74] *Id.* ("The Havners rely to a considerable extent on epidemiological studies for proof of general causation."); *see also Merck & Co. v. Garza*, 347 S.W.3d 256, 265 (Tex. 2011) ("*Havner* holds . . . that when parties attempt to prove general causation using epidemiological evidence, a threshold requirement of reliability is that the evidence demonstrate a statistically significant doubling of the risk.").

[75] *See Havner*, 953 S.W.2d at 715 ("Epidemiological studies examine existing populations to attempt to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition.").

[76] *Id.* at 714 ("General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury.").

[77] *Id.* at 715.

[78] Some of the Georgia-Pacific drywall compound to which Bostic was allegedly exposed contained chrysotile asbestos fibers. Plaintiffs' experts testified that the prevailing scientific consensus is that chrysotile fibers can cause mesothelioma. While Georgia-Pacific contends that a scientific debate continues as to whether inhalation of chrysotile fibers causes mesothelioma, it states in its principal brief that it is not challenging "the assumption that exposure to chrysotile can cause mesothelioma."

the expert's scientific testimony is not reliable, it is not evidence."[79] We discussed our decision in *E.I. du Pont de Nemours and Co. v. Robinson*,[80] where we analyzed the issue of expert reliability.[81] As recognized in *Robinson,* "In addition to being relevant, the underlying scientific technique or principle must be reliable. Scientific evidence which is not grounded in the methods and procedures of science is no more than subjective belief or unsupported speculation. Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702."[82]

Havner also held that, notwithstanding competing policies of deterrence, risk-avoidance, or compensating innocent injured parties, "[o]ur legal system requires that claimants prove their cases by a preponderance of the evidence," and we rejected all rationales for adopting a lesser burden of proof.[83] In concluding that studies showing more than a doubling of the risk may be supportive of legal causation, provided that other indicia of reliability are met, we explained that this standard corresponds to the legal requirement that the plaintiff prove his case by a preponderance of the evidence:

> Recognizing that epidemiological studies cannot establish the actual cause of an individual's injury or condition, a difficult question for the courts is how a plaintiff faced with this conundrum can raise a fact issue on causation and meet the "more likely than not" burden of proof.
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[79] *Id.* at 713.

[80] 923 S.W.2d 549 (Tex. 1995).

[81] *Havner*, 953 S.W.2d at 712, 714.

[82] *Robinson*, 923 S.W.2d at 557 (citation, internal quotation marks omitted).

[83] 953 S.W.2d at 728.

> Other courts have likewise found that the requirement of a more than 50% probability means that epidemiological evidence must show that the risk of an injury or condition in the exposed population was more than double the risk in the unexposed or control population.
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> Although we recognize that there is not a precise fit between science and legal burdens of proof, we are persuaded that properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case and that there is a rational basis for relating the requirement that there be more than a "doubling of the risk" to our no evidence standard of review and to the more likely than not burden of proof.
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> Assume that a condition naturally occurs in six out of 1,000 people even when they are not exposed to a certain drug. If studies of people who *did* take the drug show that nine out of 1,000 contracted the disease, it is still more likely than not that causes other than the drug were responsible for any given occurrence of the disease . . . . However, if more than twelve out of 1,000 who take the drug contract the disease, then it may be *statistically* more likely than not that a given individual's disease was caused by the drug.
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> This is an oversimplification of statistical evidence relating to general causation . . . but it illustrates the thinking behind the doubling of the risk requirement.
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> [T]he law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for an injury unless the preponderance of the evidence supports cause in fact. The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.[84]

In sum, *Havner* enunciated principles in toxic tort cases that (1) expert testimony of causation must be scientifically reliable, (2) the plaintiff must establish the elements of his claim by a preponderance of the evidence, and (3) where direct evidence of causation is lacking, scientifically reliable evidence in the form of epidemiological studies showing that the defendant's product more than doubled the plaintiff's risk of injury appropriately corresponds to the legal standard of proof by

[84] *Id*. at 715–18 (citations omitted) (emphasis in original).

a preponderance of the evidence. These principles should apply to asbestos cases. As to the availability of scientific studies, asbestos-related disease has been researched for many decades and the population of potentially affected persons numbers in the millions. Dr. Lemen, one of Plaintiffs' experts, testified that many millions of people have been exposed to chrysotile asbestos from manmade sources, that a scientific consensus that asbestos causes serious illness has existed since 1930, that a statistically significant link between asbestos and mesothelioma was shown in 1963, and that by 1965 over a thousand publications discussed asbestos disease. We observed over 15 years ago that "[a]sbestos litigation, particularly asbestos products cases, has achieved maturity."[85] We therefore conclude that in the absence of direct proof of causation, establishing causation in fact against a defendant in an asbestos-related disease case requires scientifically reliable proof that the plaintiff's exposure to the defendant's product more than doubled his risk of contracting the disease. A more than doubling of the risk must be shown through reliable expert testimony that is based on epidemiological studies or similarly reliable scientific testimony.

Multiple-exposure cases raise the issues of how the finder of fact should consider exposure from sources other than the defendant, what proof might be required as to those other sources, and who has the burden of proof regarding those other sources. These are difficult questions.

We recognized in *Havner*, generally, that "if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty."[86] We think this statement in *Havner* is correct but cannot be applied without

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[85] *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998).

[86] 953 S.W.2d at 720.

qualification to cases involving multiple sources of exposure to the same toxin. We think the plaintiff should be required to establish more than a doubling of the risk attributable to the defendant's product, for the reasons discussed, but do not think it necessary or fair to require a plaintiff to track down every possible source of asbestos exposure and disprove that those other exposures caused the disease. Strict application of *Havner*'s requirement of ruling out all other possible causes of disease would in effect re-introduce a strict but for requirement, which for reasons already discussed is not appropriate in a multiple-exposure case like today's case. Our law accepts that in cases of multiple exposure multiple defendants may be held liable for causing the plaintiff's disease. And in multiple-exposure cases few if any plaintiffs could ever establish which particular fibers from which particular defendant caused the disease, and we do not believe the plaintiff should be required to quantify the exposure from every other conceivable source, occurring perhaps over a period of decades.

However, when evidence is introduced of exposure from other defendants or other sources, proof of more than a doubling of the risk may not suffice to establish substantial factor causation. In the Restatement Second of Torts, and as quoted by our Court in *Flores*, substantial factor causation "denote[s] the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have

occurred."[87] The law should retain this concept. Along the same lines, the Restatement Third recognizes that a defendant's trivial contribution to multiple causes will not result in liability.[88]

Suppose a plaintiff shows that his exposure to a defendant's product more than doubled his chances of contracting a disease, but the evidence at trial also established that another source of the toxin increased the chances by a factor of 10,000. In this circumstance, a trier of fact or a court reviewing the sufficiency of the evidence should be allowed to conclude that the defendant's product was not a substantial factor in causing the disease.

JUSTICE LEHRMANN presents a thorough and thought-provoking dissent, but we cannot agree with its ultimate conclusion that the evidence of causation was legally sufficient in this case. The dissent contends that *Havner* primarily focused on general causation. As noted above, *Havner* was concerned with general causation while today's case is not. But *Havner* was also concerned with specific causation. General causation is never the ultimate issue of causation tried to the finder of fact in a toxic tort case. The ultimate issue is always specific causation—whether the defendant's product caused the plaintiff's injury. General causation as established through epidemiological studies is relevant only insofar as it informs specific causation. In *Havner*, we held that where direct evidence of specific causation is unavailable, specific causation may be established through an alternative two-step process whereby the plaintiff establishes general causation through reliable

[87] *Flores*, 232 S.W.3d at 770 (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)).

[88] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 36 (2010).

studies, and then demonstrates that his circumstances are similar to the subjects of the studies.[89] By meeting these requirements, the plaintiff shows that his exposure to the defendant's product more than doubled his individual risk and thereby establishes specific causation. *Havner* is, therefore, relevant to our analysis today. Its recognition that every plaintiff must prove his case by a preponderance of the evidence has application here.

The dissent suggests that our analysis is flawed because specific causation as explicated in *Havner* is different from substantial factor causation. We disagree. "Substantial factor" is a term we use to describe the level of proof required to establish specific causation, which is always an element of the plaintiff's case.

The dissent argues that *Havner* is inapplicable to multiple-exposure cases. We are at a loss to understand why. If exposure from other sources were irrelevant when we decided *Havner*, we would not have stated that other causes of the disease should be excluded,[90] a requirement we actually relax in today's case because of the special difficulties encountered in multiple-exposure cases, as discussed above. But we think *Havner*'s requirement of proof of a more than doubling of

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[89] *See Havner*, 953 S.W.2d at 715 ("[I]n many toxic tort cases . . . there will be no reliable evidence of specific causation. In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury. The finder of fact is asked to infer that because the risk is demonstrably greater in the general population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance. Such a theory . . . is based on a policy determination that when the incidence of a disease or injury is sufficiently elevated due to exposure to a substance, someone who was exposed to that substance and exhibits the disease or injury can raise a fact question on causation."); *id.* at 720 ("To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies."); *see also Merck*, 347 S.W.3d at 265 ("*Havner* holds . . . that when parties attempt to prove general causation using epidemiological evidence, a threshold requirement of reliability is that the evidence demonstrate a statistically significant doubling of the risk. In addition, *Havner* requires that a plaintiff show 'that he or she is similar to [the subjects] in the studies . . . .'").

[90] 953 S.W.2d at 720.

the risk is particularly useful in multiple-exposure cases where the alternative is to abdicate resort to scientifically reliable proof and accept that any exposure will suffice.

The dissent also suggests that we would require the application of *Havner* even in cases where the only conceivable source of exposure to a toxin is the defendant. If the plaintiff can establish with reliable expert testimony that (1) his exposure to a particular toxin is the only possible cause of his disease, and (2) the only possible source of that toxin is the defendant's product (or, in another of the dissent's hypotheticals, the products of two defendants whose combined doses established the required threshold dose to cause disease), this proof might amount to direct proof of causation and the alternative approach embraced in *Havner* might be unnecessary. These hypotheticals certainly do not apply to today's case, as discussed further below. Plaintiffs never claimed that Georgia-Pacific was the only source of Bostic's exposure or that combined exposures from multiple defendants were needed to cause his disease.[91] Plaintiffs tried the case in exactly the opposite manner, by insisting that any exposure to asbestos beyond background exposure should be treated as a cause of Bostic's disease. Further, in the real world of complex environments and complex organisms, we think that science is often limited to establishing probabilities. *Havner*'s

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[91] On the latter point, the following exchange occurred at oral argument:

> Q: [Y]ou argue, as I understand it, that if there hadn't been any other exposure, the exposure to Georgia-Pacific product was enough.
>
> A: Correct, Your Honor, which is what—
>
> Q: So you're not making the argument that even though it wasn't enough, if you add it in with everything else, that would have been enough.
>
> A: No. We are not at all, and I want to be very clear on that . . . .

recognition that science must sometimes resort to probabilistic approaches is hardly a valid criticism of that decision. We assume the dissent has no quarrel with quantum mechanics. Establishing the direct proof posited in the dissent's hypotheticals might prove far more difficult than the method of proof sanctioned in *Havner*. Excluding the universe of all other possible causes, which we do not require, might prove more daunting than what we do require. And even in a single-exposure case, we think that proof of dose would be required, because as *Flores* noted, "One of toxicology's central tenets is that the dose makes the poison."[92] As explained below, dose was not established in this case.

4. Recapitulation

We conclude that in all asbestos cases involving multiple sources of exposure, including mesothelioma cases, the standards for proof of causation in fact are the same. In reviewing the legal sufficiency of the evidence:

- proof of "any exposure" to a defendant's product will not suffice and instead the plaintiff must establish the dose of asbestos fibers to which he was exposed by his exposure to the defendant's product;
- the dose must be quantified but need not be established with mathematical precision;
- the plaintiff must establish that the defendant's product was a substantial factor in causing the plaintiff's disease;

[92] *Flores*, 232 S.W.3d at 770 (internal quotation marks omitted).

- the defendant's product is not a substantial factor in causing the plaintiff's disease if, in light of the evidence of the plaintiff's total exposure to asbestos or other toxins, reasonable persons would not regard the defendant's product as a cause of the disease;
- to establish substantial factor causation in the absence of direct evidence of causation, the plaintiff must prove with scientifically reliable expert testimony that the plaintiff's exposure to the defendant's product more than doubled the plaintiff's risk of contracting the disease.

B. Proof of Causation in This Case

Georgia-Pacific manufactured and sold asbestos-containing joint compound from 1965 to 1977. Bostic was born in 1962 and turned 15 in 1977. The joint compound was sold in a dry-mix form, to which water was added to make drywall "mud," and a pre-mixed form. The compound was used to smooth cracks and joints during drywall installation and repair. During the 1965–77 period, the compound contained chrysotile asbestos,[93] the most common form of asbestos used commercially. Asbestos fibers can become airborne when dry compound is sanded, mixed, or swept as part of normal drywall work.

Bostic and his father Harold Bostic (Harold) testified by deposition at trial. Bostic's exposure to asbestos-containing Georgia-Pacific products occurred when, as a child and teenager, he assisted Harold in remodeling projects for friends and family. Plaintiffs contend that Bostic's exposure as a child is particularly significant since several experts agreed that children are especially

[93] As noted above, *see supra* note 78, Georgia-Pacific does not dispute for purposes of this appeal that exposure to chrysotile asbestos fibers can cause mesothelioma. "Chrysotile asbestos is the most abundant type of asbestos fiber and is a serpentine fiber consisting of 'pliable curly fibrils which resemble scrolled tubes.'" *Flores*, 232 S.W.3d at 766 n.4.

vulnerable to exposure to asbestos and carcinogens in general. Bostic helped his father mix and sand drywall compound from the age of five. Plaintiffs contend that Bostic was also exposed to asbestos from exposure to Harold's clothing. Bostic lived with his father until his parents divorced in 1972, when he was 9, and he stayed with his father thereafter on weekends, holidays, and at times during the summer.

Harold testified that he performed drywall work on various projects during the relevant period. He testified that he used Georgia-Pacific drywall compounds "[l]ike 98% of the time." Bostic assisted Harold on projects during the 1967–77 time frame when Georgia-Pacific drywall compound contained asbestos. Harold testified that he and Bostic used Georgia-Pacific compound "[m]any, many, many times." He was able to recall specifically eight projects during the relevant period, although he thought there were other projects he simply could not recall. Of the specific projects he could recall, he specifically identified one where Georgia-Pacific compound was used, a job where he constructed a kit house for a friend. He could not recall whether Bostic was present when drywall work was done on this project. Bostic could not recall with certainty ever using Georgia-Pacific drywall products during the relevant 1967–77 period.

Bostic was exposed to asbestos from Knox Glass Company. Harold was employed at Knox Glass from 1962 until 1984. Bostic lived with his father until his parents divorced and sometimes stayed with his father after 1972 as noted above. He also lived with his father from ages 15 to 18. Bostic worked at Knox Glass in the summers of 1980, 1981, and 1982. While Plaintiffs point to Bostic's testimony that he spent only about three months during these summers in the "hot end" of the plant where asbestos was prevalent, he testified that he frequently worked 16 hours a day as "a

relief hot end worker." Asbestos was used in products extensively at the plant, in cements, fireproofing, asbestos cloth, pumps, packing, valves, furnaces, and other products. Bostic's work included cutting asbestos cloth, cleaning up after asbestos pipe insulation was repaired, removing and replacing asbestos from machines, and wearing asbestos gloves. One of his main jobs was cutting asbestos cloth. He had no respiratory protection. He was exposed to asbestos from the Knox Glass plant due to his own employment and also from exposure to asbestos brought home on his father's clothes. Bostic and Harold participated in a study finding that 27% of workers at the plant had developed asbestos-related illnesses, although the duration of Bostic's employment at the plant was at the low end of the employees studied.

Bostic was exposed to asbestos while employed by another company, Palestine Contractors, in 1977 and 1978, and while working alone and with his father on automobiles with brake pads and other parts that contained asbestos. As an adult Bostic was also exposed to asbestos while doing remodeling work, where he was exposed to shingles, tiles, and other asbestos-containing building materials that were not manufactured by Georgia-Pacific. His primary employment, from 1984 until he stopped working due to his illness at the end of 2002, was as a correctional officer with the Texas Department of Criminal Justice (TDCJ). He did not claim exposure to asbestos from this employment.

Work history sheets provide certain details of Bostic's work history. These were based on information provided by Bostic and reviewed by Plaintiffs' experts. Bostic reported that he had used drywall compounds from seven different manufacturers.

Plaintiffs offered the testimony of several experts. Dr. Richard Lemen, an epidemiologist, testified about the history of research linking asbestos in its various forms to diseases including mesothelioma. Dr. William Longo, a material scientist, testified about the concentrations of asbestos that would be released into the air by workers performing typical drywall work. Dr. Arnold Brody, a pathologist, testified regarding asbestos, including the chrysotile variety used in the drywall compound, as a recognized cause of mesothelioma and other diseases. Dr. Samuel Hammar, a pathologist, was Plaintiffs' expert on specific causation.

Hammar testified that any asbestos exposure above background levels causes mesothelioma. He testified that he had not reviewed the deposition testimony of Bostic and Harold. He reviewed the work history sheets but conceded they did not indicate the duration or intensity of exposure. Hammar, Brody, and Lemen repeatedly testified that "each and every exposure" to asbestos was a cause of Bostic's disease.[94] Longo conceded that his studies did not attempt to "mimic any one

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[94] For example, Hammar testified:

> Q: And is it fair to say then that to a reasonable degree of medical probability, that if somebody has mesothelioma that each and every exposure to asbestos that that person had would be a significant contributing factor to the development of mesothelioma?
>
> A: I believe so, at least potentially a contributing factor, yes.
>
> * * *
>
> Q: And did each and every exposure that Timothy Bostic had to Georgia Pacific joint compounds and wallboard materials increase his risk of mesothelioma?
>
> A: Yes.
>
> * * *
>
> Q: And is that consistent with your opinion that each and every exposure to asbestos is a contributing factor?
>
> A: Yes.
>
> * * *
>
> Q: And do you agree that each and every exposure that he had to asbestos, regardless of the source to the extent he had an exposure, that those were significant and contributing factors in the development

person's actual exposure to asbestos," so he made no attempt to measure Bostic's actual aggregate dose assignable to Georgia-Pacific or any other source.[95]

We conclude, under the principles stated above, that the causation evidence was legally insufficient to uphold the verdict. Proof of substantial factor causation requires some quantification of the dose resulting from Bostic's exposure to Georgia-Pacific's products. Plaintiffs did not establish even an approximate dose. Instead, the expert testimony was to the effect that any exposure was sufficient to establish causation, a theory we rejected in *Flores*. Plaintiffs' counsel reinforced this testimony in opening and closing argument by embracing the any exposure theory. In opening counsel argued:

> of his mesothelioma?
>
> A: Yes.

Brody agreed that "each and every exposure that a person has to asbestos contributes to their risk for developing disease," and that "you have to consider that each and every one of those exposures played a role in the development of the disease." He agreed that "each and every one of the asbestos fibers that a person inhales into their lungs has to be considered a cause" of his mesothelioma. Lemen agreed that "each and every exposure that somebody has . . . increase[s] their risk of developing mesothelioma." He agreed that "any exposure" and "each exposure" to asbestos "caused [Bostic's] mesothelioma."

[95] Longo's experiments measured the intensity of exposure a worker might encounter while performing various drywall tasks. He did not attempt to establish Bostic's actual aggregate dose. We think Georgia-Pacific's expert, Dr. William Dyson, correctly explained the difference between intensity of exposure and dose:

> [A]ll diseases, including those associated with asbestos, follow a dose-response relationship. And a dose is the multiplication product of the exposure intensity times the exposure duration. Those are the two components of dose. So measuring the airborne concentration in fibers per cubic centimeter or a million particles per cubic foot is a measure of the intensity of the exposure or the level of exposure in the air. Then you take the duration of that exposure, and those two components give you dose.

Dyson further explained that "dose is a two-component factor. It's the intensity of exposure, which are the measurements that Dr. Longo provides us here but also the duration of exposure." *See also* Bernard D. Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 633, 638 n.12 (Fed. Jud. Ctr. 3d ed. 2011) ("Dose is a function of both concentration and duration.").

> [W]e have the burden of proof. . . . And we assume that burden and will prove this case to you by meeting that burden of proof. To prove our case that it is more likely true than not true that Georgia-Pacific sold an asbestos product, that Timothy Bostic was exposed to this asbestos product, and that he died as a result of the exposure to this and other asbestos products.

In closing counsel argued:

> The first part of this [jury] question is proximate cause, and that's what I want to talk to you about first. . . . And in this case, you have seen that Timothy Bostic did have more than just one exposure to asbestos. And at no point in this trial have we ever said that one of those exposures you could just pull out and forget about it. You're [] not going to hear us say that. You didn't hear our experts say that. *Each and every exposure is a contributing factor to the disease.* That's just the science. *But when more than one exposure comes together to cause a disease, they're all responsible.* You can't just separate one out.

Counsel invited the jury to find that any exposure was sufficient to impose liability and that aggregate and relative dose did not matter.

Rather than attempting to quantify the aggregate dose of asbestos attributable to Georgia-Pacific's products, Plaintiffs' experts expressly eschewed this approach in favor of the view that any exposure at all was sufficient to constitute a cause of the disease, even though Hammar, Brody, and Lemen conceded that all asbestos diseases are dose-related,[96] Brody conceded that everyone has

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[96] Hammar testified:

> Q: Now, Doctor, that leads me to the next question, which is: Are asbestos-related diseases what we call dose-related diseases?
>
> A: Yes.
>
> Q: What does that mean?
>
> A: That means that the cumulative dose, at least up to the point at least in cancer where the first cell developed, were all causative or potentially causative of disease. And that basically means that the more asbestos exposure you have the greater the risk of developing asbestos-related disease.

He agreed "if you were to look at it from a probability point of view" that "higher levels may contribute more to the

some asbestos in his lungs, but at levels too low to cause disease,[97] and Lemen conceded that "the only way to adequately study subjects and their risk of developing disease is to study the exposure they have." We agree with the Pennsylvania Supreme Court that an expert opinion embracing the any exposure theory while recognizing that the disease is dose-related "is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive."[98]

Not only did *Flores* reject the any exposure theory, but Plaintiffs' experts purported to rely on studies that contradicted or at least did not confirm a theory that each and every exposure should be treated as a substantial cause of the disease. For example, Brody, Lemen, and Hammar purported to rely on a report[99] of the "Helsinki Conference" on asbestos disease which states that while mesothelioma can occur in cases of low exposure, "very low background environmental exposures carry only an extremely low risk."[100] Brody also relied on an article by Philip Landrigan and others finding it "widely accepted that asbestos fibers, including chrysotile fibers, increase the existing risk

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development of the disease than exposures at much lower levels. . . . I would give you that at least from a probability point of view, the more exposure to asbestos that you have from any given exposure, the more likely that that exposure is to contribute to the development of that mesothelioma." Brody similarly agreed that "[a]ll these [asbestos] diseases are so-called dose response diseases. That means the more you're exposed to, the more likely you are to get [the] disease." He later testified that because Bostic worked only nine months at the Knox Glass plant his risk of disease would be less than the risk of employees who had worked at the plant for 20 years. Lemen agreed "that asbestos-related diseases were dose-response diseases." He stated: "I think the jury should understand that the higher the exposure, the more the risk increases."

[97] *See supra* note 22.

[98] *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 56 (Pa. 2012).

[99] *Consensus Report, Asbestos, Asbestosis, and Cancer: the Helsinki Criteria for Diagnosis and Attribution*, 23 SCANDINAVIAN J. WORK, ENV'T & HEALTH 311 (1997).

[100] *Id.* at 313.

of developing lung cancer in proportion to the cumulative exposure that occurred up to a time 10 years prior to evaluation."[101] Brody repeatedly testified that minimal exposure to asbestos does not cause mesothelioma.[102]

Hammar and Lemen testified that any exposure to asbestos should be treated as a cause of Bostic's mesothelioma. In reaching this conclusion they relied in part on publications in the Federal Register, including a 1977 report of the Consumer Product Safety Commission[103] (CPSC) proposing to ban asbestos-containing patching compounds. This report was not itself a peer-reviewed epidemiological study, although it cited a number of studies. It concluded, based in part on theoretical arguments, that "[a] 'no effect' level theoretically may exist, but it has not been demonstrated. Therefore, there is no known threshold below which exposure to respirable free-form asbestos would be considered safe."[104] Lemen also discussed 1972 OSHA regulations concerning asbestos exposure standards. This publication recognized "controversy as to the validity of the measuring techniques" and "controversies concerning the relative toxicity of various kinds of asbestos," but concluded that in view of the risk of not acting "it is essential that the exposure be regulated now, on the basis of the best evidence available now, even though it may not be as good as scientifically desirable."[105] These publications are not scientific studies, and while a federal

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[101] Philip J. Landrigan et al., *The Hazards of Chrysotile Asbestos: A Critical Review*, 37 INDUS. HEALTH 271, 273 (1999).

[102] *See supra* notes 22–23.

[103] Respirable Free-Form Asbestos, 42 Fed. Reg. 38782 (July 29, 1977).

[104] *Id.* at 38786.

[105] Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11318, 11318 (June 7, 1972).

agency may be authorized to ban a product based on the lack of proof of its safety,[106] a "fundamental principle" of Texas products liability law "is that the plaintiff must prove that the defendants supplied the product which caused the injury."[107] Because "[o]ur legal system requires that claimants prove their cases by a preponderance of the evidence," our law "lags science; it does not lead it."[108] Like the CPSC, Lemen could not state that "there is not a safe level" of asbestos. Instead, his testimony was that "we don't know really how much exposure it takes to cause mesothelioma," and that "one of the reasons we recommend banning of asbestos, all types of asbestos, is because that level is so low that we have not been able to measure that level." As noted above, Lemen testified that for all carcinogens, the threshold at which the risk of disease falls to zero is unknown. Brody similarly testified that "no one's ever been able to show a level that will prevent everyone from getting mesothelioma." Assuming this testimony is factually correct, the failure of science to isolate a safe level of exposure does not prove specific causation in today's case, but the any exposure theory in effect asks the Court to do so. As noted above, one court, in refusing to admit Hammar's any exposure testimony, observed that "Dr. Hammar wants to be allowed to tell a jury that all of the plaintiff's *possible* exposures to asbestos during his entire life were contributing causes of the plaintiff's cancer, and, therefore, sufficient to support a finding of legal liability . . . . Just because

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[106] For example, the FDA "may make regulatory decisions . . . based on postmarketing evidence that gives rise to only a suspicion of causation." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1320 (2011). Hence, "efforts to invoke . . . regulatory standards are also ineffectual in terms of substantial-factor causation, since the most these can do is suggest that there is underlying risk from the defendants' products . . . ." *Betz*, 44 A.3d at 55.

[107] *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989).

[108] *Havner*, 953 S.W.2d at 728.

we cannot rule anything out does not mean we can rule everything in."[109] Stated another way, the inability of science to establish a maximum safe dose does not mean that science cannot establish a statistically significant link between a dose and the disease. It seems to us that all other things being equal, the more toxic the substance, the easier it should be to establish a *Havner*-compliant statistical link.

So far as we can tell, none of the peer-reviewed scientific studies on which Plaintiffs' experts relied found a statistically significant link between mesothelioma and occasional exposure to joint compounds comparable to Bostic's exposure, namely the occasional exposure of a son helping his father on building renovation projects that were not the primary occupation of either father or son, and which included drywall work as well as other construction activities. For example, Lemen testified about one of his own published articles[110] which relied on a study of a Chinese asbestos plant where workers were employed at the plant, presumably full-time, for an average of over two decades.[111] While, as Lemen reported, the study of the Chinese plant met standards we recognized in *Havner* (a relative risk of 4.29, with a confidence level of 95% and a confidence interval of 2.17 to 8.46), the cohort studied consisted of individuals whose circumstances were very different from those of Bostic. Lemen also discussed a study by Frank Stern and others[112] of union plasterers and

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[109] *Smith v. Ford Motor Co.*, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013).

[110] Richard A. Lemem, *Chrysotile Asbestos as a Cause of Mesothelioma: Application of the Hill Causation Model*, 10 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 233, 235 (2004).

[111] Eiji Yano et al., *Cancer Mortality Among Workers Exposed to Amphibole-Free Chrysotile Asbestos*, 154 AM J. EPIDEMIOLOGY 538 (2001).

[112] Frank Stern et al., *Mortality Among Unionized Construction Plasterers and Cement Masons*, 39 AM. J. INDUS. MED. 373 (2001).

cement masons where the authors made reference to another study of drywall construction which found asbestos fiber concentrations "similar to those measured in the work environment of asbestos insulation workers who"[113] in yet another study by Irving Selikoff and others[114] "had a seven-fold increased risk of cancer of the lung and of the pleura."[115] However, the Stern and Selikoff studies were of workers employed in the trades studied, not persons like Bostic who performed occasional drywall work outside of their primary employment. Further, the Stern study found that the correlation between employment in the trades studied and mesothelioma was "not statistically significant,"[116] despite special efforts by the authors to manually review death certificates "to obtain a more accurate assessment of mesothelioma-related deaths in this cohort."[117] In *Havner*, we held that the plaintiff "must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies . . . and that the timing of the onset of injury was consistent with that experienced by those in the study."[118] Without such a showing, "epidemiological studies are without evidentiary significance."[119] While the exposure of those in

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[113] *Id.* at 383.

[114] Irving J. Selikoff et al., *Mortality Experience of Insulation Workers in the United States and Canada, 1943–1976*, 330 ANNALS N.Y. ACAD. SCIS. 91 (1979).

[115] Stern, *supra* note 112, at 383.

[116] *Id.* at 376.

[117] *Id.* at 381.

[118] 953 S.W.2d at 720.

[119] *Flores*, 232 S.W.3d at 771.

the study need not exactly match the plaintiff's exposure, "the conditions of the study should be substantially similar to the claimant's circumstances,"[120] a requirement that was not met.

Plaintiffs' experts did not show, through reliance on scientifically reliable evidence, that Bostic's exposure to asbestos from Georgia-Pacific's products more than doubled his risk of contracting mesothelioma.

Evidence was presented of another source of asbestos exposure, namely Bostic's employment at Knox Glass, where he was exposed to asbestos from numerous sources. Hammar testified that Bostic's exposure to asbestos from Knox Glass was minimal as compared to his exposure from construction, but this testimony was conclusory, as it was not based on any scientific studies or any scientific attempt to measure the relative exposures. An expert's testimony that brings no more than "his credentials and a subjective opinion" will not support a judgment.[121] The testimony may also have been based on an incorrect assumption that Bostic's primary occupation was in construction, because the work history sheets Hammar reviewed made no mention of Bostic's employment with the TDCJ.[122] "[C]ourts must look beyond the bare opinions of qualified experts and independently evaluate the foundational data underlying an expert's opinion in order to determine whether the

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[120] *Merck*, 347 S.W.3d at 266.

[121] *Havner*, 953 S.W.2d at 712.

[122] Hammar testified, incorrectly, that from his review of the work history sheets Bostic "actually worked in construction primarily" and "it looked to me like his primary occupational exposure itself was actually in the construction industry." "We are not required . . . to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2004).

expert's opinion is reliable."[123] If the testimony is not reliable, it is not evidence.[124] Further, another of Plaintiffs' experts, Dr. Brody, testified that if, as was the case, Bostic worked nine months at the Knox Glass plant and had amosite asbestos in his lungs, that exposure "substantially contributed to his mesothelioma." Without any meaningful and scientific attempt to quantify the exposures from the two sources, the testimony was legally insufficient, for there was no meaningful way for the jury to conclude that Bostic's exposure to Georgia-Pacific's products was a substantial factor in causing his disease, nor was there any basis for the jury to apportion liability between these two sources of asbestos. In *Flores* we found the evidence of causation legally insufficient not only because of the plaintiff's failure to establish his aggregate dose but also his failure to "introduce evidence regarding what percentage of that indeterminate amount may have originated with [Defendant] Borg-Warner's products" as opposed to "other brands of brake pads."[125]

The dissent would hold the causation evidence legally sufficient if an expert testified that exposure to a defendant's product was "significant." In bringing this suit Plaintiffs claimed exposure from 40 defendants, and the case as Plaintiffs tried it to the jury (1) relied on opening and closing arguments and on multiple experts who repeatedly testified[126] that any exposure to asbestos should be considered a cause of Bostic's disease, (2) failed to quantify, even approximately, the aggregate dose, (3) failed to quantify, even approximately, the dose attributable to Georgia-Pacific, and

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[123] *Merck*, 347 S.W.3d at 262.

[124] *Havner*, 953 S.W.2d at 713.

[125] 232 S.W.3d at 772.

[126] *See supra* note 94.

(4) failed to show that the dose fairly assignable to Georgia-Pacific more than doubled Bostic's chances of contracting mesothelioma. The evidence was sufficient only if proof of some exposure is sufficient to establish causation. It is not. The essential teaching of *Flores* is that dose matters, and this requirement applies to mesothelioma cases.

For these reasons, we conclude that the evidence of causation was legally insufficient to sustain the verdict in this case.

III. Conclusion

While we do not agree with all of the language of the court of appeals' decision, that court reached the correct result in reversing the trial court's judgment and rendering a take-nothing judgment. We affirm the court of appeals' judgment.

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Don R. Willett
Justice

OPINION DELIVERED: July 11, 2014

IN THE SUPREME COURT OF TEXAS

NO. 10-0775

SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN BOSTIC, DECEASED; HELEN DONNAHOE; AND KYLE ANTHONY BOSTIC, PETITIONERS,

v.

GEORGIA-PACIFIC CORPORATION, RESPONDENT

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

JUSTICE GUZMAN, concurring.

Over the last several decades, asbestos litigation has become ubiquitous in our federal and state courts. In Texas, the Court has decided a handful of seminal cases articulating a legal framework for toxic torts in the context of asbestos litigation. Here, though the Court correctly deems the evidence of causation legally insufficient, I write separately because my approach is more nuanced in that I believe proving an occasional exposure mesothelioma case with epidemiological studies is not an impossible task. I also write to note my belief that the asbestos litigation framework proposed by the dissent fails to adhere to our well-settled precedents as they relate to the preponderance of evidence standard. In short, I am concerned that both writings do not faithfully interpret the preponderance of the evidence standard that stands as the lodestar of civil liability in

Texas. A plaintiff must always prove his toxic tort claim by this standard: Nothing less will suffice, but nothing more is required.

When we allowed scientific rather than direct proof for toxic torts in *Havner*, we interpreted the preponderance standard to mean that a plaintiff must prove he was exposed to a dose of the toxin that more than doubled his risk of injury. In *Flores* and here, the preponderance standard demands that if the plaintiff was exposed to toxins from multiple defendants, he must nonetheless prove he was exposed to a dose of the defendant's toxin that more than doubled his risk of injury. Any standard above or below this threshold fails to comport with the preponderance standard as articulated by this Court.

This matter requires us to apply the preponderance of the evidence standard to mesothelioma cases, and I fear that while the Court may demand too much, the dissent misconstrues our precedents to require too little. The Court holds here that the plaintiff's epidemiological studies were insufficient because they were not "the occasional exposure of a son helping his father on building renovation projects which were not the primary occupation of either father or son, and which included drywall work as well as other construction activities." __ S.W.3d __, __. But we have only required substantially similar—not completely identical—epidemiological studies. Plaintiffs must resolve any differences between the studies and the plaintiff's pattern of exposure through reliable scientific evidence. Here, the plaintiff offered epidemiological studies of occupational exposure that were extrapolated to purportedly measure risk from occasional exposure. But the plaintiff never substantiated those extrapolations, yielding an analytical gap in his proof of causation. Nonetheless,

I agree with the Court that the plaintiff failed to prove his approximate dose of exposure to the defendant's asbestos. Thus, I join the Court's opinion except for parts II.A.3 and II.B.

If the Court arrives at the correct result by potentially setting the evidentiary bar too high for future claimants, the dissent reaches an implausible conclusion by neglecting the preponderance standard as established by our precedents. Not requiring quantifiable evidence that a defendant's asbestos product more than doubled the risk of harm, as the dissent proposes, eases the required burden of proof to something subaltern to a preponderance of the evidence. While mesothelioma is a unique disease in that relatively limited exposure can induce illness, this does not change the burden of proof. It simply permits the plaintiff to present lesser dosage evidence (*i.e.*, epidemiological studies for mesothelioma will show more than a doubling of the risk at a lower dose, and plaintiffs need only show exposure comparable to this dose). The pathological peculiarities of mesothelioma should not render a plaintiff's claim almost impossible to prove or almost impossible to lose. Therefore, I respectfully concur in the Court's judgment.

I. Legal and Factual Background

This Court's foundational case for proving causation in toxic torts matters is *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 708 (Tex. 1997). *Havner* addressed litigation surrounding a drug for pregnant mothers that was alleged to have caused birth defects.[1] *Id*. In *Havner*, we held that where direct, scientifically reliable proof of causation was unavailable, epidemiological studies can prove causation, provided they comply with burden of proof

[1] Causation can be general (whether a substance is capable of causing a particular injury or condition in the general population) or specific (whether a substance caused a particular individual's injury). *Havner*, 953 S.W.2d at 714.

requirements. *Id*. at 715. After a comprehensive review of the applicable academic literature, we established that the burden of proof is satisfied when properly-conducted studies establish more than a "doubling of the risk" caused by the toxic tortfeasor, as this strikes "a balance between the needs of our legal system and the limits of science."[2] *Id*. at 717–18.

Havner specifically addressed a single defendant and a non-asbestos tort, but *Borg-Warner Corp. v. Flores* involved multiple defendants in a products liability action involving asbestos. 232 S.W.3d 765, 766 (Tex. 2007). The Court recognized "the proof difficulties accompanying asbestos claims," and accordingly did not demand that causation be proved with "mathematical precision." *Id*. at 772–73. Although the Court only briefly discussed *Havner*, it integrated its reasoning. For instance, while epidemiological studies were not presented in *Flores*, the Court noted that had such studies been introduced, they would have had to show that brake mechanics (the occupational class of the plaintiff) "face at least a doubled risk of asbestosis." *Id*. at 772.[3]

In the wake of *Havner* and *Flores*, then, a plaintiff employing epidemiological studies to prove causation must set forth reliable studies showing exposure to a dosage that more than doubles

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[2] We noted:

> [T]he law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for an injury unless the preponderance of the evidence supports cause in fact. The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.

Id. at 718.

[3] We also cited *Havner* for the proposition that dosage is germane: "We have held that epidemiological studies are without evidentiary significance if the injured person cannot show that 'the exposure or dose levels were comparable to or greater than those in the studies.'" *Flores*, 232 S.W.3d at 771 (quoting *Havner*, 953 S.W.2d at 720–21).

the risk of injury (general causation) and that the plaintiff's exposure to the defendant's toxin was comparable to or greater than the more than doubling of the risk dose in the studies (specific causation). The standard will be the same for both asbestosis and mesothelioma cases, though the epidemiological studies will likely vary considerably depending upon the ailment involved given that different exposure levels are associated with each illness.[4] The studies might differ depending upon the type of the asbestos involved as well.[5]

II. The Court's Methodology

I agree with the Court's ultimate conclusion that Bostic did not produce epidemiological studies that complied with *Havner* and failed to prove his approximate dose of exposure to Georgia-Pacific asbestos. Because I believe the Court's opinion may be interpreted to foreclose recovery in a mesothelioma case based on occasional exposure to asbestos, I expound on this issue.

Here, though the parties strongly contested nearly every issue in this matter, they appear to concede that *Havner* controls. As to *Havner*, the crux of their disagreement centered on its application. At oral argument, Georgia-Pacific argued that *Havner* precludes Bostic from

[4] The most common diseases that might result from asbestos exposure are (1) Asbestosis: a diffuse, interstitial, nonmalignant, scarring of the lungs; (2) Bronchogenic carcinoma: a malignancy of the interior of the lung; (3) Mesothelioma: a diffuse malignancy of the lining of the chest cavity (pleural mesothelioma), or of the lining of the abdomen (peritoneal mesothelioma); and (4) Cancer of the stomach, colon, and rectum. Consumer Product Safety Commission, 42 Fed. Reg. 38,782, 38,784 (proposed July 29, 1977) (to be codified at 16 C.F.R. pts. 1304 and 1305); *see also Flores*, 232 S.W.3d at 771 ("It is generally accepted that one may develop mesothelioma [in contrast to asbestosis] from low levels of asbestos exposure." (citations omitted)).

[5] "There are six basic varieties of asbestos minerals which are found in fiber form: chrysotile (the most common variety, and that ordinarily found in asbestos-containing products), amosite, crocidolite, actinolite asbestos, tremolite asbestos, and anthophyllite asbestos. Most of the world supply of commercial asbestos is chrysotile, the fibrous form of serpentine." Consumer Product Safety Commission, 42 Fed. Reg. at 38,784.

recovering, because "without dose evidence, you cannot do a *Havner* analysis."[6] Bostic's attorneys countered that they furnished epidemiological studies that measured exposure to a dosage and asbestos type sufficiently analogous to those experienced by Bostic.[7] Thus, despite the interpretative differences, both parties articulated their arguments consistent with the framework we established in *Havner*.

I believe Georgia-Pacific advances the more cogent argument. All but one of the studies Bostic presented were not sufficiently analogous to his situation to meet *Havner* and *Flores* standards; for instance, these studies largely concerned occupational exposure, which measures a much different phenomenon than the occasional exposure Bostic experienced.

The Consumer Product Safety Commission (CPSC) report, however, is based on a much more similar pattern of exposure to that of Bostic.[8] Deriving its statistics from "epidemiological data

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[6] *See* Transcript of Oral Argument at 11.

[7] Counsel for Bostic stated:

> [T]here were studies showing absolutely that chrysotile asbestos causes mesothelioma and then in terms of the claim of Georgia-Pacific, and this is very important, Georgia-Pacific is stating that we need low-dose chrysotile-only studies to survive the causation challenge in this case and that is wrong for two reasons. First, it's not relevant to this Record because this record showed that the Georgia-Pacific joint compound that Timothy Bostic used, while it was trace amounts, still had millions of tremolite fibers in it . . . . [S]econd, pure low-dose chrysotile studies do not exist because people are not exposed solely to chrysotile fibers. People are exposed like Timothy Bostic was to mixed fibers and *Havner* recognized that you're dealing with retrospective exposure analyses. We can't go out and put somebody in a test chamber and say we're going to expose you to this amount of chrysotile asbestos and then that amount of chrysotile asbestos since you're a baby and then wait 40 years and see if that was sufficient.

Id. at 19.

[8] Consumer Product Safety Commission, 42 Fed. Reg. at 38,782.

in the literature," it tied comparatively low levels of asbestos exposure to increased risk of injury.[9] Specifically, it detected increased risk of asbestos-related diseases stemming from exposure to drywall products that were used "six hours a day four times a year"—what it termed "high yet reasonably foreseeable" usage.[10] This is much closer to the exposure allegedly experienced by Bostic in regard to Georgia-Pacific's product. Extrapolating from that dosage, the CPSC concluded that even on the low end, the result would be a ten-fold increase in the risk of illness.[11]

However, I am troubled by two aspects of Bostic's reliance on the CPSC report. First, no evidence supported the extrapolation from the foundational data to the projected risk rates. The underlying epidemiological studies on which the report was based measured occupational exposure. To assess the equivalent risk from occasional exposure such as through consumer products, the CPSC made calculations it retained at its offices based on a published theoretical model. The Court has never held that such extrapolations violate *Havner*, but as we recently held in *Merck & Co. v. Garza*, there must be some "scientific basis" for the extrapolation. 347 S.W.3d 256, 267 (Tex. 2011).

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[9] *Id.* at 38,787. Though not a peer-reviewed academic study, the CPSC report was predicated on a study by Skelikoff of three separate cohorts.

[10] *Id.*

[11] In the relevant part, the report provided:

> For purposes of this assessment, the Commission considered the use of patching compounds by a consumer, for six hours a day four times a year, to be a high yet reasonably foreseeable yearly exposure. The increased risk of death from respiratory cancer induced by this yearly exposure is estimated at between 10 and 2,000 per million. For five years of exposure at these levels, the risk increases geometrically and is estimated at between 1,000 and 12,000 per million. Based on current information, the Commission estimates that the lower estimate of 10 per million is closer to the actual risk for a one year exposure.

Id.

Here, the published study and CPSC calculations form that scientific basis, but Bostic never admitted them into evidence. Thus, the lack of evidence regarding the scientific basis for the extrapolation amounts to an analytical gap in this particular case.

Second, as was the case with the eponymous plaintiff in *Flores*, Bostic failed to prove his dose was comparable to or greater than the dose in the study. He vigorously contests this, citing the accommodating language of *Flores* regarding scientific proof. *See* 232 S.W.3d at 772–73. But even if *Flores* did not require numerically precise dosage, some reasonable approximation is required to satisfy causation. Bostic failed to marshal such an approximation because, as the Court's thorough analysis indicates, testimony only indicated one drywall job where Bostic's father recalled using Georgia-Pacific joint compound, and the father did not recall if Bostic was present during that job.[12] As in *Flores*, this is insufficient evidence of an approximate dose.

It bears noting that even though Bostic failed to prove his case, the preponderance standard does not present an insuperable hurdle for all occasional exposure mesothelioma cases. While the bulk of epidemiological studies appear to focus on occupational exposure, properly substantiated extrapolations can bridge the gap between those studies and the plaintiff who contracted mesothelioma from occasional exposure to asbestos. But such a plaintiff must provide a reliable scientific basis for the extrapolation and exposure to a dose of the defendant's toxin comparable to

[12] The Court does a thorough job of cataloguing Bostic's exposure. As it demonstrates, the only evidence that Bostic was exposed to Georgia-Pacific's joint compound were statements from Bostic and his family, and many of these statements were highly speculative. While there is little doubt that Bostic was exposed to asbestos-containing products, there is significant uncertainty as to the extent that Georgia-Pacific's products were involved.

or greater than the extrapolated dose that more than doubled the risk of injury. Here, Bostic failed to do either.

The Court also seems to improperly apply its own articulated standard governing how closely-tailored an epidemiological study must be to a plaintiff's demonstrated exposure. Interestingly, the Court rightly notes that the exposure measured in the studies and stemming from the plaintiff's own experience need only be "substantially similar," not precisely congruent. __ S.W.3d at __ (quoting *Garza*, 347 S.W.3d at 266). Although the Court advances the proper standard, it seems to misapply it by dismissing all of Bostic's epidemiological studies because they were not "the occasional exposure of a son helping his father on building renovation projects which were not the primary occupation of either father or son, and which included drywall work as well as other construction activities." __ S.W.3d at __. As a practical matter, requiring this level of exactitude may imply that hardly any mesothelioma plaintiff can recover. Indeed, experts have long-acknowledged that asbestos encompasses a broad panoply of constituent types and forms; for instance, there are six types of asbestos fibers, and they may be in either friable or encapsulated form. *See supra* note 5. The CPSC report was predicated on epidemiological studies involving asbestos insulation that contained friable, principally chrysotile fibers. This type of exposure is substantially similar to Bostic's exposure for two reasons. First, both information in the studies and in the record indicate that asbestos exposure from joint compound is more severe than that from insulation.[13]

[13] The underlying data for the CPSC report indicated that insulators were exposed to 15 fibers per cubic centimeters (f/cc) of air for their half day of work, compared to 35.4 to 59.0 f/cc for dry-mixing joint compound, 1.3 to 16.9 f/cc for hand-sanding joint compound, 41.4 f/cc sweeping the dust after applying joint compound, and 26.4 f/cc 35 minutes following sweeping.

Second, the underlying evaluation informing the CPSC report's calculation was a study of predominately friable, chrysotile asbestos, and Georgia-Pacific's joint compound principally contained chrysotile asbestos. The thrust of *Havner* is that we will allow a plaintiff to recover if science can bridge the gap in proof of causation. Requiring perfectly congruent epidemiological studies when science can fill potential analytical gaps undercuts the very purpose of *Havner*.

Lastly, I cannot join Part II.A.3 of the Court's opinion because of the potential conflict between its articulation of substantial factor causation and the Texas comparative fault statute. The Court believes that substantial factor causation means that a defendant whose toxin more than doubled the plaintiff's risk of injury may not be liable if exposure to another defendant's toxin was at a factor 10,000 times more. __ S.W.3d at __. For simplicity's sake, assume a jury found a lesser such defendant 1% at fault and the greater defendant 99% at fault. Applying the Court's view of substantial factor causation to this scenario is problematic. If the Court's interpretation of substantial factor causation requires the defendant found 99% at fault to assume the remaining 1% liability, this runs afoul of the comparative fault statute—the purpose of which is to make each defendant liable for its percentage fault. And if the Court's interpretation requires the plaintiff to assume the remaining liability, this conflicts with our long-standing tradition that a plaintiff can recover the percentage attributable to the defendant after carrying his burden by a preponderance of the evidence. The Court's injection of an ostensibly common sense approach to causation unnecessarily skews the preponderance standard (just in the opposite direction that the dissent's common sense approach does, as addressed below). This deviation from the preponderance standard we have long adhered to is unwarranted, especially in a case where it does not apply.

III. The Dissent's Methodology

If the Court impliedly requires too much of a mesothelioma plaintiff in requiring overly congruent epidemiological studies, the dissent errs in the opposite direction—significantly and errantly easing the burden of proof requirement to something below a preponderance of the evidence. First, it misapprehends *Havner*, suggesting that the case need not apply because Bostic has offered sufficient direct evidence, and therefore alternative methods of proving causation are unnecessary. I disagree. While Bostic introduced evidence of exposure to Georgia-Pacific products containing asbestos, the evidence lacked sufficient specificity. As previously addressed, Bostic's father cited eight discrete examples of drywall jobs, but only recalled using Georgia-Pacific's product in one such job and did not remember whether his son was present for that project. Moreover, Bostic cannot tie a specific manufacturer's asbestos fiber to his ailment. While this is an admittedly formidable evidentiary task, it does not automatically mean, as the dissent suggests, that traditional notions of causation can be relaxed. As the Court rightly notes, a mesothelioma plaintiff asserting a claim stemming from occasional exposure from multiple asbestos sources has a more challenging task than a plaintiff with well-documented occupational exposure from a single source. __ S.W.3d at __. The former plaintiff may still recover, but he must prove causation with evidence that comports with a preponderance of the evidence standard. Here, there is no direct evidence that Georgia-Pacific asbestos fibers caused Bostic's mesothelioma, so Bostic must rely on an alternative method of proving causation. While the dissent found the expert testimony offered by Bostic's witnesses sufficiently specific to prove causation, I believe that the burden of proof demands more closely-tailored evidence.

Second, the dissent overstates the scientific hurdles confronting a mesothelioma plaintiff attempting to prove *Havner* causation. While it contends that "no epidemiological study has established the threshold of exposure over which the risk of developing mesothelioma is doubled" for intermittent exposure, the epidemiological studies in the CPSC report cited previously may serve as a baseline for future mesothelioma plaintiffs with occasional exposure (provided that they substantiate the extrapolation and their approximate dose). __ S.W.3d __, __ (Lehrmann, J., dissenting). In short, then, *Havner* permits a mesothelioma plaintiff to prove causation and recover in tort, and at least one scientific study may exist as a benchmark. Bostic merely failed to sufficiently relate the epidemiological studies in the CPSC report to his own case or submit proper evidence that his dose was comparable to or greater than that in the study. Thus, his failure to prove specific causation renders his claim unrecoverable.

More generally, I fear that the dissent's failure to pronounce a clear standard risks instilling confusion in our courts, where future asbestos litigation will inevitably occur. A plaintiff may recover by direct evidence of causation, or may attempt to prove alternative causation consonant with *Havner*'s framework. Regardless of the litigation path trod, causation must be proved by a preponderance of the evidence. This standard is satisfied differently depending upon whether direct or *Havner* evidence is involved, but under either approach, the plaintiff faces the same burden of proof. We must not dilute the preponderance of the evidence standard that has stood as a hallmark of toxic tort litigation in order to make mesothelioma cases easier to prove. We have declined prior invitations from tort claimants to weaken the preponderance of the evidence standard as it relates to

scientific proof of causation. *See Havner*, 953 S.W.2d at 730; *Flores*, 232 S.W.3d at 774. I join the Court in declining to do so today.

Accordingly, I join all but Parts II.A.3 and II.B of the Court's opinion and concur in the judgment.

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Eva M. Guzman
Justice

OPINION DELIVERED: July 11, 2014

IN THE SUPREME COURT OF TEXAS

NO. 10-0775

SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN BOSTIC, DECEASED; HELEN DONNAHOE; AND KYLE ANTHONY BOSTIC, PETITIONERS,

v.

GEORGIA-PACIFIC CORPORATION, RESPONDENT

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

JUSTICE LEHRMANN, joined by JUSTICE BOYD and JUSTICE DEVINE, dissenting.

Throughout history, science has informed our society in important ways. Educated people once believed that the sun orbited the earth, until Nicolaus Copernicus used geometry and astronomy to prove a heliocentric model of the solar system. Doctors once accepted that illness was carried by poisonous vapors, until experiments by Louis Pasteur and others provided support for germ theory. In the same way, the Court's opinion suggests that a person must be exposed to asbestos in large quantities before he develops mesothelioma as a result of his exposure. However, reliable science has now demonstrated that even low levels of exposure to asbestos are sufficient to cause the disease. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771 (Tex. 2007) (citing 3 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 28:5 (2007)).

In this case, the Court ignores this advance in scientific research and holds that a jury's verdict must be set aside because the Bostics, the petitioners here, did not present evidence demonstrating a threshold of exposure to asbestos above which a person's risk of developing mesothelioma is doubled. To arrive at this holding, the Court conflates the alternative measure of proof we announced in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 715 (Tex. 1997), and the understanding of substantial-factor causation we approved in *Flores*, 232 S.W.3d at 770. This combination is both illogical and inequitable. The Bostics showed by direct, scientifically reliable evidence that Timothy Bostic's mesothelioma was caused by exposure to asbestos, and that he was exposed to Georgia-Pacific's asbestos-containing products in substantial quantities. Because the Court holds that this evidence was insufficient to sustain a jury verdict in their favor, I am compelled to respectfully dissent.

I. Facts

In this case we consider the legal sufficiency of the Bostics' evidence on causation. Accordingly, a detailed review of that evidence is warranted. I begin by examining the testimony of the Bostics' expert witnesses on the nature and pathology of mesothelioma. Because Dr. Brody was the first expert to testify, I set forth his testimony more fully and then note the opinions with which other expert witnesses agreed. Next, I proceed to the testimony of Timothy Bostic and his father, Harold, who recounted Timothy's exposure to Georgia-Pacific's products. Finally, I conclude with the expert testimony of Dr. Longo, who determined Timothy's approximate level of asbestos exposure resulting from those products.

A.

Dr. Arnold Brody is an experimental pathologist, which means that he studies diseases and their causes. At trial, Dr. Brody explained that the only known environmental cause of mesothelioma in North America is asbestos. He testified that scientists agree that smoking plays no role. Dr. Richard Lemen, an epidemiologist, concurred with Dr. Brody, adding that the only other known cause is radiation treatment for certain types of cancer. There was no testimony at trial that Timothy was ever treated with radiation.

Dr. Brody went on to explain that, though all people inhale some asbestos, accumulation at such "background" levels "does not produce disease." However, when a person is exposed to asbestos in amounts above background levels, every exposure "is contributing and making it more likely" that the individual will develop mesothelioma in the future. Dr. Brody explained that, though scientists have successfully established a threshold level below which exposure to asbestos does not cause asbestosis, scientists have been unable to establish a similar threshold with respect to mesothelioma. Dr. Lemen agreed, adding that the reason scientists have not been able to establish that threshold is because it is "very low." He testified, "we've not been able to identify a safe level. It's not to say there is not a safe level, but one of the reasons we recommend [the] banning of asbestos . . . is because that level is so low that we have not been able to measure [it]."

Dr. Brody also emphasized that individuals have different levels of susceptibility to mesothelioma depending on particular genetic factors, as with all carcinogens. Dr. Lemen elaborated on this point, stating that "[t]here are other factors besides the exposure . . . individual characteristics, genetic make up of individuals, some individuals are more susceptible to developing

disease than others." Dr. Lemen also noted that epidemiologists have not yet identified the factors that make one person more susceptible than another. Both doctors agreed, however, that children were especially vulnerable to the harmful effects of asbestos.

Using images from an electron microscope, Dr. Brody explained how a person develops mesothelioma, which is a type of cancer that afflicts the pleura, the thin membrane covering the lung. While lung cancer and asbestosis develop inside the lung, mesothelial cells are located outside the lung, which means that the asbestos fibers, once inhaled, must travel through lung tissue in order to cause mesothelioma. The fibers migrate through the lung tissue when they are picked up by macrophages and other types of cells. These cells then make their way into the "fluid flow of the lung," which includes blood vessels and lymphatic tissue. This pathway carries the asbestos-laden cells out of the lung and into the pleura, where mesothelial cells are located. Asbestos fibers are deposited in the pleura and, once deposited, can cause genetic errors in mesothelial cells. Dr. Brody explained that "if a person has cancer, what you know is that the original cell that got that first error divided and passed on the error to the offspring." This same cell "a year or two years later" can be "hit again with another fiber," which causes the cell to "accumulate[] a second error." Eventually, a cell is exposed to a sufficient number of asbestos fibers and accumulates a sufficient number of genetic errors that cell growth becomes uncontrolled. Considering this process "from a molecular biology point of view," Dr. Samuel Hammar, another pathologist, confirmed that "a very brief exposure could be a critical exposure in the development of a single cancer cell."

Dr. Lemen testified that, when a person is exposed to the asbestos fibers of multiple manufacturers, there is no way for a scientist to determine who manufactured the fibers that actually

migrated through the lung and triggered the genetic errors that resulted in mesothelioma. Dr. Hammar agreed. Even if a person is exposed to a large quantity of asbestos from product A, and a small quantity of asbestos from product B, it could be the product B fibers that traveled through the lung and into the pleura, causing the tumor to develop. For that reason, Dr. Lemen opined that it is impossible, in a mesothelioma case, for a scientist to determine which product or manufacturer was responsible on a cellular level for the person's condition.

B.

Trial testimony revealed that Timothy Bostic was exposed to asbestos from more than one manufacturer's products. However, his earliest exposures were to Georgia-Pacific's joint compound. From the time he was five years old, Timothy helped his father, Harold, complete sheetrock work on residential construction projects. Harold explained that, when undertaking these projects, he used Georgia-Pacific joint compound "98 percent of the time." He used Georgia-Pacific's product so frequently because, compared to other brands, it was "simply the best. Just the best." In his view, Georgia-Pacific's joint-compound was "by and far the No. 1." Timothy assisted his father by mixing the dry joint compound, sanding it after he had applied the mixture to drywall, and sweeping up the resulting dust at the end of a day's work. Harold had difficulty recalling exactly how many jobs he and Timothy completed together, but affirmed that Timothy had used Georgia-Pacific joint compound "[m]any, many, many times."

Timothy was also exposed to asbestos from the Knox Glass Company, which employed him for three summers and his father for twenty-two years. When Timothy was younger, he was exposed to fibers that were carried home on his father's clothes. However, Timothy's parents divorced when

he was nine years old, reducing the amount of time he spent at home with Harold. When Timothy was older, he joined his father as a temporary employee of the company, where he worked for three summers. Timothy estimated that, during his time at the company, he worked for approximately three months, total, at the "hot end" of the plant, where asbestos was the most prevalent. The rest of the time, Timothy swept floors, cleaned, packed cartons, inspected bottles, cut asbestos cloth, and performed other tasks.

Finally, Timothy was exposed to asbestos from Palestine Contractors, where he worked for two summers. Timothy was employed as a welder's helper, and his job was to assist the principal welder with pipeline repairs, a task that included removing gaskets from the pipes. Some of the pipes Timothy encountered had been insulated with asbestos, exposing him to the fibers.

C.

In order to shed light on the approximate quantity of asbestos Timothy inhaled, the plaintiffs called Dr. William Longo. Dr. Longo is a materials scientist, which means that he studies products like ceramics, metals, polymers, and bio-materials to determine their properties and the contexts in which they can be safely and effectively used. At trial, Dr. Longo testified about Timothy's exposure to Georgia-Pacific's products, which occurred during the period Timothy assisted his father with residential construction projects. Relying on his own calculations and a study performed by the Environmental Protection Agency, Dr. Longo estimated that a twenty-five pound bag of Georgia-Pacific joint compound contains an average of 11.4 quadrillion asbestos fibers. He also detailed the average concentrations of asbestos released when a person performed tasks related to the use of joint compound. In the experiment he conducted, before performing any sample tasks, Dr. Longo

measured a background level of .0002 asbestos fibers per cubic centimeter in the room that would serve as the site for his study. After dry joint compound was sanded on the walls, the doctor measured an average concentration of 4.97 fibers of asbestos per cubic centimeter of air. When dust generated by the sanding was being cleaned up, Dr. Longo measured an average concentration of 4.7 fibers of asbestos per cubic centimeter of air. Dr. Longo noted that the precise quantity of asbestos released depends on many factors. But, after reviewing Timothy Bostic's work history, Dr. Longo testified that Timothy's exposure to Georgia-Pacific's product was "significant." When asked to clarify, Dr. Longo confirmed that he meant Timothy had been exposed to Georgia-Pacific's asbestos at levels ten to twenty times the average background level. No objection was raised to this testimony at trial.

II. Causation in Toxic Tort Cases

In toxic tort cases, we determine whether a plaintiff has proven causation by addressing three areas of inquiry: (1) General Causation: Does the toxin in question have the capacity to cause the type of injury sustained by the plaintiff? And if so, what dose, or amount of exposure, is required? (2) Specific Causation: Was the plaintiff's injury actually caused by the toxin? (3) Substantial-Factor Causation: When multiple manufacturers contribute to a plaintiff's exposure, was the toxin produced by the defendant a substantial factor in causing the plaintiff's injury? *See* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 52, 55 (2008). In this part, I explain why the alternative standard of proof we announced in Havner is only useful for resolving the first two causation questions, and is not useful for resolving the third causation question: whether exposure to one of several defendants' products was a substantial cause of the

plaintiff's harm. I argue that the Court improperly applies *Havner* to answer all three causation questions, and effectively renders *Havner* the exclusive measure of proof in all toxic tort cases. This ignores our affirmation that a plaintiff is always free to prove his case by "direct, scientifically reliable proof of causation." *Havner*, 953 S.W.2d at 715. By disregarding this avenue of proof, the Court turns substantial-factor causation on its head, requiring a toxic tort plaintiff to prove that exposure to a particular defendant's product was, by itself, the cause of his injury. Because this contravenes well-established principles of tort law, I disagree with the Court's opinion.

A. Causation Under *Havner*

Havner was decided in the context of the extensive litigation surrounding the manufacture of Bendectin, a prescription medication that was marketed and sold in the United States and abroad for the treatment of nausea during pregnancy. *Id.* at 708. In that case, we considered whether the plaintiff had adduced evidence sufficient to support a jury verdict that the plaintiff's ingestion of Bendectin had caused her daughter's birth defects. *Id.* In our analysis, we distinguished between general and specific causation. *Id.* at 714. While these labels are flexible, in the context of a toxic tort case they correspond to causation questions (1) and (2). *See id.*; *see also* Bernstein, 74 BROOK. L. REV. at 52. We explained, "[g]eneral causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Havner*, 953 S.W.2d at 714.

As the Court acknowledges today, the principal dispute in *Havner* concerned general causation, that is, whether scientists had determined that a pregnant woman's ingestion of Bendectin could cause birth defects in her child. *Id.* at 708. Our opinion noted that more than thirty studies

had been conducted in an effort to resolve that question, and that experts had not arrived at a consensus. *Id.* However, because we recognized the proof problems associated with toxic torts, we held that "[i]n the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury." *Id.* at 715. More specifically, we held that when epidemiological studies show that the risk of injury in a population exposed to a certain dose of a particular toxin is more than double the risk of injury in a population not exposed to the toxin, those studies satisfy the demands of question (1), general causation. *Id.* at 718.

With respect to question (2), specific causation, we held that "a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk." *Id.* at 720. The claimant must also show "that he or she is similar to those in the studies." *Id.* This demonstration includes among other considerations "proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study." *Id.*

Havner did not address causation question (3), which considers whether, when multiple sources contribute to a plaintiff's exposure, the plaintiff's exposure to the defendant's product was a substantial factor in causing his injury. This stands to reason because, in that case, the plaintiff had only been exposed to Bendectin from one source. *Id.* at 708. For that reason, proof that the plaintiff's daughter's birth defects had been caused by Bendectin was equivalent to proof that her birth defects had been caused by Merrell Dow. The facts did not require us to consider whether the

plaintiff's exposure to the defendant's product was substantial; there were no other sources of exposure. The framework we approved in *Havner*, then, did not contemplate a factual scenario involving multiple manufacturers. As a result, that alternative measure of proof should only be used to resolve causation questions (1) and (2).

B. The Court's Application of *Havner*

Rather than recognize the fundamental differences between *Havner* and the case at bar, the Court applies a version of our *Havner* framework to causation questions (1), (2), and (3). There are three problems with the Court's approach. First, though I agree that in the absence of direct, scientifically reliable proof of causation *Havner* may be applied to resolve causation questions (1) and (2), the Court's opinion today suggests that *Havner* is the exclusive measure of proof with respect to those questions in every toxic tort case. We spoke plainly in *Havner* when we stated that proof of causation by epidemiological studies is an *alternative measure*: a plaintiff may always establish general and specific causation by "direct, scientifically reliable proof" as the Bostics did here. *Id.* at 715. Under the Court's formulation, however, a mesothelioma plaintiff with intermittent exposure is unable to recover even when he has been exposed to the products of only one manufacturer of asbestos. This is because, with respect to plaintiffs with intermittent exposure, the Court has been made aware of no epidemiological study that has established the threshold of exposure over which the risk of developing mesothelioma is doubled.

Second, the Court mistakes testimony that Timothy was exposed to "significant" levels of asbestos as dose-related evidence that might only be relevant to the epidemiological approach outlined in *Havner*. Because the Bostics were unable to produce an epidemiological study

establishing a threshold of exposure over which risk is doubled for individuals who are exposed only intermittently, the Court dismisses as insufficient the evidence of Timothy's exposure to asbestos. However, evidence of the approximate quantum of fibers Timothy ingested is also relevant to plaintiffs who opt to prove causation by direct, scientifically reliable evidence. Imagine a negligence case in which a plaintiff attempts to prove that her son's death was caused by his ingestion of a certain medication. And assume there is no debate among scientists that this medication is fatal to some children when ingested in sufficient doses. If the plaintiff proves general causation with reliable scientific evidence that approximately 400 milligrams of the medication can cause death in children, the plaintiff will be able to prove specific causation in at least two ways. First, she may produce an autopsy report showing that the child's body contained approximately 400 milligrams of the medication at the time of his death. Second, she may demonstrate, perhaps by the testimony of an observer, that the child swallowed approximately 400 milligrams of the medication an hour before he died. In this way, plaintiffs may employ evidence of approximate dose to prove causation by direct, scientifically reliable evidence. In other words, the dose-related evidence proves that the child ingested a sufficient quantity of medication to actually cause his injury, not that the child ingested a sufficient quantity to more than double his risk of dying.

The same is true in this case. Though the Bostics did not produce an autopsy demonstrating the concentration of asbestos fibers in Timothy's lungs, they did produce the testimony of reliable expert witnesses who stated that Timothy's ingestion of asbestos exceeded the level over which that toxic substance can cause mesothelioma. When the Court is confronted with this evidence, it only considers its probative value in relation to the method of proof by epidemiological study we

explained in *Havner*. But the Court also should have considered whether the Bostics proved their case in the traditional way, by "direct, scientifically reliable proof of causation." *Havner*, 953 S.W.2d at 715. As I demonstrate in the forthcoming sections, the Bostics accomplished this task.

Finally, and most problematically, the Court implements *Havner* to resolve causation question (3). This makes little sense in light of the fact that *Havner* contemplated the degree of increased risk a plaintiff must demonstrate in order to prove that a certain toxin caused her injury in the absence of direct proof. *Id*. But causation question (3) has nothing whatsoever to do with whether a toxin caused a plaintiff's injury: that inquiry is resolved by causation questions (1) and (2). Rather, causation question (3) contemplates whether the actions of a specific defendant were significant enough to be denominated a substantial factor in bringing about the plaintiff's disease. *See* Bernstein, 74 BROOK. L. REV. at 55. The first two questions contemplate risk, and resort to *Havner* is appropriate. The third question contemplates substantiality, and *Havner* has no place.

In order to apply that case's framework to a causation question that was not presented by its facts, the Court must alter the standard in a subtle, but significant way. According to the Court, multiple-exposure toxic tort plaintiffs must now produce "scientifically reliable proof that the plaintiff's exposure to the *defendant's* product more than doubled his risk of contracting the disease." *Ante* at ___ (emphasis added). This is a marked departure from our precedent. The Court now holds that in multiple-exposure cases a plaintiff must isolate his exposure to each defendant's product and show that exposure to that particular defendant's product, alone, more than doubled his risk. This transforms a substantial-factor inquiry into a singular-factor inquiry. Rather than require a plaintiff to prove that exposure to each defendant's product was, relative to his exposure from other sources,

a substantial factor in causing his mesothelioma, the Court now requires the plaintiff to prove that exposure to each defendant's product was sufficient by itself to cause his mesothelioma. It is a foundation of tort law, and of substantial-factor causation in particular, that the actions of multiple defendants may converge to cause a plaintiff's harm. *Atchison v. Tex. & Pac. Ry. Co.*, 186 S.W.2d 228, 231 (Tex. 1945); *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). These causes may be independently sufficient to cause the plaintiff's harm, or independently insufficient to cause the plaintiff's harm. In either instance, our precedent makes plain that a defendant may not escape liability simply because his tortious acts were accompanied by the tortious acts of others. *See, e.g.*, *Atchison*, 186 S.W.2d at 231 ("[I]f an injury occurs from two causes, both due to the negligence of different persons, but together constituting an efficient cause, all persons whose acts contribute to the injury are liable therefor, and the negligence of one does not excuse the negligence of the other."). In today's case, the Court affirms that substantial-factor causation governs in the context of toxic torts, but, at the same time, requires plaintiffs to isolate the exposure to each defendant's product and prove that exposure to that defendant's product alone was sufficient to cause the plaintiff's disease. I affirm that tort law requires a plaintiff to show that each defendant's product caused his injury, but I do not agree that in a multiple-exposure case a plaintiff must show that a single defendant's product was sufficient by itself to cause his disease. We have never required plaintiffs to meet this arbitrary standard of proof, and we should not do so today.

This extension of *Havner* not only imposes an illogical burden on plaintiffs, but also departs from *Flores*, in which we first approved substantial-factor causation in the multiple-exposure toxic tort context. After today, the law in these types of cases will be that exposure to a single defendant's

product is a "substantial factor" in bringing about a plaintiff's injury only when that exposure would have been sufficient, by itself, to more than double the plaintiff's risk of developing a particular disease. But imagine a case in which a plaintiff demonstrates that she has been exposed to a certain toxin, from two different sources, that was certainly the cause of her disease. In other words, the plaintiff proves causation questions (1) and (2), but question (3) remains disputed. Now also imagine that the plaintiff's expert witness testifies that the plaintiff's exposure to Company A's toxin is 75% responsible for her illness, while the plaintiff's exposure to Company B's toxin is 25% responsible for her illness. However, on cross-examination, the expert admits that neither exposure, by itself, would more than double the plaintiff's risk of developing the disease. He also concludes that the plaintiff's illness is not overdetermined. Under the paradigm the Court urges, a jury would not be entitled to conclude that the plaintiff's exposure to the toxin produced by Company A was a substantial factor in bringing about her injury, even though the plaintiff's expert testified that it bore 75% of the responsibility for causing that injury, because the plaintiff's exposure to that toxin was not sufficient, by itself, to cause the plaintiff's illness.

This is in stark contrast to the position taken by the Restatement with respect to substantial-factor causation. In explaining its stance, the Restatement envisions a car, owned by Paul, parked at a scenic overlook. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 27 cmt. f, illus. 3 (2010). It then suggests that Able, Baker, and Charlie negligently lean against the car, which results in the vehicle's "plummeting down the mountain to its destruction." *Id.* The commentators add that the force exerted by any one of the three men "would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient." *Id.* Under these

circumstances, the Restatement concludes that each of the three men is a factual cause of the destruction of Paul's car. *Id.* This is true even though the force exerted by each of the men was independently insufficient to destroy the vehicle. *Id.* In today's opinion, the Court moves in the opposite direction by holding that unless a plaintiff's exposure to a particular defendant's product was sufficient by itself to more than double the plaintiff's risk of sustaining an injury, it cannot be a substantial factor in bringing that injury about. This holding does not just offend logic—it offends justice, and it misconstrues *Flores* to do so.

C. The Court's Analysis of the "Any Exposure" Theory

In an attempt to justify its graft of a modified version of the test we developed in *Havner* onto the model of substantial-factor causation *Flores* approved, the Court criticizes what it perceives to be its only alternative. Specifically, the Court enumerates the many shortcomings of the "any exposure" theory of causation, which would permit a plaintiff to prove causation by showing any exposure to a defendant's product. The puzzling aspect of the Court's insistence that we should not adopt this position is that no one urges the Court to do so. At oral argument, the Bostics' attorney stated: "I want to be very clear . . . because Georgia-Pacific has stated repeatedly that we're after the[] any exposure test or [argue that] a single fiber can cause [mesothelioma]. That is not the standard that *Borg-Warner* adopted nor is it the standard we're proposing." So far as I can tell, this misunderstanding has arisen from a misreading of the expert testimony. At trial, several expert witnesses stated that every exposure to asbestos contributes to the causation of mesothelioma insofar as an increased quantity of asbestos concentrated in the lungs heightens a person's risk of developing the disease. Dr. Brody, for example, affirmed that "each and every exposure that a person has to

asbestos contributes to their risk for developing disease." The doctor then clarified, "What that means is every time a person is exposed . . . some proportion of those fibers will concentrate in the lung and some of those fibers will reach that site where the disease develops. There's no way to exclude any of them. . . . So everything the person's exposed to is contributing and making it more likely that the person gets disease." Other experts provided similar explanations. I agree with the Court that evidence that the plaintiff was exposed to any quantity of the defendant's asbestos, without more, is insufficient by itself to prove the causal link between a particular defendant's product and the plaintiff's injury. But this is not a controversial stance—no one argues that it should.

Still, the Court attempts to bolster its position by arguing that "[i]f any exposure at all were sufficient to cause mesothelioma, everyone would suffer from it or at least be at risk of contracting the disease." *Ante* at ___. This statement misunderstands the expert testimony regarding the nature of mesothelioma. As the expert witnesses testified at trial, mesothelioma is caused by asbestos fibers that migrate through the lung and cause genetic errors in mesothelial cells. When the exposure is only at background levels, "we tend to keep up and it's not a problem. As you start being exposed . . . in other settings where it's above background, then it's more difficult." And even when a person's exposure exceeds background levels, that exposure is not sufficient to cause the disease without additional misfortune. Fate must frown upon a person in more than one respect before he develops this rare form of cancer. As Dr. Brody explained at trial, a cell must accumulate a sufficient number of genetic errors of precisely the right kind before it becomes cancerous. This accumulation depends on at least two factors that are governed by chance. First, the accumulation of asbestos fibers in the pleura occurs unpredictably, and depends on a macrophage or other cell

picking up the fiber and transporting it into the fluid flow of the lung. Second, this accumulation is subject to a host of individual genetic factors that affect a person's susceptibility to mesothelioma. Because these genetic factors vary from individual to individual, no person's risk of developing mesothelioma is the same as another's. To state that any exposure to asbestos is not sufficient to cause mesothelioma, simply because every person has not developed mesothelioma, is to ignore the testimony of the expert witnesses at trial and to misunderstand fundamentally the nature of the disease.

D. The Concurrence Forecloses Proof by Direct Evidence

Though both the Court and the concurrence disregard scientific consensus that very low levels of exposure to asbestos cause mesothelioma, the concurrence does so in a way that forecloses the avenue of "direct, scientifically reliable proof of causation" that our opinion in *Havner* preserved. 953 S.W.2d at 715. The concurrence states that the Bostics were required to resort to proof by epidemiological studies because they were unable to "tie a specific manufacturer's asbestos fiber to [Timothy's] ailment." *Ante* at ___. This statement is troubling for two reasons. For one, it reveals that the concurrence shares the Court's misunderstanding of the nature of mesothelioma. The expert testimony at trial flatly forecloses the notion that a single asbestos fiber could generate a sufficient number of genetic errors in a cell to cause a person to develop that disease. More problematically, however, the concurrence's statement suggests that a plaintiff must identify the particular fibers that contributed to the development of his mesothelioma should he opt to prove causation by direct, scientifically reliable evidence. This replaces substantial-factor causation with the equivalent of but-for causation, insofar as it requires a plaintiff to identify the fibers without which he would not have

developed mesothelioma. Taken at its word, the concurrence obligates a plaintiff to chart the progress of his disease on a molecular level as it actually occurred. This would amount to conclusive evidence of a defendant's liability. In this manner, the concurrence advocates that the standard of proof be altered.

The concurrence also insists that the Bostics' evidence with respect to Timothy's exposure lacked specificity. As I recount in further detail in the next part, Dr. Longo concluded that Timothy was exposed to chrysotile asbestos in "significant" quantities, that is, at levels ten to twenty times the average background level. In light of the fact that exposure to very low levels of asbestos can cause mesothelioma, that Timothy did develop the disease, and that asbestos is the only known environmental cause of mesothelioma, I fail to see how the evidence the Bostics adduced was inadequate to prove causation by a preponderance of the evidence.[1] For those reasons, I cannot agree with the position the concurrence urges.

III. Application

Having outlined the available avenues by which a plaintiff may prove causation in a toxic tort case, I turn to the facts at hand. I consider whether the Bostics have proven (1) that asbestos has the capacity to cause mesothelioma, and in what quantity, (2) that asbestos caused Timothy's mesothelioma, and (3) that Timothy's exposure to asbestos from Georgia-Pacific's product was a substantial factor in causing his mesothelioma. As I determine whether there is more than a scintilla of evidence to support the jury's findings, I consider "whether the evidence at trial would enable

[1] Whether a plaintiff relies on traditional science or the alternative measure of proof announced in *Havner*, she must prove her case by a preponderance of the evidence. *Havner*, 953 S.W.2d at 728. Obviously, this writing affirms that standard.

reasonable and fair-minded jurors to reach the verdict." *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009). This examination, which hinges on the reliability of expert testimony, encompasses the entire record. *Id.*

A. General Causation

In toxic tort cases, we have indicated that general causation may be proved in two ways. Under *Havner*, a plaintiff may produce epidemiological studies that establish a threshold of exposure to a toxin over which a person's risk of sustaining injury is more than doubled. 953 S.W.2d at 715–18. From this evidence, jurors may infer that the toxin probably causes the injury in persons who are exposed to quantities at or above the threshold. *Id.* at 715. However, *Havner* has never been the exclusive measure of proof. *Id.* The plaintiff is always free to establish causation in the traditional way, by "direct, scientifically reliable proof." *Id.*

In the case at bar, multiple expert witnesses testified that chrysotile asbestos, which is the kind of asbestos Georgia-Pacific included in its products, causes mesothelioma. Dr. Lemen detailed the history of scientific research with respect to this important question, and concluded that the research supported an opinion that mesothelioma is caused by this type of asbestos, even when a person is exposed to only very low doses of the toxin. Dr. Hammar agreed and noted that the National Institute for Occupational Safety and Health, the Environmental Protection Agency, the American Industrial Hygiene Association, the International Agency for Research on Cancer, and the World Health Organization all affirm that chrysotile asbestos causes mesothelioma. As I recounted in Part I, Dr. Brody detailed the biological process by which asbestos fibers migrate through the lung, into the pleura, and cause genetic errors in mesothelial cells. He affirmed that chrysotile fibers were

capable of causing these errors, even in very small quantities. This evidence is compelling. Taken together, it would have enabled reasonable jurors to conclude that asbestos from Georgia-Pacific's products can cause mesothelioma.

B. Specific Causation

As with general causation, there are two methods by which a plaintiff may prove specific causation. Pursuant to *Havner*, a plaintiff may produce evidence that he was exposed to a dose of the toxin that brings him in line with epidemiological studies showing that his risk of injury was more than doubled. 953 S.W.2d at 720. As noted above, "[t]his would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study." *Id.* If other plausible causes of the injury can be negated, the plaintiff must negate those causes with reasonable certainty. *Id.* However, once again, the plaintiff may prove specific causation in the traditional way, by "direct, scientifically reliable proof." *Id.* at 715.

In the case at bar, Dr. Hammar testified that chrysotile asbestos caused Timothy's mesothelioma. Dr. Hammar based his opinion on his own experience. TEX. R. EVID. 702. He explained that he had "personally diagnosed cases of mesothelioma in individuals with low exposures to chrysotile asbestos." In considering Timothy's level of exposure, Dr. Hammar reviewed Timothy's pathology materials, medical records, and work history. Dr. Hammar then testified that he had concluded that Timothy was "exposed at high enough levels . . . in doing this drywall work, in mixing[,] sanding[,] and cleaning up of drywall materials" that asbestos exposure

was, to a reasonable medical certainty, the cause of his mesothelioma. Dr. Longo affirmed this conclusion by testifying that Timothy had been exposed to chrysotile asbestos in "significant" quantities, that is, at levels ten to twenty times the average background level. This exposure is greater than the very low levels of exposure sufficient to cause mesothelioma. Dr. Longo based his conclusion on Timothy's and Harold's testimony, as well as experiments he had conducted to determine how much asbestos is released during the installation of drywall.

The testimony of Drs. Hammar and Longo was in keeping with the testimony of Dr. Lemen, who explained that individuals who work with joint compound are susceptible to mesothelioma. Dr. Lemen clarified that his conclusion was not limited to those with occupational exposure. He explained that his opinion was based on a study conducted by Dr. Selikoff, who found mesothelioma in drywallers who had "three months or less of exposure to asbestos." Dr. Lemen also testified that if a patient has a history of asbestos exposure above background levels, and no history of therapeutic radiation, then the "accepted" cause of his mesothelioma is asbestos. *See also* 3 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 26:24 (2013–14) ("It is generally accepted that any pulmonary asbestos concentration that is substantially above background is an indication of causation."). Taken together, the testimony of these expert witnesses would have enabled reasonable jurors to conclude that exposure to chrysotile asbestos caused Timothy Bostic's mesothelioma.

C. Substantial-Factor Causation

This final inquiry required the Bostics to show that Timothy's exposure to Georgia-Pacific's chrysotile asbestos was a substantial factor in causing his mesothelioma. As I explained in Part II, *Havner* may not be applied to resolve this question.

In *Flores*, we explained that "[t]he word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred." 232 S.W.3d at 770 (citation and internal quotation marks omitted). We clarified further that a plaintiff may satisfy the dictates of substantial-factor causation "'by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer.'" *Id.* at 773 (quoting *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997)). This relieves plaintiffs of an impossible burden: proving "that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth." *Id.* (citation and internal quotation marks omitted). Still, we maintained that a plaintiff must produce "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed," though with the caveat that the dose "need not be reduced to mathematical precision." *Id.*

For this reason, plaintiffs are not required to calculate dose in absolute terms. When it comes to the question of whether a plaintiff's exposure to a defendant's product in a multiple-exposure case was substantial, the *relevant* quantification is *relative* quantification: a plaintiff can prove causation by showing that her exposure to a certain defendant's product was sufficiently significant, in relative terms, that it should be considered a substantial factor in causing his injury. This is not the first time we have indicated that this consideration might be important. In *Flores*, we held that the plaintiff had failed to quantify his exposure to the defendant's product with sufficient particularity in part because this lack of evidence made us unable to determine whether that exposure "sufficiently contributed to the aggregate dose of asbestos Flores inhaled, such that it could be considered a substantial factor in causing his asbestosis." *Id.* at 772.

As the Court notes, consideration of a plaintiff's aggregate dose is in keeping with all three volumes of the Restatement of Torts. Both the first and second volumes recognize that an important consideration in determining whether a factor is so causative as to be considered substantial is "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it." RESTATEMENT (SECOND) OF TORTS § 433(a) (1965); RESTATEMENT (FIRST) OF TORTS § 433(a) (1934). The third volume advises that "[w]hen an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm . . . the harm is not within the scope of the actor's liability." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 36 (2010).

In multiple-exposure cases, once a plaintiff proves causation questions (1) and (2), the only question that remains is whether the plaintiff's exposure to a defendant's product was substantial

enough to be regarded as a cause "in the popular sense, in which there always lurks the idea of responsibility." *Flores*, 232 S.W.3d at 770. A jury is well-suited to make this determination. As the Court admits, "some discretion must be ceded to the trier of fact in determining whether the plaintiff met that standard. One respected treatise has opined that it is 'neither possible nor desirable to reduce [substantial factor] to any lower terms.'" *Ante* at ___ (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984)). As part of this determination, jurors may consider whether the plaintiff proved that a certain defendant's product was independently sufficient to cause his illness, either by resort to *Havner* or by "direct, scientifically reliable proof." *Havner*, 953 S.W.2d at 715. Jurors should consider this as one factor among many, as it may be more fitting to denominate an exposure substantial when it is independently sufficient to cause the plaintiff's disease. However, in contrast to the Court, I maintain that this consideration is relevant, rather than prerequisite.

In the case at bar, the Bostics produced evidence that Timothy Bostic was exposed to asbestos from three primary sources: First, Timothy ingested Georgia-Pacific's joint compound, which he and his father used "98 percent of the time" while completing residential construction projects. Timothy was also exposed to asbestos at the Knox Glass plant, which may have been produced by any number of manufacturers. Finally, while employed by Palestine Contractors Timothy inhaled particles from the asbestos used to insulate pipes, which again may have been produced by any number of manufacturers.

The Bostics also produced evidence as to the approximate quantum of time Timothy was exposed to each source of asbestos: Timothy worked with his father throughout his childhood on

residential construction projects. When he was only a boy, Timothy mixed dry joint compound, sanded it on the walls "[a]s far up as he could reach," and swept the dust generated by sanding. Expert witnesses consistently maintained that exposure to asbestos during childhood can be particularly detrimental. Timothy also worked at the Knox Glass plant for three summers, where his ingestion of asbestos may have been more severe in one part of the plant than in another. In addition, Timothy was exposed to fibers that his father carried home on his clothing from the plant. Because Timothy did not live with Harold full-time, this exposure was sporadic. Finally, Timothy worked at Palestine Contractors for two summers, where he encountered asbestos on an intermittent basis.

The Bostics also produced evidence that Timothy's exposure to Georgia-Pacific's products was independently sufficient to cause his mesothelioma. Dr. Hammar testified that Timothy was exposed to sufficiently high levels of asbestos that his exposure was, to a reasonable medical certainty, the cause of his mesothelioma. Dr. Longo agreed, testifying that Timothy had been exposed to Georgia-Pacific's asbestos at levels ten to twenty times the average background levels. This exposure is greater than the very low levels of exposure sufficient to cause mesothelioma.

And though the evidence the Bostics put forward with respect to Timothy's exposure is hardly exact, we do not require a plaintiff to reduce the quantity of exposure "to mathematical precision." *Flores*, 232 S.W.3d at 773. I would hold that the evidence the Bostics presented in this case was sufficiently specific to enable a jury to determine that Timothy's exposure to Georgia-Pacific's asbestos was a substantial factor in causing his illness.

IV. Conclusion

By requiring every plaintiff to produce epidemiological studies demonstrating that exposure to every defendant's product independently more than doubled his risk of developing a disease, the Court renders *Havner* a hindrance rather than a help. In this case, the Bostics produced scientifically reliable evidence that asbestos causes mesothelioma, that it caused Timothy's development of that disease, and that Timothy's exposure to Georgia-Pacific's asbestos-containing products was substantial in relation to his exposure to other asbestos sources. Because they adduced this evidence in the traditional way, they had no need to resort to the alternative measure we approved in *Havner.* By elevating this standard to the exclusive measure of proof, the Court effectively forecloses recovery for mesothelioma plaintiffs with intermittent exposure to asbestos until researchers develop epidemiological studies demonstrating a doubling of the risk in that population. The Court also forecloses recovery for mesothelioma plaintiffs who were exposed to multiple sources of asbestos when no single source of exposure is sufficient, by itself, to more than double that plaintiff's risk of developing mesothelioma. Under the paradigm the Court propounds, this would remain true even in the face of reliable expert testimony that the plaintiff's mesothelioma was overwhelmingly attributable to one source. For these reasons, and because in this instance I would hold that the Bostics proved that exposure to Georgia-Pacific's asbestos-containing product was a substantial factor in causing Timothy's injury, I would reverse the judgment of the court of appeals and reinstate the trial court's judgment in favor of the Bostics.

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 11, 2014

IN THE SUPREME COURT OF TEXAS

NO. 10-0846

BROOKSHIRE BROTHERS, LTD., PETITIONER,

v.

JERRY ALDRIDGE, RESPONDENT

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

Argued September 12, 2012

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

JUSTICE GUZMAN filed a dissenting opinion, in which JUSTICE DEVINE and JUSTICE BROWN joined.

A fundamental tenet of our legal system is that each and every trial is decided on the merits of the lawsuit being tried. After all, reaching the correct verdict is the goal of a fair and impartial judiciary. However, when the spoliation of evidence is at issue, this goal is hampered in conflicting ways. First, as is the case when evidence is lost or destroyed for any reason, spoliation can deprive the factfinder of relevant evidence, which can in turn negatively impact the fairness of the trial. Trial courts therefore must have wide discretion in remedying such conduct and in imposing sanctions to deter it. However, the imposition of a severe spoliation sanction, such as a spoliation jury

instruction, can shift the focus of the case from the merits of the lawsuit to the improper conduct that was allegedly committed by one of the parties during the course of the litigation process. The problem is magnified when evidence regarding the spoliating conduct is presented to a jury. Like the spoliating conduct itself, this shift can unfairly skew a jury verdict, resulting in a judgment that is based not on the facts of the case, but on the conduct of the parties during or in anticipation of litigation.

Modern technology has added another layer of complexity to these competing concerns. Due to the exponential increase in the volume of electronic data being generated and stored, maintaining the balance between the significant interest in preserving relevant evidence and the burdens associated with doing so has become increasingly difficult.

Today we enunciate with greater clarity the standards governing whether an act of spoliation has occurred and the parameters of a trial court's discretion to impose a remedy upon a finding of spoliation, including submission of a spoliation instruction to the jury. We first hold that a spoliation analysis involves a two-step judicial process: (1) the trial court must determine, as a question of law, whether a party spoliated evidence, and (2) if spoliation occurred, the court must assess an appropriate remedy. To conclude that a party spoliated evidence, the court must find that (1) the spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so. Spoliation findings—and their related sanctions—are to be determined by the trial judge, outside the presence of the jury, in order to avoid unfairly prejudicing the jury by the presentation of evidence that is unrelated to the facts underlying the lawsuit. Accordingly, evidence bearing directly upon whether a party has spoliated evidence is

not to be presented to the jury except insofar as it relates to the substance of the lawsuit. Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive. Key considerations in imposing a remedy are the level of culpability of the spoliating party and the degree of prejudice, if any, suffered by the nonspoliating party.

While the spectrum of remedies that may be imposed range from an award of attorney's fees to the dismissal of the lawsuit, the harsh remedy of a spoliation instruction is warranted only when the trial court finds that the spoliating party acted with the specific intent of concealing discoverable evidence, and that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. This intent requirement is congruent with the presumption underlying a spoliation instruction—that the evidence would have hurt the wrongdoer. A failure to preserve evidence with a negligent mental state may only underlie a spoliation instruction in the rare situation in which a nonspoliating party has been irreparably deprived of any meaningful ability to present a claim or defense.

In the underlying slip-and-fall premises-liability case, we are asked to determine whether the trial court erred in charging the jury with a spoliation instruction when a premises owner retained the requested portion of surveillance video footage of the plaintiff's fall, but allowed additional footage to be automatically erased. Applying the standard enunciated today, we hold that imposition of the severe sanction of a spoliation instruction was an abuse of discretion. We need not address the propriety of a particular lesser sanction because none was requested or imposed. We further hold

that the trial court erred in admitting evidence of the circumstances of the spoliating conduct. Because these errors were not harmless, we reverse the court of appeals' judgment and remand the case for a new trial in accordance with this opinion.

I. Background

On September 2, 2004, Jerry Aldridge slipped and fell near a display table at a Brookshire Brothers grocery store. At the time of the fall, Aldridge did not tell store employees that he was injured, and the store did not investigate the fall or complete an incident report. However, about an hour-and-a-half after leaving the store, Aldridge went to the emergency room because of pain. On September 7, Aldridge returned to the store and reported his injuries. Jon Tyler, a store manager trainee, prepared an incident report based on Aldridge's statements and the recollections of the assistant manager who was on duty at the time of Aldridge's fall. The incident report stated that "Aldridge slipped on grease that had leaked out of a container by the 'Grab N Go.'" The Grab-N-Go, which featured rotisserie chickens that were cooked and packaged in the store's deli, was located approximately fifteen feet from the area of the fall.

Aldridge's fall was captured by a surveillance camera mounted near the check-out counters. Because of the camera's placement, the floor where Aldridge fell was in the background and was obscured by a display table, which was covered with a cloth that extended to the floor. At the time of the fall, the cameras recorded surveillance video in a continuous loop that, after approximately thirty days, recorded over prior events. After Aldridge reported his injuries to Brookshire Brothers, Robert Gilmer, Brookshire Brothers' Vice President of Human Resources and Risk Management,

decided to retain and copy approximately eight minutes of the video, starting just before Aldridge entered the store and concluding shortly after his fall.

Aldridge learned that Brookshire Brothers possessed video footage of the incident and, on September 13, asked the claims department for a copy so he could see his fall. Gilmer testified that he instructed the claims department not to provide the tape to Aldridge, as Gilmer believed it would be improper. The claims department wrote Aldridge a letter on September 29 stating that there was only one copy of the video at that time and that it therefore could not provide him with a copy. The camera presumably recorded over the September 2 footage by early October.

Brookshire Brothers initially paid Aldridge's medical expenses,[1] but ceased paying by June 2005, when Gilmer wrote Aldridge a letter stating that he had reviewed the video and determined that Brookshire Brothers was going to deny responsibility. In August 2005, Aldridge's attorney sent Brookshire Brothers a letter requesting approximately two-and-a-half hours of additional footage from the store cameras. Brookshire Brothers was unable to comply with that request because the footage had been recorded over almost a year earlier.

Aldridge sued Brookshire Brothers, claiming injuries from a slip and fall under a premises-liability theory. To recover in a slip-and-fall case, a plaintiff must prove, *inter alia*, that the defendant had actual or constructive knowledge of a dangerous condition on the premises such as a slippery substance on the floor, *Keech v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992), which may be accomplished with a showing that "(1) the defendant placed the substance on the floor, (2) the

[1] With respect to customers injured in its store, Brookshire Brothers had a routine practice of paying an initial medical bill as well as paying for one follow-up visit and associated prescriptions. As to Aldridge, Brookshire Brothers also authorized payment for a visit to a neurosurgeon and several weeks of physical therapy.

defendant actually knew that the substance was on the floor, or (3) it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it," *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002). Aldridge argued in the trial court that Brookshire Brothers' failure to preserve additional video footage amounted to spoliation of evidence that would have been helpful to the key issue of whether the spill was on the floor long enough to give Brookshire Brothers a reasonable opportunity to discover it. Aldridge accordingly moved for a spoliation jury instruction.

The trial court allowed the jury to hear evidence bearing on whether Brookshire Brothers spoliated the video, submitted a spoliation instruction to the jury, and permitted the jury to decide whether spoliation occurred during its deliberations on the merits of the lawsuit. The principal witness to testify on the circumstances surrounding the preservation of the video was Gilmer, who had made the decision regarding the amount of video footage to preserve after Aldridge's incident report was completed. Gilmer testified at trial that he had instructed Tyler to save the portion showing the fall and the five or six minutes before the fall so as to try to identify Aldridge entering the store. He further testified that the purpose of saving the video was to verify that Aldridge had actually fallen and that Gilmer believed the rest of the video, which he had not viewed, "[w]asn't relevant." Gilmer verified his understanding that a key legal issue in a slip-and-fall case is whether store employees knew or should have known there was something on the floor that caused the fall.[2] However, he maintained that when the decision was made to preserve the video he "didn't know

[2] Gilmer testified that he had worked in the grocery store business for forty-four years. As Vice President of Human Resources and Risk Management, Gilmer headed Brookshire Brothers' risk management department, which included managing the company's litigation.

there was going to be a case." At that time, "[i]t was just a man who made a claim that he slipped and fell in the store," and the actions relating to the video were not taken "in anticipation of this trial."

The trial court submitted the following spoliation instruction to the jury:

> In this case, Brookshire Brothers permitted its video surveillance system to record over certain portions of the store surveillance video of the day of the occurrence in question. If you find that Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may consider such evidence would have been unfavorable to Brookshire Brothers.

The jury determined that Brookshire Brothers' negligence proximately caused Aldridge's fall and awarded Aldridge $1,063,664.99 in damages. The court of appeals affirmed the trial court's judgment on the verdict, holding that the trial court did not abuse its discretion in admitting evidence of spoliation or charging the jury with the spoliation instruction.

II. Spoliation Analysis

The spoliation of evidence is a serious issue. A party's failure to reasonably preserve discoverable evidence may significantly hamper the nonspoliating party's ability to present its claims or defenses, *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003), and can "undermine the truth-seeking function of the judicial system and the adjudicatory process," Justice Rebecca Simmons and Michael J. Ritter, *Texas's Spoliation "Presumption"*, 43 ST. MARY'S L.J. 691, 701 (2012); *see also Trevino v. Ortega*, 969 S.W.2d 950, 954 (Tex. 1998) (Baker, J., concurring) (observing that "[e]vidence spoliation is a serious problem that can have a devastating effect on the administration of justice"). As one federal district court has explained, "[d]ocuments

create a paper reality we call proof. The absence of such documentary proof may stymie the search for the truth." *Zubulake v. UBS Warburg L.L.C.*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (citations and internal quotation marks omitted). In some circumstances, a missing piece of evidence like a photograph or video can be irreplaceable. Testimony as to what the lost or destroyed evidence might have shown will not always restore the nonspoliating party to an approximation of its position if the evidence were available; sometimes a picture is indeed worth a thousand words.

In light of these concerns, courts have broad discretion to utilize a variety of remedies to address spoliation, including the spoliation instruction. *See* Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 86 (2008). The instruction is an important remedy, but its use can affect the fundamental fairness of the trial in ways as troubling as the spoliating conduct itself. As we have recognized, "[b]ecause the instruction itself is given to compensate for the absence of evidence that a party had a duty to preserve, its very purpose is to 'nudge' or 'tilt' the jury" toward a finding adverse to the alleged spoliator. *Wal-Mart Stores*, 106 S.W.3d at 724. Thus, an unfortunate consequence of submitting a spoliation instruction is that it "often ends litigation" because "it is too difficult a hurdle for the spoliator to overcome." *Zubulake*, 220 F.R.D. at 219. This "nudging" or "tilting" of the jury is magnified by the presentation of evidence that emphasizes the spoliator's wrongful conduct rather than the merits of the suit.

Added to these concerns are the complexities surrounding evidence preservation in today's world, as technology has advanced to allow potential litigants to store larger volumes of electronic information. *See* Simmons and Ritter, *Texas's Spoliation "Presumption"*, 43 ST. MARY'S L.J. at 701. Thus, while electronic data can be a valuable source of evidence, it can also make compliance

with one's responsibility to preserve and produce such data much more difficult and expensive. *See id.* at 702; Robert Hardaway, et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 522 (2011). Because of the prevalence of discoverable electronic data and the uncertainties associated with preserving that data, sanctions concerning the spoliation of electronic information have reached an all-time high. Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790 (2010).

Because of these and other myriad concerns, the Federal Rules of Civil Procedure were amended in 2006 to prohibit federal courts from imposing sanctions when discoverable electronic evidence is lost "as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e).[3] The Texas rules do not contain a comparable provision, but the challenges facing Texas courts are just as acute. Merits determinations are significantly affected by both spoliation instructions and the conduct that gives rise to them. We have observed that when a party is inherently prevented from having the merits of its case adjudicated, constitutional due process is implicated. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917–18 (Tex. 1991) (discussing constitutional limitations on the power of courts to adjudicate a party's claims without regard to the merits, but instead based on a party's conduct in discovery). In light of these concerns,

[3] Rule 37(e) is in the process of being amended again. Following the receipt of public comment, the Advisory Committee on Civil Rules recommended a proposed amended rule for adoption by the Committee on Rules of Practice and Procedure. *See* Hon. David G. Campbell, Advisory Committee on Civil Rules, *Report of Advisory Committee on Civil Rules*, 306–17 (May 2, 2014), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks. The Standing Committee approved the proposal at its May 29, 2014 meeting. Thomas Y. Allman, *Standing Committee OKs Federal Discovery Amendments*, LAW TECHNOLOGY NEWS (June 2, 2014), http://www.lawtechnologynews.com/id=1202657565227?slreturn=20140505130019.

we granted review of Brookshire Brothers' petition in order to bring much-needed clarity to our state's spoliation jurisprudence.

A. Development of Spoliation Law in Texas

In Texas, spoliation is an evidentiary concept rather than a separate cause of action. *Trevino*, 969 S.W.2d at 952. In declining to recognize spoliation as an independent tort in *Trevino*, we acknowledged that courts must have "adequate measures to ensure that it does not improperly impair a litigant's rights." *Id.* at 953. Thus, when evidence is lost, altered, or destroyed, trial courts have the discretion to impose an appropriate remedy so that the parties are restored to a rough approximation of what their positions would have been were the evidence available. *Wal-Mart Stores*, 106 S.W.3d at 721. As discussed further below, Texas courts necessarily enjoy wide latitude in remedying acts of discovery abuse, including evidence spoliation. *Trevino*, 969 S.W.2d at 953.

Neither the Texas Rules of Evidence nor the Texas Rules of Civil Procedure specifically address spoliation. However, this Court recognized the concept as early as 1852, when we adopted the principle that all things are presumed against the wrongdoer; this is known as the spoliation presumption. *See Cheatham v. Riddle*, 8 Tex. 162, 167 (1852) (citation omitted) (stating that "[e]verything is to be presumed *in odium spoliatoris*"); *see also Trevino*, 969 S.W.2d at 952 (observing that "[e]vidence spoliation is not a new concept" and that "all things are presumed against a wrongdoer"). However, our guidance in this area has been limited to a small spattering of cases in the nineteenth century[4] and several more in the last twenty years.[5]

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[4] *See Curtis & Co. Mfg. v. Douglas*, 15 S.W. 154, 155 (Tex. 1890) (noting that nonpreservation of evidence was "a circumstance to be considered by the jury"); *Underwood v. Coolgrove*, 59 Tex. 164, 170 (1883) (recognizing that the refusal to produce evidence in a party's possession without explanation as to why it was not produced creates the

The courts of appeals have generally followed two basic frameworks in evaluating the propriety of a spoliation remedy. The first is that established by Justice Baker's oft-cited concurring opinion in *Trevino v. Ortega*. Under this analytical framework, a party may be entitled to a remedy for the opposing party's spoliation of evidence if the party establishes three elements: (1) the party who destroyed or failed to produce evidence had a duty to preserve it; (2) the party either negligently or intentionally breached that duty by destroying the evidence or rendering it unavailable; and (3) the breach prejudiced the nonspoliating party. *Trevino*, 969 S.W.2d at 955–58 (Baker, J., concurring). In evaluating prejudice, Justice Baker suggested that courts should consider the destroyed evidence's relevance, whether other cumulative evidence exists to take the place of the spoliated evidence, and whether the destroyed evidence supports "key issues in the case." *Id.* at 958.

The second distinct framework applied by the courts of appeals focuses on the so-called presumptions arising from a party's destruction of or failure to produce evidence. As we recognized in *Wal-Mart Stores*, the courts of appeals have generally limited the use of a spoliation instruction to two circumstances (generally referred to as the "two rules"): (1) a party's deliberate destruction of relevant evidence, and (2) a party's failure to produce relevant evidence or explain its nonproduction. 106 S.W.3d at 721. Under the first rule, a presumption arises that a party who deliberately destroys evidence does so because it is unfavorable to the party's case. *Id.* Under the

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belief that it would not aid the case of the nonproducing party); *Cheatham*, 8 Tex. at 162.

[5] *See Trevino*, 969 S.W.2d at 952 (refusing to recognize an independent tort of spoliation); *Wal-Mart Stores*, 106 S.W.3d at 722 (concluding that a party must possess a duty to preserve evidence in order for a spoliation instruction to be proper); *see also Cire v. Cummings*, 134 S.W.3d 835, 841 (Tex. 2004) (holding that party's "deliberate[]" destruction of relevant evidence justified death-penalty sanctions).

second, the same presumption arises because the party who controls the missing evidence is unable to explain its failure to produce the evidence. *Id.* at 722.[6] Though we have never expressly adopted these two rules, both derive from our nineteenth-century precedent. *See Cheatham*, 8 Tex. at 167 (recognizing that all things are presumed against a wrongdoer); *Underwood*, 50 Tex. at 170 (observing that a failure to produce evidence without explanation creates a belief that it would not aid the nonproducing party's case). Some courts of appeals have referred solely to the two rules in determining the propriety of a spoliation instruction, *see, e.g.*, *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 920 (Tex. App.—Houston [14th Dist.] 2002, pet. denied), while others—including the court of appeals in the instant case—have referred to both Justice Baker's framework and the two rules in determining whether the trial court abused its discretion in charging the jury with a spoliation instruction, ___ S.W.3d ___, ___; *see also Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 56 (Tex. App.—Corpus Christi 2001, no pet.); *Whiteside v. Watson*, 12 S.W.3d 614, 621 (Tex. App.—Eastland 2000, pet. dism'd by agr.).

B. Spoliation Framework

Because we have never crafted a complete analytical framework for determining whether an act of spoliation has occurred, we first focus on the elements that must be satisfied to warrant a finding of spoliation and the corresponding imposition of an appropriate remedy. As an initial

[6] The Texas spoliation presumption is a confusing concept that has not been uniformly applied. *See generally* Justice Rebecca Simmons and Michael J. Ritter, *Texas's Spoliation "Presumption"*, 43 ST. MARY'S L.J. 691 (2012). In Texas, courts usually use the term "presumption," while federal courts generally refer to a spoliation instruction as an "adverse inference" instruction. *See id.* at 716, 769.

matter, however, we address whether it is the responsibility of the trial court or the jury to make this determination.

1. The Trial Court Determines Whether Evidence Was Spoliated and the Proper Remedy

As discussed above, spoliation is an evidentiary concept, not a separate cause of action. *See Trevino*, 969 S.W.2d at 952. It is well-established that evidentiary matters are resolved by the trial court. *See, e.g.*, *City of San Antonio v. Pollock*, 284 S.W.3d 809, 823 (Tex. 2009). Further, spoliation is essentially a particularized form of discovery abuse, in that it ultimately results in the failure to produce discoverable evidence, and discovery matters are also within the sole province of the trial court. Finally, presenting spoliation issues to the jury for resolution magnifies the concern that the focus of the trial will shift from the merits to a party's spoliating conduct. For these reasons, we agree with Justice Baker that the trial court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy. *See Trevino*, 969 S.W.2d at 954 (Baker, J., concurring); *see also Massie v. Hutcheson*, 270 S.W. 544, 545 (Tex. Comm'n App. 1925, holding approved) (stating that determining whether a party intentionally destroyed evidence is a preliminary question for the court to decide). The trial court may hold an evidentiary hearing to assist the court in making spoliation findings, but not in the presence of the jury. Placing the responsibility on the trial court to make spoliation findings and to determine the proper remedy is a key mechanism in ensuring the jury's focus stays where it belongs—on the merits.

2. Spoliation Finding

With this background in mind, we turn to the elements that underlie a trial court's spoliation finding, beginning with the issue of duty. We have held that a party alleging spoliation bears the

burden of establishing that the nonproducing party had a duty to preserve the evidence. *See Wal-Mart Stores*, 106 S.W.3d at 722. The standard governing the duty to preserve resolves two related inquiries: when the duty is triggered, and the scope of that duty. Specifically, we observed in *Wal-Mart Stores* that "[s]uch a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." *Id.* In turn, a "substantial chance of litigation" arises when "litigation is more than merely an abstract possibility or unwarranted fear." *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993) (citation and internal quotation marks omitted); *see also id.* ("Common sense dictates that a party may reasonably anticipate suit being filed . . . before the plaintiff manifests an intent to sue.").[7]

Second, we have implicitly recognized, and now do so explicitly, that the party seeking a remedy for spoliation must demonstrate that the other party breached its duty to preserve material and relevant evidence. *See Wal-Mart Stores*, 106 S.W.3d at 722 (observing that the *initial* inquiry in determining if discovery abuse has occurred is whether a party has a duty to preserve evidence). If a party possesses a duty to preserve evidence, it is inherent that a party breaches that duty by failing to exercise reasonable care to do so. Otherwise, the nonspoliating party would have no legitimate reason to seek a spoliation remedy. Further, we agree with Justice Baker that the breach may be either intentional or negligent. *Trevino*, 969 S.W.2d at 957 (Baker, J., concurring) ("Because

[7] Federal courts have struggled with the issue of when a duty to preserve is triggered and the scope of that duty, especially as it relates to electronic data and "litigation holds." *See generally* Paul W. Grimm, et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381 (2008) (discussing the perplexing issue in federal courts of the duty to preserve as it relates to electronically stored information).

parties have a duty to reasonably preserve evidence, it is only logical that they should be held accountable for either negligent or intentional spoliation.").[8]

3. Spoliation Remedies

After a court determines that a party has spoliated evidence by breaching its duty to preserve such evidence, it may impose an appropriate remedy. Rule 215.2 of the Texas Rules of Civil Procedure enumerates a wide array of remedies available to a trial court in addressing discovery abuse, such as an award of attorney's fees or costs to the harmed party, exclusion of evidence, striking a party's pleadings, or even dismissing a party's claims. *See* TEX. R. CIV. P. 215.2–.3. These remedies are available in the spoliation context. *Trevino*, 969 S.W.2d at 953. The trial court also has discretion to craft other remedies it deems appropriate in light of the particular facts of an individual case, including the submission of a spoliation instruction to the jury. *Id.*

In accordance with our well-settled precedent on remedying discovery abuse, however, the remedy must have a direct relationship to the act of spoliation and may not be excessive. *See TransAmerican*, 811 S.W.2d at 917. In other words, the remedy crafted by the trial court must be proportionate when weighing the culpability of the spoliating party and the prejudice to the nonspoliating party. *See Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (in crafting a remedy for spoliation, assessing (1) the degree of fault of party who failed to preserve evidence, (2) the degree of prejudice suffered by the opposing party, and (3) whether there is a lesser

[8] It follows that a party does not breach its duty to preserve relevant evidence if such evidence is lost or destroyed through no fault of the party from whom the evidence is sought, such as by an act of God. Given that spoliation sanctions, while primarily remedial, also serve a punitive purpose, they are not appropriately imposed against an innocent party, regardless of the extent to which another party is prejudiced. *See Trevino*, 969 S.W.2d at 957 (Baker, J., concurring) (comparing the "culpable" spoliating party with the "innocent" nonspoliating party).

sanction that will avoid substantial unfairness to the opposing party); Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 44 (2006) (noting that federal courts generally follow the three-part test outlined in *Schmid* in determining the appropriate sanction for spoliation). This logically follows from the remedial purpose undergirding the imposition of a spoliation remedy under Texas law, which is to restore the parties to a rough approximation of their positions if all evidence were available. *See Wal-Mart Stores*, 106 S.W.3d at 721.

The courts of appeals evaluate prejudice largely on the considerations Justice Baker espoused in his *Trevino* concurrence.[9] These include the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case (or, conversely, whether the evidence would have been helpful to the nonspoliating party's case), and whether the spoliated evidence was cumulative of other competent evidence that may be used instead of the spoliated evidence. *Trevino*, 969 S.W.2d at 958 (Baker, J., concurring); *see, e.g.*, *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666 (Tex. App.—Houston [1st Dist.] 1998, no pet.). These factors have proved workable in the courts of appeals, are similar to the test followed by federal courts, and provide guidance to the trial courts in analyzing prejudice in a specific case. *See, e.g.*, *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 615–16 (S.D. Tex. 2010) (discussing the prejudice factor of adverse inference analysis). Accordingly, we adopt them.

[9] Justice Baker opined that prejudice should be analyzed both as a yes-or-no element of spoliation and as a factor in imposing a remedy. *Trevino*, 969 S.W.2d at 955–58 (Baker, J., concurring). We think this two-step analysis is unnecessary and that analyzing prejudice as a key factor in imposing a spoliation remedy contemplates that some degree of prejudice is required for the nonspoliating party to be entitled to a remedy.

In light of the difficulty of conducting a prejudice analysis based on evidence that is no longer available for review, we recognize that a party's intentional destruction of evidence[10] may, "[a]bsent evidence to the contrary," be sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party. *See Trevino*, 969 S.W.2d at 958 (Baker, J., concurring). This flows from the common-law spoliation presumption that all things are presumed against the wrongdoer.[11] Conversely, negligent spoliation could not be enough to support such a finding without "some proof about what the destroyed evidence would show."[12] *Id.* In any event, the trial court should of course consider all evidence bearing on the factors associated with evaluating prejudice to the nonspoliating party. *Id.*

We note, however, that a trial court should exercise caution in evaluating the final prejudice factor, which accounts for the existence of cumulative evidence. For example, a spoliating party might argue that no prejudice resulted from spoliation of a video of an incident because there is also eyewitness testimony regarding the incident. But many of the inherent problems with such testimony—inaccurate memory, poor eyesight, bias, etc.—are simply not present with a video recording. Again, a picture is often worth a thousand words. The same can be true with respect to testimony regarding the contents of a destroyed document, compared to the document itself. The

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[10] We discuss in detail below what is required to demonstrate that a party "intentionally" spoliated evidence.

[11] Some federal courts endorse this viewpoint as well. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 109 (2d Cir. 2002).

[12] This does not mean that the contents of the missing evidence must be conclusively proven, as they can be demonstrated through circumstantial evidence. *See, e.g.*, *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 110 (2d Cir. 2001) (observing that "a party seeking an adverse inference may rely on circumstantial evidence to suggest the contents of destroyed evidence"); *Reece*, 81 S.W.3d at 817 (noting that circumstantial evidence may establish a fact when that fact is "inferred from other facts proved in the case") (citation and internal quotation marks omitted).

differences in kind and quality between the available evidence and the spoliated evidence will thus be a key factor in analyzing prejudice to the nonspoliating party.

C. Spoliation Instruction as a Remedy

Having laid out the general framework governing spoliation findings and remedies, we turn to the particular remedy at issue in this case—the submission of an instruction to the jury to presume that the missing evidence would have been unfavorable to the spoliator. Though we have generally described the purpose of a spoliation remedy in remedial rather than punitive terms, *see Wal-Mart Stores*, 106 S.W.3d at 721, a spoliation instruction is still inherently a sanction, *see Trevino*, 969 S.W.2d at 953.[13] Further, it is among the harshest sanctions a trial court may utilize to remedy an act of spoliation. *See, e.g.*, *Zubulake*, 220 F.R.D. at 220 (describing a spoliation instruction as "an extreme sanction" that "should not be given lightly"); *Rimkus Consulting Group, Inc.*, 688 F. Supp. 2d at 619 (characterizing a spoliation instruction "as among the most severe sanctions a court can administer"). Because a spoliation instruction has the propensity to tilt a trial in favor of a nonspoliating party, it can, in some sense, be tantamount to a death-penalty sanction. *See Wal-Mart Stores*, 106 S.W.3d at 724; *TransAmerican*, 811 S.W.2d at 917–18; *Zubulake*, 220 F.R.D. at 219–20. At the same time, the destruction of relevant evidence can also unfairly skew the outcome of a trial. Thus, improper use of a spoliation instruction can deprive either party of the right to a fair trial on the merits of the case. It follows that an instruction should be available to address spoliation in certain circumstances, but should be used cautiously. *See TransAmerican*, 811 S.W.2d at 917.

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[13] *See also, e.g.*, *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 553 (6th Cir. 2010) (describing an adverse inference instruction as a sanction); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449 (4th Cir. 2004) (same).

1. Culpability

The competing considerations outlined above have led courts to grapple with the specific issue of whether a spoliation instruction can ever be an appropriate remedy for negligent spoliation. Though the issue has split both federal and state courts,[14] there has been little discussion of this issue in our courts of appeals,[15] and we previously left open the question of the requisite culpable mental state to warrant submission of a spoliation instruction. *See Wal-Mart Stores*, 106 S.W.3d at 722 (declining to decide whether a spoliation instruction is justified when evidence is unintentionally lost or destroyed).

For several reasons, and with a narrow exception we will explain below, we conclude that a party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy. Although some Texas courts of appeals have approved spoliation instructions on the basis of negligent spoliation, this approach lacks a basis in Texas common law. *See, e.g.*, *Adobe Land Corp. v. Griffin, L.L.C.*, 236 S.W.3d 351, 360–61 (Tex. App.—Fort Worth 2007, pet. denied). First, we have expressly stated that a spoliation instruction may be given when a party *deliberately* destroys evidence. *Cire*, 134 S.W.3d at 843. Second, a person who merely negligently destroys evidence lacks the state of mind of a "wrongdoer," and it makes little sense to infer that a party who only negligently lost or destroyed evidence did so because it was unfavorable to the party's case. Courts that allow a negligent state of mind to warrant the submission of a spoliation

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[14] *See* Margaret M. Koesel and Tracey L. Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation* 64–65 (Daniel F. Gourash ed., 2d ed. 2006).

[15] *See* Simmons and Ritter, *Texas's Spoliation "Presumption"*, 43 St. Mary's L.J. at 757.

instruction tend to reason that the need to deter and punish spoliation is a sufficient basis for the instruction. *See* Koesel and Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation*, at 65–66. However, in Texas, the instruction is based on the presumption of wrongdoing, so it follows that the more appropriate requirement is intent to conceal or destroy discoverable evidence.

Our analysis of Rule 215 discovery sanctions in *TransAmerican* and its progeny, in which we held that there must be a direct relationship between the offensive conduct and the sanction imposed, and that the sanction may not be excessive, also compels our conclusion. *TransAmerican*, 811 S.W.2d at 917. As we observed, "sanctions that are so severe as to inhibit presentation of the merits of a case should be reserved to address a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules." *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 883 (Tex. 2003). Though *TransAmerican* specifically interpreted a requirement in Rule 215 that any sanction imposed be "just," the spirit of its analysis applies equally in the context of spoliation instructions. *See TransAmerican*, 811 S.W.2d at 917. To allow such a severe sanction as a matter of course when a party has only negligently destroyed evidence is neither just nor proportionate. *Id.*

Finally, our approach aligns with a majority of the federal courts of appeals. *See United States v. Laurent*, 607 F.3d 895, 902–03 (1st Cir. 2010) (requiring bad faith for adverse inference instruction); *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1219–20 (10th Cir. 2008) (intentionality or bad faith necessary for spoliation instruction); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (spoliator must intentionally destroy evidence in bad faith to warrant

adverse inference instruction); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (observing that a spoliation sanction requires a finding of intentional destruction that indicates a desire to suppress the truth); *Hodge*, 360 F.3d at 450 (adverse inference instruction is only available when the spoliating party knew the evidence was relevant to an issue at trial and his willful conduct resulted in the evidence's loss or destruction); *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003) (nonspoliating party must show that spoliating party destroyed evidence in bad faith to establish entitlement to an adverse inference); *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003) (adverse inference may only be drawn when the failure to preserve evidence is done in bad faith).[16] We believe this approach is consistent with our jurisprudence and is the most practical in this era of complex electronic discovery.

Because of the significant consequences stemming from a finding that spoliation is intentional, further discussion of the meaning of "intentional" in this context is warranted. By "intentional" spoliation, often referenced as "bad faith" or "willful" spoliation, we mean that the party acted with the subjective purpose of concealing or destroying discoverable evidence. This includes the concept of "willful blindness," which encompasses the scenario in which a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless "allows for its

[16] *But see Beavem*, 622 F.3d at 554 (adverse inference appropriate when a party destroys evidence knowingly or negligently); *Residential Funding Corp.*, 306 F.3d at 108 (same); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (spoliation instruction may be given when spoliator acts with less than bad faith).

destruction."[17] Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. at 97–98.

Accordingly, we hold that a trial court's finding of intentional spoliation pursuant to the analysis set forth above is a necessary predicate to the proper submission of a spoliation instruction to the jury. In the event the trial court makes such a finding and concludes, as with any sanction, that a lesser remedy would be insufficient to ameliorate the prejudice caused by the spoliating party's conduct, the trial court is within its discretion in submitting an instruction. *See TransAmerican*, 811 S.W.2d at 917 (holding that, because a discovery sanction "should be no more severe than necessary to satisfy its legitimate purposes," the trial court must determine that lesser sanctions constitute an insufficient remedy); *Cire*, 134 S.W.3d at 842 (holding that the trial court "must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed").

2. Caveat Authorizing Instruction in Context of Negligent Spoliation

Our conclusion regarding the requisite state of mind to justify a jury instruction, however, must include a narrow caveat. On rare occasions, a situation may arise in which a party's negligent

[17] The issue of willful blindness is especially acute in the context of automatic electronic deletion systems. A party with control over one of these systems who intentionally allows relevant information to be erased can hardly be said to have only negligently destroyed evidence, though we recognize the complexities of these determinations when a potential litigant who controls massive volumes of electronic data is attempting to determine, prelitigation, which information is likely to be discoverable. *See, e.g.*, Hardaway, et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. at 529 (discussing the "staggering costs" in discovery because of the volumes of electronically stored information in computers and other databases around the country); Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 806 (2009) (discussing the discovery problems when electronically stored information is routinely deleted from a business's computers, and the need for courts to remedy spoliation while also remembering that "[i]n a world where the very act of deletion is integral to normal operations, it is unfair to treat the inadvertent or negligent loss of [ESI] as indicative of an intent to destroy evidence and to thereby infer spoliation") (citation and internal quotation marks omitted).

breach of its duty to reasonably preserve evidence irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense. *See Wal-Mart Stores*, 106 S.W.3d at 721 (recognizing that "the loss or destruction of evidence may seriously impair a party's ability to present its case"). In such circumstances, the destruction or loss of the evidence, regardless of motive, could completely subvert the factfinder's ability to ascertain the truth.

The United States Court of Appeals for the Fourth Circuit has explained in detail the rationale for occasionally imposing a severe sanction—in that case, dismissal—when evidence is negligently destroyed. In *Silvestri v. General Motors Corp.*, evidence spoliation deprived General Motors of the only available evidence from which it could develop its defenses. 271 F.3d 583, 594 (4th Cir. 2001).[18] The court recognized that, although negligence is generally an insufficient level of culpability to warrant a severe spoliation sanction like an instruction, such a remedy may nevertheless be justified if the prejudice to a party is "extraordinary, denying it the ability to adequately defend its case." *Id.* at 593.

Similarly, we do not believe a spoliation instruction would be excessive if the act of spoliation, although merely negligent, so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense. *See id*. We therefore conclude that, in this rare circumstance, a court should have the discretion to remedy such extreme

[18] In *Silvestri*, the plaintiff sued General Motors following a motor vehicle accident, alleging the air bag in the car he was driving had failed to deploy. 271 F.3d at 586. In anticipation of filing suit, the plaintiff's attorney hired experts to inspect the car and the crash site, but failed to notify General Motors of the accident for three years, by which time the car had been sold and repaired. *Id.* at 587.

and irreparable prejudice to the nonspoliating party with a spoliation instruction, even if the trial court determines that the evidence was only negligently lost or destroyed.

D. Admission of Spoliation Evidence at Trial

An issue that commonly arises when a party is accused of spoliation is the admissibility of evidence at trial relating to whether spoliation occurred and the culpability of the spoliating party. Under the Texas Rules of Evidence, admissible evidence must be relevant, which is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401. Further, a trial court may exclude even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. The evidentiary issue presented here is whether evidence bearing solely on whether a party spoliated evidence or the party's degree of culpability in doing so relates to a "fact that is of consequence to the determination of the action." For the reasons set out below, we hold that it does not.

Our holding that the trial court, not the jury, bears responsibility for making the required spoliation findings and imposing a remedy affects the propriety of admitting evidence regarding spoliation at trial. Again, when a party requests spoliation sanctions, the trial court decides whether the accused party owed and breached a duty to preserve relevant evidence, assesses the culpability level of the spoliator, evaluates the prejudice suffered by the nonspoliating party, and imposes a remedy. The evidence considered by the trial court in making these findings, however, often has no bearing on the facts that are "of consequence to the determination of the action" from the jury's

perspective. TEX. R. EVID. 401. This lack of relevance is reinforced by our longstanding refusal to recognize spoliation as an independent cause of action. *Trevino*, 969 S.W.2d at 952. Further, the tendency of such evidence to skew the focus of the trial from the merits to the conduct of the spoliating party raises a significant risk of both prejudice and confusion of the issues.

That said, we recognize that all references to missing evidence, whether lost due to a party's spoliation or missing for some other reason, cannot and should not be foreclosed. For example, to the extent permitted by the Texas Rules of Evidence, parties may present indirect evidence to attempt to prove the contents of missing evidence that is otherwise relevant to a claim or defense, such as a person's testimony about the content of a missing document, photo, or recording. *See* TEX. R. EVID. 1002 (noting the general rule that an original writing, recording, or photograph is required to prove the content thereof); *see also, e.g.*, TEX. R. EVID. 1004(a) (noting an exception to the general rule when the originals are lost or destroyed, "unless the proponent lost or destroyed them in bad faith"). However, there is no basis on which to allow the jury to hear evidence that is unrelated to the merits of the case, but serves only to highlight the spoliating party's breach and culpability. While such evidence may be central to the trial court's spoliation findings, it has no bearing on the issues to be resolved by the jury.

III. Application

We review a trial court's imposition of a spoliation remedy, including the submission of a spoliation instruction to the jury, for an abuse of discretion. *Wal-Mart Stores*, 106 S.W.3d at 723; *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (trial court's factual findings reviewed for abuse of discretion). We similarly evaluate the court's admission of evidence under an abuse-of-

discretion standard. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). The trial court in this case admitted evidence at trial regarding Brookshire Brothers' alleged spoliation of video footage and, as noted above, submitted the spoliation issue to the jury in the following instruction:

> In this case, Brookshire Brothers permitted its video surveillance system to record over certain portions of the store surveillance video of the day of the occurrence in question. If you find that Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may consider such evidence would have been unfavorable to Brookshire Brothers.

Under the analysis set forth herein, both the admission of such evidence and the submission of the instruction were improper.

Further, based on our review of the considerable amount of record evidence surrounding the spoliation issue, we hold that the submission of a spoliation instruction in any form was an abuse of discretion. Assuming without deciding that Brookshire Brothers had and breached a duty to reasonably preserve evidence by saving an insufficient amount of video footage before allowing the additional footage to be erased, prejudicing Aldridge, there is no evidence that it did so with the requisite intent to conceal or destroy relevant evidence or that Aldridge was irreparably deprived of any meaningful ability to present his claim.

Shortly after Aldridge reported his fall, Gilmer instructed an assistant manager to review video footage from the day of the fall and to preserve any footage showing the fall as well as several minutes before the fall. As a result, Brookshire Brothers saved footage that showed Aldridge entering the store and continued until approximately one minute after he fell. Gilmer testified that, when he made the decision regarding the amount of footage to save, he did not believe any additional

footage would be relevant and did not anticipate a lawsuit. A few days after the incident, Aldridge requested video footage of "the fall," which had already been preserved, but did not request any other footage. Although Aldridge's attorney requested additional footage almost a year later, there is no evidence that such a request was made when that footage was still available.[19]

Tyler, the employee who copied the video, testified that he began watching the footage at the 5:00 p.m. time stamp, which corresponded with the approximate time of the incident,[20] and "played it from there." There is no evidence that a Brookshire Brothers employee viewed any additional footage from that day other than the eight preserved minutes. In turn, there is no indication that the decision regarding the amount of footage to save was based in any way on what the additional footage would have shown. Had Brookshire Brothers allowed *all* footage of the incident to be destroyed, the outcome might be different. But there is simply no evidence that Brookshire Brothers saved the amount of footage that it did in a purposeful effort to conceal relevant evidence. To the contrary, it is undisputed that Brookshire Brothers preserved exactly what it was asked to preserve—footage of the fall.[21]

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[19] We are in no way suggesting that parties may immunize themselves from the consequences of evidence spoliation by hiding behind unreasonable limited-duration retention policies. Our opinion today does not address the reasonableness of Brookshire Brothers' policy, which is not challenged. Rather, we review whether the amount of video footage Brookshire Brothers chose to preserve was sufficient.

[20] The preserved video starts at 5:01 p.m. and ends at just before 5:09 p.m. It shows that Aldridge entered the store at about 5:02 p.m. and fell just before 5:08 p.m.

[21] The dissent speculates about what the deleted video would have shown in concluding that Brookshire Brothers engaged in willful blindness. Minimizing the fact that the area of the fall was obscured by a table covered with a cloth that extended to the floor and the fact that the low quality of the video makes details very difficult to discern, the dissent would improperly assume, based on speculation rather than evidence, that Brookshire Brothers knew what the video would or even could have shown, particularly with respect to how long the substance was on the floor before Aldridge slipped and fell.

Further, any prejudice to Aldridge resulting from Brookshire Brothers' failure to preserve additional video footage did not rise to the rare level required to justify an instruction in the absence of intentional spoliation. This narrow exception to the intent requirement is meant to address situations akin to those presented in *Silvestri*, in which the only available evidence from which General Motors could develop its defenses—the car in which an air bag allegedly failed to deploy—was irreparably altered before General Motors even had a chance to examine it. *See Silvestri*, 271 F.3d at 594. By contrast, in this case, even without the missing video footage, other evidence was available to Aldridge to prove the elements of his slip-and-fall claim.

Again, the portion of the video showing the fall, several minutes before the fall, and one minute after the fall was preserved and shown to the jury at trial. The video showed the activity around the area of the fall, including the actions of various store employees, during this period of time. Aldridge also presented Brookshire Brothers' incident report confirming its conclusion that Aldridge had slipped in grease that leaked out of a container by the Grab-N-Go, which was located near the area of the fall. Finally, Aldridge himself testified at length about the circumstances surrounding his fall. Based on all the available evidence, we hold that Brookshire Brothers' failure to preserve additional video footage did not irreparably deprive Aldridge of any meaningful ability to present his claim.

We therefore hold that the trial court abused its discretion in submitting a spoliation instruction. Further, the trial court erred in admitting evidence of the circumstances surrounding the failure to preserve additional video footage, though only to the extent such evidence was unrelated to the merits and served principally to highlight Brookshire Brothers' culpability. For example,

nonspeculative testimony relating to what the missing video would have shown, such as the testimony about the cleanup, was not problematic. Further, because a portion of the video was preserved and presented at trial, some degree of questioning about the creation of the video was reasonably pursued as background for its introduction to the jury. However, testimony that is relevant only to the issues of whether Brookshire Brothers breached a duty to preserve evidence or acted with the requisite intent was improperly admitted.

The trial court's error is reversible, however, only if it "probably caused the rendition of an improper judgment." TEX. R. APP. P. 61.1(a); *see also Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004) (in determining whether erroneous admission of evidence is harmful, "[w]e review the entire record, and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted"). In *Wal-Mart Stores*, we noted that "if a spoliation instruction should not have been given, the likelihood of harm from the erroneous instruction is substantial, particularly when the case is closely contested." 106 S.W.3d at 724. Such a likelihood of harm existed in this case.

The instruction capped off a trial in which both liability and the extent of Aldridge's damages were closely contested and in which significant emphasis was placed on the spoliation issue. In opening and closing arguments, Aldridge's attorney accused Brookshire Brothers of destroying the tape, hiding evidence, and acting deceptively. Gilmer was questioned extensively about his motivation in preserving part of the video. The presentation of the spoliation issue to the jury also led the trial court to admit evidence regarding Brookshire Brothers' payment of a portion of Aldridge's medical expenses, even though such evidence was otherwise inadmissible. TEX. R. EVID.

409. Further, the preserved video footage suggests the highly speculative nature of a presumption that additional footage would have been harmful to Brookshire Brothers. The video is of poor quality, and the area of the fall is far from the camera and was obscured by a table covered with a cloth that extended to the floor. On this record, particularly when considered in conjunction with our holding in *Wal-Mart Stores* that an improper spoliation instruction presents a substantial likelihood of harm, it is "very difficult to overlook the likely impact" of the spoliation evidence and the instruction. *Kia Motors Corp. v. Ruiz*, ___ S.W.3d ___, ___ (Tex. 2014). Accordingly, we hold that the trial court's error probably caused the rendition of an improper judgment, and we reverse the judgment of the court of appeals.

We note that this case highlights the need for guidelines and clarity in our spoliation jurisprudence, as the record reflects the significant effect that the spoliation allegations had on the course of this trial. Indeed, this case typifies the manner in which the focus of the trial can impermissibly shift from the merits of the case to the spoliating conduct when such guidance is missing. Because spoliation is not directly addressed in either our rules of evidence or our rules of procedure, courts must fill in the gaps to maintain the consistency and predictability that is basic to the rule of law in our society. The continued development of the State's common law, in which we engage today, is not only the province—but the responsibility—of this Court.

IV. Legal Sufficiency Challenge

Finally, we address Brookshire Brothers' assertion that it is entitled to rendition of judgment in its favor on legal sufficiency grounds. Brookshire Brothers argues that, regardless of whether the spoliation instruction is taken into account, the evidence is legally insufficient to support the

constructive notice element of Aldridge's claim. One of the grounds on which we will uphold a legal sufficiency challenge is if "'the evidence offered to prove a vital fact is no more than a scintilla.'" *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). "Evidence does not exceed a scintilla if it is so weak as to do no more than create a mere surmise or suspicion that the fact exists." *Id.* (citation and quotation marks omitted). In reviewing evidence in the context of a legal sufficiency challenge, "we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so." *Id.*

As is relevant here, to show Brookshire Brothers had constructive notice of the "condition" (*i.e.*, a slippery substance on the floor), Aldridge had to prove that "it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it." *Reece*, 81 S.W.3d at 814. Temporal evidence is the best indicator of whether the owner could have discovered and remedied the condition. *Id.* at 816.

As noted above, the exact area of the floor where Aldridge fell was obscured by a table in the video footage that was preserved, but the video does not appear to show a spill or leak occurring during the seven minutes before the fall. Tyler testified that substances reasonably should not remain on the floor of the store for longer than five minutes without being noticed and cleaned up. The video showed store employees walking past the area approximately three minutes and five minutes before Aldridge fell. It also showed an employee signaling for help to clean up the spill right before the video ended, suggesting the spill was too large to be cleaned by paper towels. This evidence,

even without the spoliation instruction, amounts to more than a scintilla favoring a finding that Brookshire Brothers had constructive notice of the condition.[22]

V. Conclusion

We hold that the trial court abused its discretion in submitting a spoliation instruction because there is no evidence that Brookshire Brothers intentionally concealed or destroyed the video in question or that Aldridge was deprived of any meaningful ability to present his claim to the jury at trial. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for a new trial in accordance with this opinion.

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 3, 2014

[22] As we noted recently in *Kia Motors Corp.*, our review of the evidence in evaluating a legal sufficiency challenge is much narrower than our review in determining whether the trial court's error probably caused the rendition of an improper judgment. ___ S.W.3d at ___. Our holding that the evidence is legally sufficient to support the verdict is thus fully consistent with our determination that the trial court's spoliation errors were harmful.

IN THE SUPREME COURT OF TEXAS

NO. 10-0846

BROOKSHIRE BROTHERS, LTD., PETITIONER,

v.

JERRY ALDRIDGE, RESPONDENT

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

JUSTICE GUZMAN, joined by JUSTICE DEVINE and JUSTICE BROWN, dissenting.

Courts exist as a mechanism for administering justice and arriving at truth. Spoliation, whether done negligently or intentionally, jeopardizes this essential function and cannot be condoned. Today, the Court articulates a spoliation framework that departs in significant ways from decades of spoliation jurisprudence as developed by our capable courts of appeals. In doing so, the Court places substantial limits on the trial court's discretion in crafting an appropriate remedy for acts of spoliation, and articulates a standard that, as applied by the Court, may permit the destruction of relevant evidence so long as it is—in name—done in accordance with a stated retention policy. Because I do not believe the Court's framework provides trial courts with the necessary discretion to appropriately remedy the wrongful destruction of evidence in an era where limited duration retention policies have become the norm, I respectfully dissent.

I. Background

Jerry Aldridge slipped and fell while shopping at a Brookshire Brothers grocery store on September 2, 2004. Though initially unaware of the extent of his injury, Aldridge suffered a substantial spinal injury as a result of the fall. He sought medical attention later that day. On September 7, 2004, Aldridge returned to the store and reported his injuries to Jon Tyler, the store manager trainee on duty at the time. Tyler completed a customer incident report documenting Aldridge's fall.

Additionally, store surveillance cameras captured footage of the fall. After Aldridge reported the incident to Tyler, Robert Gilmer, the Vice President of Human Resources and Risk Management for Brookshire Brothers, instructed Tyler to view the surveillance video. Despite notice of the accident and the availability of footage covering the entire day of Aldridge's fall, Gilmer chose to copy and save only an eight-minute segment of footage, beginning just before Aldridge entered the store and concluding just after his fall.

Although Aldridge had yet to file a lawsuit, he requested a copy of the footage of his fall on September 13—less than one week after reporting his injuries. In a letter dated September 14, Gina Sorrell of Brookshire Brothers' claims department wrote to Aldridge and notified him that "[a]s a token . . . for being such a valuable customer," Brookshire Brothers agreed to pay for Aldridge's "first initial medical aid bill along with a follow-up visit and prescriptions for those visits." In a subsequent letter dated September 29, though Sorrell explained that Brookshire Brothers would additionally cover the costs of a visit with a neurosurgeon and "several weeks of physical therapy

along with the prescriptions,"[1] she indicated Brookshire Brothers would not comply with Aldridge's request for a copy of the footage of his fall because she "only ha[d] one copy at this time." Shortly thereafter, Brookshire Brothers allowed the tape containing the entire day's worth of footage, with the exception of the eight-minute segment showing Aldridge's fall, to automatically erase, rendering it unable to comply with Aldridge's request when he did file suit.[2]

Brookshire Brothers continued to cover Aldridge's medical expenses for nearly a year until June 2005, when Gilmer "re-reviewed the video recording" and determined that Brookshire Brothers would deny any responsibility with respect to Aldridge's claim. Aldridge retained an attorney, who requested a copy of the video referenced in Gilmer's June 2005 letter declining Aldridge coverage. Brookshire Brothers provided the eight minutes of footage covering the fall. But when Aldridge's attorney requested copies of additional surveillance footage beyond the preserved eight minutes (specifically, from 4:00pm until 6:30pm on the day of the incident), Brookshire Brothers declined to provide the footage. And, rather than explaining that the footage had been automatically recorded-over pursuant to a standard and routine practice, Gilmer stated:

> The video you have requested does not focus on the area where Mr. Aldrige "fell." Please understand that short of litigation, I have been reasonably generous in what

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[1] Brookshire Brothers has a routine practice of covering the costs of an initial doctor's appointment and prescriptions. However, testimony at trial indicated that it was not routine practice for Brookshire Brothers to pay for the cost of a referral to a neurosurgeon and several weeks of physical therapy, as the September 29 letter indicated Brookshire Brothers would cover. Thus, on September 29, when the entirety of the September 2 footage was still available, Brookshire Brothers' claims department had agreed to cover the costs of more than the routine initial doctor's appointment.

[2] Gilmer testified that Brookshire Brothers' surveillance cameras are "on a clock," and the footage is recorded over every thirty-one days. Thus, the entirety of the September 2 video footage was presumably recorded over sometime in the beginning of October, roughly three weeks after Aldridge filed a customer incident report with Brookshire Brothers.

> I have provided thus far. It is a "slip & fall" case. Seems we know how these ultimately resolve. If you decide to pursue a legal action on behalf of your client, you are well aware that we would be obligated to furnish certain information at that time. We are not going to assist you further in helping you build your case.

When asked at trial why Brookshire Brothers allowed the footage to be erased, Gilmer testified he saved the selected eight minutes of video simply to verify Aldridge had actually fallen and that he "didn't get what [he] got in anticipation of this trial" because "[i]t wasn't a lawsuit when it happened." But Gilmer also acknowledged his awareness of the fact that a key issue in slip-and-fall cases is whether a store employee knew or reasonably should have known that a substance was on the floor. In fact, at the time of trial, Gilmer testified that he had over four decades of experience working in the grocery store business, eighteen years of which he worked in the risk management department overseeing Brookshire Brothers' litigation. Despite Gilmer's knowledge and experience regarding slip-and-fall litigation, despite Aldridge's request for a copy of the footage of his fall less than two weeks after the fall occurred, and despite Brookshire Brothers' September 29 authorization of payment for Aldridge's medical expenses above and beyond the company's routine practice, the sole reason Gilmer provided for failing to preserve any more of the video was that he believed the rest of the footage "wasn't relevant" and that he "didn't know there was going to be a case" at the time the rest of the footage was automatically erased.[3]

[3] Of course, Brookshire Brothers' duty to preserve the footage is not limited to whether Gilmer *knew* "there was going to be a case;" rather, as we articulated in *Wal-Mart Stores, Inc. v. Johnson*, the relevant inquiry in determining whether there was in fact a duty to preserve evidence is whether Gilmer "[knew] *or reasonably should [have known]* that there [was] a *substantial chance* that a claim will be filed and that evidence in [Brookshire Brothers'] possession or control will be material and relevant to that claim." 106 S.W.3d 718, 722 (Tex. 2003) (emphases added).

Arguing that the additional footage would have been helpful to the key issue of whether the substance was on the floor long enough for the employees of Brookshire Brothers to reasonably have discovered it, Aldridge moved for a spoliation instruction at trial.[4] The trial court allowed evidence of the spoliation to be admitted at trial and submitted an instruction to the jury. This instruction was one of the milder spoliation instructions, allowing, but not requiring, the jury to presume harm if the jury found Brookshire Brothers had spoliated evidence.[5] The jury returned a verdict in favor of Aldridge and awarded damages to compensate Aldridge for medical expenses and lost earning capacity.[6] The court of appeals affirmed.

II. A Significant Departure from "Broad Discretion"

Today, the Court eliminates a core component of our spoliation jurisprudence: the trial court's broad discretion in constructing an effective remedy. In *Trevino v. Ortega*, we specifically noted "there is no one remedy that is appropriate for every incidence of spoliation; the trial court must respond appropriately based upon the particular facts of each individual case." 969 S.W.2d

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[4] Additionally, Aldridge's attorney argued, and Gilmer agreed, that "the video [Brookshire Brothers] had before it was erased would have shown someone standing at that area, getting some help, and cleaning up [the] chicken grease." Though it is undisputed the view of the floor itself was obscured by a table in the video, surveillance footage of the clean-up process could have provided evidence of the size of the spill by revealing, for example, the number of employees and the amount of time it took to clean up the spill.

[5] Specifically, the trial court instructed the jury:

> If you find that Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may consider such evidence would have been unfavorable to Brookshire Brothers.

[6] Notably, the jury awarded damages solely to compensate Aldridge for past and future medical expenses and past and future loss of earning capacity. It did not award Aldridge damages for physical pain and suffering, mental anguish, or physical impairment—so-called "soft" damages—casting doubt on the Court's presumption that the jury was unfairly prejudiced or inflamed by the presentation of the spoliation issue.

950, 953 (Tex. 1998). And in *Wal-Mart Stores, Inc. v. Johnson*, we likewise explained "[a] trial judge should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available." 106 S.W.3d 718, 721 (Tex. 2003). Before today's decision, trial courts *did* possess the discretion to effectively craft spoliation remedies befitting of the particular facts and circumstances of each individual case.

Trial courts have had the ability to address the spoliation of evidence in a variety of circumstances precisely because the spoliation remedies at a trial court's disposal vary in severity. For instance, the court might allow recovery of the fees and expenses resulting from the spoliation, exclude evidence adduced from spoliated evidence, or hold a party in contempt. *See* TEX. R. CIV. P. 215.2; *Trevino*, 969 S.W.2d at 959 (Baker, J., concurring). In particularly egregious cases of spoliation, the court may even strike pleadings or dismiss claims or defenses. *Trevino*, 969 S.W.2d at 959. And, before today, a trial court also had the option of allowing discussion of spoliation at trial, *Lively v. Blackwell*, 51 S.W.3d 637, 641 (Tex. App.—Tyler 2001, pet. denied), or submitting any one of the following varieties of jury instructions:

(1) The jury *may* presume evidence is harmful *if* it finds intentional spoliation, *Ordonez v. M.W. McCurdy & Co.*, 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.);

(2) The jury *must* presume evidence is harmful *if* it finds intentional spoliation, *Wal-Mart Stores*, 106 S.W.3d at 721;

(3) That intentional spoliation has occurred, and the jury *may* presume the evidence is harmful, *id*.; or

(4) That intentional spoliation has occurred, and the jury *must* presume the evidence is harmful, *Trevino*, 969 S.W.2d at 952.

Though the Court purports to "enunciate with greater clarity . . . the parameters of a trial court's discretion to impose a remedy upon a finding of spoliation," __ S.W.3d at __, in effect the Court imposes new and significant restrictions on the trial court's discretion to submit a spoliation instruction to the jury. In essence, after today, trial courts may submit one, and *only one* spoliation instruction to the jury: an instruction that the trial court has found intentional spoliation has occurred, and therefore the jury *must* presume the evidence is harmful. All "milder" instructions, which permit the jury to exercise its judgment regarding the potential harm of the lost evidence to the spoliator's case, would require the jury to weigh the evidence of spoliation. This becomes an impossible task after the Court has concluded that, because of "the tendency of such evidence to skew the focus of the trial from the merits," such evidence of spoliation is inadmissible at trial. __ S.W.3d at __.[7] At bottom, the trial court's discretion is eliminated: it may only issue one instruction (requiring the jury to presume harm) and only in rare circumstances (when the court has found (1) the spoliating party acted with specific intent to conceal discoverable evidence *and* no lesser remedy will suffice to overcome the prejudice the spoliation caused, or (2) a party negligently failed to preserve evidence *and* the nonspoliating party has been irreparably deprived of any meaningful opportunity to present a claim or defense).

[7] The Court hedges its conclusion regarding the admissibility of evidence, explaining that "we recognize that all references to missing evidence, whether lost due to a party's spoliation or missing for some other reason, cannot and should not be foreclosed." __ S.W.3d at __. But the Court's holding still deprives the trial court of the discretion to submit questions regarding spoliation issues to the jury and curtails the ability of the trial court to utilize the Rules of Evidence to ensure juries are not exposed to unduly prejudicial evidence.

This narrowing of the trial court's discretion stems from the Court's conclusion that spoliation instructions inappropriately shift the focus of the trial from the merits of the case to the spoliation. Though the Court assumes the admission of evidence regarding spoliation will wrongly shift the focus of litigation away from the merits of a case, it provides no evidence that this has been a significant problem in Texas, and certainly no evidence that the problem is so widespread as to require the displacement of decades of Texas spoliation jurisprudence affording trial courts broad discretion.[8] And although there is some risk that spoliation issues could shift the focus of litigation away from the merits of the case, the Court fails to indicate how restricting the trial court's discretion would mitigate this risk.

On the contrary, Texas already has a framework providing guidance for trial courts in determining whether the jury may hear evidence of spoliation: the Texas Rules of Evidence. Despite the admittedly fact-specific nature of cases involving spoliation, the Court concludes that such issues are better resolved by a blanket rule that spoliation evidence is per se inadmissible at trial. But the Rules of Evidence exist so that the Court need not engage in developing specific rules of admissibility for each type of evidence a trial court might encounter, recognizing the value of affording trial courts flexibility in making context-specific evidentiary rulings. Under Rule 402, irrelevant evidence is inadmissible. TEX. R. EVID. 402. And under Rule 403, relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by, *inter alia*, the danger

[8] As articulated above, our jurisprudence has allowed trial courts to craft spoliation instructions that permit the jury to make certain spoliation findings. *See Wal-Mart Stores*, 106 S.W.3d at 721 ("The instruction informed the jury that it must presume that the missing reindeer would have harmed Wal–Mart's case *if* the jury concluded that Wal–Mart disposed of the reindeer after it knew or should have known that they would be evidence in the case. Such an instruction is a common remedy for spoliation, with roots going back to the English common law." (emphasis added)).

of unfair prejudice, confusion of the issues, or misleading the jury. TEX. R. EVID. 403. There is no indication that our trial courts are unable to appropriately apply Rules 402 and 403 to determine the admissibility of spoliation evidence, and I would not so lightly displace it.

Despite the benefits of affording trial courts broad discretion and the absence of evidence indicating that Texas trial courts are regularly abusing that discretion, the Court concludes that it must depart from this well-established precedent and significantly limit such discretion. Now, trial courts are stripped of their discretion to decide which spoliation instruction is appropriate and no longer have the option of allowing the jury to resolve factual disputes concerning spoliation.[9]

[9] The Court maintains that its framework is in accordance with the majority of federal courts of appeals, but the majority of federal circuits also afford district courts discretion as to whether evidence of spoliation is admitted at trial and allow for a permissive (rather than mandatory) jury instruction. *See, e.g.*, *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013) ("Whether an adverse inference is permissive or mandatory is determined on a case-by-case basis, corresponding in part to the sanctioned party's degree of fault."); *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 422 (9th Cir. 2011) ("[T]he District Court's sanction, which permits the jury to decide if any documents were destroyed . . . strikes us as precisely the kind of flexible and resourceful sanction order that district judges should be encouraged to craft."); *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1219–20 (10th Cir. 2008) (explaining that "[a]n adverse inference is a powerful sanction as it . . . 'necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape'" (citing *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900–01 (8th Cir. 2004))); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746–48 (8th Cir. 2004) (finding no abuse of discretion in the district court's instruction to the jury that "[y]ou may, but are not required to, assume that the contents of the voice tape and track inspection records would have been adverse, or detrimental, to the defendant"); *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000) ("A district court has discretion to admit evidence of spoliation and to instruct the jury on adverse inferences."); *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996) ("The defendant also chastises the court for admitting evidence of another missing record . . . . Once again, the ruling cannot be faulted. The defendant had no good explanation for the missing log, and the jury was entitled to infer that the defendant destroyed it in bad faith."); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 157 (4th Cir. 1995) ("We conclude that the district court acted within its discretion in permitting the jury to draw an adverse inference if it found that Vodusek . . . caused destruction or loss of relevant evidence."); *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994) ("The admissibility of spoliation evidence and the propriety of the spoliation inference is well established in most jurisdictions."); *see also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 470 (S.D.N.Y. 2010), abrogated on other grounds by *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012) ("The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party.").

Because I do not believe the Court has laid the foundation to support this substantial departure from settled spoliation jurisprudence, I cannot join its opinion.

III. Willful Blindness

In addition to depriving trial courts of the substantial discretion they once exercised in remedying spoliation, the Court's framework—more specifically, the *manner* in which the Court's framework is applied—in effect permits a party to escape liability for the destruction of relevant evidence by simply demonstrating the destruction occurred in accordance with the party's existing document retention policy. On the contrary, "when a policy is at odds with a duty to maintain records, the policy [should] not excuse the obligation to preserve evidence." *See Trevino*, 969 S.W.2d at 957 (Baker, J., concurring).

Under the Court's framework, a trial court must first make a preliminary determination as to whether spoliation occurred as a matter of law. This involves finding whether (1) the spoliating party had a duty to preserve evidence, and (2) the party breached that duty by failing to preserve the evidence. If the trial court finds both duty and breach, it must then assess the proper remedy. The trial court may submit a spoliation instruction only in circumstances where the party intentionally spoliated evidence and no lesser remedy will suffice to remedy the prejudice caused to the nonspoliating party (or in the rare instance when as a result of negligent destruction of evidence a party is "irreparably deprived of any meaningful opportunity to present a claim or defense"). __ S.W.3d at __. With regard to "duty," the Court echoes the standard articulated in *Wal-Mart Stores*, namely that the duty to preserve evidence "arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession

or control will be material and relevant to that claim." 106 S.W.3d at 722. The Court then expressly recognizes that "the party seeking a remedy for spoliation must demonstrate that the other party breached its duty to preserve material and relevant evidence." __ S.W.3d at __.

Once the trial court determines that a party had the duty to preserve evidence and breached that duty by failing to do so, the Court's framework requires the trial court to assess an appropriate remedy. For an instruction to be proper, the trial court must find both intentional destruction[10] and prejudice to the nonspoliating party. The Court correctly notes that "intentional" encompasses the concept of "willful blindness" in which a party does not directly destroy evidence known to be discoverable, but nevertheless "allows for its destruction." __ S.W.3d at __. Thus, under the Court's definition of "intentional," a party that is aware of circumstances that are likely to give rise to future litigation but fails to take reasonable steps to ensure the relevant evidence is not destroyed pursuant to "routine practice" may be found to have intentionally destroyed evidence.

But the Court renders this notion of "willful blindness" ineffective, for it nevertheless concludes (assuming without deciding that Brookshire Brothers breached a duty to reasonably preserve evidence) "there is *no evidence*" that [Brookshire Brothers] failed to preserve the surveillance footage "with the requisite intent to conceal or destroy relevant evidence . . . ." __ S.W.3d at __ (emphasis added). Curiously, the Court reaches this result despite the fact that at the time Brookshire Brothers allowed the additional surveillance footage surrounding Aldridge's fall to automatically erase, Brookshire Brothers (particularly Gilmer) knew of Aldridge's fall, knew

[10] The Court's framework also allows for a spoliation instruction when evidence is merely negligently destroyed, but only under the exceptional circumstance that the spoliation irreparably deprives the nonspoliating party of any meaningful ability to present a claim or defense.

Aldridge had filed an incident report documenting the fall and requested a copy of the footage, and had already agreed to cover Aldridge's medical costs above and beyond the amounts Brookshire covered pursuant to its routine practice.[11] It was Gilmer's conscious and intentional choice not to review or retain any more than the eight minutes of surveillance footage capturing the fall, a choice he made despite his admitted awareness that a key issue in a slip and fall case is whether employees had actual or constructive notice that there was a substance on the floor. And this choice inevitably resulted in the destruction of relevant evidence approximately thirty days after the fall occurred. If the concept of "willful blindness" is to have any meaning, these circumstances must give rise to at least some evidence of "willful blindness," and therefore at least some evidence that Brookshire Brothers acted with the requisite intent. But as it stands, the Court's assurances that its spoliation framework encompasses instances of "willful blindness" ring hollow given the Court's application of the concept to the facts of this case.

As a result of new technology and the accompanying exponential increase in electronically-stored data, document retention policies are now the rule rather than the exception. *See, e.g.*, *Arthur Anderson LLP v. United States*, 544 U.S. 696, 704 (2005). After all, "[n]o company possibly can, or should, indefinitely retain all the documents that it receives or generates." MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 25 (2d ed. 2006). Retention policies have become a nearly-essential part of the corporate landscape. And limited-duration retention policies have become

[11] Again, Brookshire Brothers agreed to pay these additional medical costs in a letter dated September 29, 2004. Nevertheless, Brookshire Brothers maintained it was not aware of circumstances likely to give rise to future litigation.

commonplace. *See, e.g.*, *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 312 (Tex. 2012) (company's thirty-day document retention policy for email resulted in only one responsive email). These limited-duration retention policies are designed not only to minimize the cost of discovery but also to assure the destruction of potentially unfavorable evidence.[12]

The proliferation of electronically stored information and the resulting increasing reliance on retention policies make the concept of "willful blindness" all the more acute.[13] Now more than ever, courts must ensure that companies cannot "blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." *See Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988). But the Court's application of its spoliation framework opens the door for corporations to do just that. A party may allow for the destruction of relevant evidence, despite notice of circumstances likely to give rise to future litigation, and come away unscathed—an "advantage" of document retention policies already recognized in the document management services industry.[14]

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[12] For example, a prominent document management services provider notes that one reason to define a retention policy is "[t]o reduce the dangers of eDiscovery. Minimizing the amount of electronic material an organization keeps means it has less material to produce during eDiscovery—and consequently it is less likely to hand over incriminating evidence." Iron Mountain, *Setting Retention Policy for Electronic Information*, 2 (2011), http://imknowledgecenter.com/~/media/Files/Iron%20Mountain/Knowledge%20Center/Reference%20Library/White%20Paper/S/Setting%20Retention%20Policy%20for%20Electronic%20Information%20US.pdf.

[13] Indeed, as recent events have brought to light, even six-month retention policies can have devastating effects on the preservation of evidence. The Internal Revenue Service is currently under congressional investigation regarding potential discrimination in the way it processed applications for tax-exempt status. It has now revealed that it "has lost untold numbers" of emails relevant to the investigation as a result of computers crashing and, because pursuant to IRS policy, the backup tapes were recycled every six months. *See* ASSOCIATED PRESS, *Emails: IRS Official Sought Audit of GOP Senator*, THE WASHINGTON POST, June 25, 2014, *available at* http://www.washingtonpost.com/business/archivist-irs-didnt-follow-law-with-lost-emails/2014/06/24/d8e7f7be-fc01-11e3-b8bf-54b8afb537b6_story.html.

[14] *See supra* note 12.

Our spoliation framework should not allow a party to pre-select the evidence that will be available against it and escape liability for the destruction of unfavorable evidence under the guise of a retention policy that preserves information for a limited time. Unfortunately, today's holding potentially provides future litigants with a blueprint for successfully shielding themselves from spoliation liability: simply establish a document retention policy with a limited duration. Because I believe the Court's holding does not provide sufficient meaning to the concept of willful blindness given the trend toward increasing reliance on limited-duration document retention policies, I cannot join the Court in its new spoliation framework or its application to this case.

IV. Rulemaking

The spoliation of evidence, as the Court notes, is both an evidentiary concept, as well as a particularized form of discovery abuse. Thus, spoliation issues are particularly well-suited to redress via the rulemaking process. Indeed, the Federal Rules Committees have recognized this, and as this Court acknowledges, are in the process of amending the Federal Rules to provide district courts with guidelines for addressing the spoliation of evidence. *See* __ S.W.3d at __ n.3. Rather than follow a similar path in Texas, the Court endeavors to create a spoliation framework outside of the rulemaking process under the rationale that "the challenges facing Texas courts are just as acute." __ S.W.3d at __. But the Court has done nothing beyond considering this isolated case to determine what spoliation challenges are facing Texas courts. In crafting a spoliation rule outside the rulemaking process, the Court severely restricts the input of the bench, academy, and bar on what the contours of the spoliation rule should be.

As several former justices have observed, "[r]ather than make such changes by judicial decree, the better practice is to enact these reforms in conjunction with our rulemaking procedure .... A statute or rule could provide the precision that is lacking in the Court's opinion." *In re Allied Chem. Corp.*, 227 S.W.3d 652, 666 (Tex. 2007) (Jefferson, C.J., dissenting); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 216 (Tex. 2001) (Baker, J., concurring); *accord State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) ("[W]e do not revise our rules by opinion."). Our rulemaking process is meant for situations such as this. The Constitution requires our Court to "promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts." TEX. CONST. art. V, § 31. To gather input, we appointed a Supreme Court Advisory Committee in 1940 to recommend rules of administration and procedure—which we continue to rely on to this day. Misc. Docket No. 11-9259 at 1, Supreme Court of Texas, Dec. 28, 2011. The committee—composed of fifty-two distinguished judges, professors, and attorneys—"solicits, summarizes, and reports to the Court the views of the bar and public." *Id.*[15]

The Court maintains that it need not concern itself with the rulemaking process because there is not a current rule in Texas addressing spoliation. But the absence of a rule does not mean we should de facto implement a rule without the thorough vetting the rulemaking framework affords. This is especially so because rules that impact how lawsuits are tried are best implemented with input from those that are actually trying cases—trial judges and litigators. As "the principal

[15] In contrast, this case has received a total of three amicus briefs, all supporting the petitioner.

mechanism for the regulation of proceedings in Texas courts,"[16] the rulemaking process can ultimately yield clarity and uniformity not otherwise attainable when this process is eschewed in favor of judicially-crafted rules.

V. Conclusion

As the Court itself acknowledges, trial courts have necessarily enjoyed broad discretion in remedying acts of discovery abuse, including evidence spoliation. Rather than leave such discretion intact, the Court displaces the discretion trial courts have properly used and in its place establishes a formulaic process. Further, though the Court in name embraces the concept of "willful blindness," the Court's application of its formulaic process to the facts of this case renders this concept essentially meaningless. This is particularly troublesome given the increasingly common corporate use of limited-duration document retention policies. Litigants and our system of justice deserve a spoliation framework that fosters the preservation of relevant evidence by equipping trial courts with the discretion to tailor remedies to the offenses committed. Until today, such a framework existed in Texas. Because the Court unnecessarily abolishes it, I respectfully dissent.

Eva M. Guzman
Justice

OPINION DELIVERED: July 3, 2014

[16] William V. Dorsaneo, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 714 (2013).

IN THE SUPREME COURT OF TEXAS

NO. 11-0037

IN RE WHATABURGER RESTAURANTS LP

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

The trial court in this case granted the plaintiffs' motion for new trial based on a juror's failure to disclose information during voir dire, even though there was no evidence that the nondisclosure probably caused injury. The defendant, Relator Whataburger Restaurants LP, filed a petition for writ of mandamus in the court of appeals, and the court of appeals denied the petition. Whataburger now seeks mandamus review in this Court. We conditionally grant the petition and order the trial court to withdraw its new trial order and render judgment on the jury's verdict.

This case arises from a premises liability suit that Jose Acuna and others (collectively Acuna) filed against Whataburger for injuries sustained in a fight outside of its restaurant in El Paso. The jury selection process included a written questionnaire that inquired whether the potential jurors had "ever been a party to a lawsuit." Four of seventy-five potential jurors disclosed that they had previously been defendants in a lawsuit. Acuna's attorney did not ask any of these four jurors questions about their prior lawsuits and did not challenge or exercise peremptory strikes against them. Whataburger exercised strikes against two of them. One of the remaining two, Albert

Villalva, was seated on the jury, and neither party questioned, challenged, or struck him even though he had disclosed that he had been a defendant in a prior lawsuit.

The jury rendered a 10-2 verdict in favor of Whataburger, and the trial court entered a final take-nothing judgment based on the jury's verdict. After investigating the jurors, Acuna filed a motion for new trial in which he asserted that one of the ten majority jurors, Georgina Chavez, had committed misconduct by failing to disclose in her questionnaire that she had been a defendant in two prior credit card collection suits and a bankruptcy action. During the hearing on the motion for new trial, Chavez testified that she mistakenly failed to disclose the suits because she never went before a judge in those cases, that her failure to disclose the suits was "an honest mistake," and that the suits simply slipped her mind. She also testified that, if she had understood the questionnaire, she would have disclosed her involvement in those suits. The trial court found that Chavez did not complete her juror questionnaire correctly, that the mistake was material, and that it resulted in probable injury. The court granted Acuna's motion for new trial on the ground that Acuna was denied the opportunity to question or strike Chavez in light of the missing information.

In *In re Toyota Motor Sales, U.S.A., Inc.*, we held that an appellate court may conduct a merits-based mandamus review of a trial court's articulated reasons for granting a new trial. 407 S.W.3d 746, 755–59 (Tex. 2013). A writ of mandamus shall issue to correct a clear abuse of discretion committed by a trial court in granting a new trial. *Id.* at 762. A trial court does not abuse its discretion so long as its stated reason for granting a new trial is legally appropriate and specific enough to indicate that the trial court derived the reasons from the particular facts and circumstances of the case at hand. *Id.* (citing *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688–89 (Tex. 2012)).

"To warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury." *Golden Eagle Archery v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000); TEX. R. CIV. P. 327(a). "The complaining party has the burden to prove all three elements before a new trial can be granted." *Redinger v. Living, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985) (citing *Fountain v. Ferguson*, 441 S.W.2d 506 (Tex. 1969)). Whether misconduct occurred and caused injury is a question of fact. *Golden Eagle Archery*, 24 S.W.3d at 372 (citing *Pharo v. Chambers Cnty.*, 922 S.W.2d 945, 948 (Tex. 1996)).

In this case, the trial court could have found that Chavez engaged in misconduct by failing to disclose her previous lawsuits, but there is no evidence that such conduct resulted in probable injury.[1] Our rules provide that a trial court "may" grant a new trial based on juror misconduct if "it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party." TEX. R. CIV. P. 327(a). In *Redinger*, we explained that there is no showing of a probable injury when the evidence is such that, even without the misconduct, the jury would in all probability have rendered the same verdict that it rendered with the misconduct. 689 S.W.2d at 419 (citing *Mrs. Baird's Bread Co. v. Hearn*, 157 Tex. 159, 300 S.W.2d 646, 649 (1957), and *Fountain v. Ferguson*, 441 S.W.2d 506, 508

[1] We agree with the courts that have held that a juror's failure to disclose information that establishes that the juror is legally disqualified from serving on the jury is per se material. *See, e.g., Burton v. R.E. Hable Co.*, 852 S.W.2d 745, 747 (Tex. App.—Tyler 1993, no pet.) ("If an erroneous or incorrect answer to a questions would cause the venireman to be disqualified then the answer is *per se* material."). In this case, however, the fact that Chavez had been a defendant in prior cases did not disqualify her as a matter of law. *See* TEX. GOV'T CODE § 62.105 (listing bases for legal disqualification of jurors). When the nondisclosure is not per se material, courts must determine the materiality in light of the context as reflected in the record. *See Burton*, 852 S.W.2d at 747 (citing *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989)). Since we find no evidence that Chavez's nondisclosure resulted in probably injury, however, we need not decide whether the nondisclosure was material.

(Tex. 1969)). Under this standard, we find no evidence that Chavez's failure to disclose that she was a defendant in prior lawsuits probably caused Acuna injury.

In an effort to meet Acuna's burden, Acuna's attorney testified that, if Chavez had disclosed that she had been a defendant in prior lawsuits, he would have questioned her about those suits and would have struck her as a juror. Generally, such testimony about what a person "would have" done or what "would have" happened under different circumstances is speculative and conclusory in the absence of some evidentiary support. *See In re Ethyl Corp.*, 975 S.W.2d 606, 618–19 (Tex. 1998) (holding that attorney's unsupported testimony that consolidated trial "would be fair and impartial" was "conclusory and entitled to no consideration"); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 50 (Tex. 1998) (damages based on profits that would have been earned if a hypothetical bid would have been accepted are speculative because there is no evidence that party would have been awarded the project); *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 650 (Tex. 1994) (holding that testimony that company "could have expected" future income was "without any evidentiary foundation and therefore, is purely speculative and conclusory"). Here, Acuna provided no evidence to support his attorney's speculation as to what he "would have" done, and the evidence of what the attorney actually did supports a contrary conclusion.

Although four jurors disclosed that they had each been a defendant in a prior lawsuit, Acuna's attorney did not question, challenge, or strike any of them, and one of them was seated on the jury and joined in the majority verdict. *See, e.g.*, *Burton*, 852 S.W.2d at 747 (finding that the pattern of strikes and the seated jury did not indicate materiality of the erroneous juror response). Acuna provided no evidence to suggest that Chavez or her prior experience as a defendant in a

lawsuit was in some way meaningfully different than the other prospective jurors' experiences, and Acuna's attorney's failure to question or strike those jurors contradicts his conclusory claim that he "would have" questioned or struck Chavez. Because the record contains no competent evidence that Chavez's nondisclosure resulted in probable injury, and the only competent evidence supports that it did not, the trial court abused its discretion in granting a new trial.

Because we hold that the trial court abused its discretion in granting a new trial, 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.

OPINION DELIVERED: April 25, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0050

FPL ENERGY, LLC, FPL ENERGY PECOS WIND I, L.P.,
FPL ENERGY PECOS WIND II, L.P., AND INDIAN MESA WIND FARM, L.P.,
PETITIONERS,

V.

TXU PORTFOLIO MANAGEMENT COMPANY, L.P.
N/K/A LUMINANT ENERGY COMPANY, LLC, RESPONDENT

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

Argued October 15, 2012

JUSTICE GREEN delivered the opinion of the Court.

In this contract interpretation case, TXU Portfolio Management Company, L.P. (TXUPM) contracted to receive electricity and renewable energy credits (RECs) from wind farms owned by FPL Energy, LLC. FPL failed to provide the required electricity and RECs. TXUPM sued FPL for breach of contract; FPL counterclaimed, arguing TXUPM failed to provide FPL with sufficient transmission capacity. The trial court granted two partial summary judgments. First, it issued a declaratory judgment that the contracts required TXUPM to provide transmission capacity. Second, it declared the contracts' liquidated damages provisions unenforceable. The remaining issues were

tried to a jury, and the trial court entered take-nothing judgments for both parties. Both parties appealed. The court of appeals reversed both summary judgment rulings. 328 S.W.3d 580, 591 (Tex. App.—Dallas 2010, pet. granted).

We address the following issues: (1) did TXUPM owe FPL a contractual duty to provide adequate transmission capacity to FPL; (2) if FPL breached and TXUPM did not, do the liquidated damages provisions apply to energy *and* RECs or only to RECs; and (3) are the liquidated damages provisions in these contracts enforceable? We affirm the court of appeals' holding that TXUPM owed no contractual duty to provide transmission capacity. However, we hold the liquidated damages provisions apply only to RECs and are unenforceable as a penalty. Accordingly, we reverse the court of appeals' judgment in part and remand the case to the court of appeals to determine damages.

I. Factual and Procedural Background

In Texas, the electric industry consists of three main components: power generation, power transmission, and power distribution. Electric producers own and operate generating facilities. The Electric Reliability Council of Texas, Inc. (ERCOT), with few exceptions, manages the transmission of electricity through an interconnected network—or grid—of transmission lines. Finally, retail electric providers distribute electricity directly to consumers.

In 1999, the Legislature created ambitious goals for renewable energy in Texas. *See* Act of May 27, 1999, 76th Leg., R.S., ch. 405, § 39, sec. 39.904, 1999 Tex. Gen. Laws 2543, 2598–99. The Legislature charged the Public Utility Commission of Texas (PUC) with establishing minimum renewable energy production requirements for all Texas electric providers. TEX. UTIL. CODE

§ 39.904(c)(1). The Legislature also tasked the PUC with establishing a REC trading program. *Id.* § 39.904(b). A REC reflects one megawatt hour (MWh) "of renewable energy that is physically metered and verified in Texas." 16 TEX. ADMIN. CODE § 25.173(c)(13). Electric producers thus simultaneously create both electricity from renewable sources and the corresponding RECs, yet producers may choose to sell the two separately. *Id.* § 25.173(d). The REC trading program allows electric providers unable to satisfy the minimum renewable energy requirements to purchase and hold RECs "in lieu of capacity from renewable energy technologies." TEX. UTIL. CODE § 39.904(b); *see* 16 TEX. ADMIN. CODE § 25.173(d)(2).

TXU Electric, a retail electric provider (and a different entity than TXUPM), solicited proposals from renewable energy producers to meet the new renewable energy production requirements. In 2000, TXU Electric entered agreements with two wind farm subsidiaries of FPL: Pecos Wind I, L.P. and Pecos Wind II, L.P. Also in 2000, FPL acquired a third party's rights to a similar contract with TXU Electric for Indian Mesa Wind Farm, L.P. Under the contracts, FPL sells TXU Electric RECs and the renewable electric energy used to produce those credits. TXU Electric assigned the contracts to TXUPM, a power marketer and, importantly, not a retail electric provider. The contracts with Pecos Wind I and II are identical. The Indian Mesa contract largely contains the same provisions, but, as explained below, the parties point to relevant differences in support of their claimed intent at the time of contracting. Two provisions of these contracts give rise to this dispute: one provision governing TXUPM's transmission responsibilities and one providing for liquidated damages in the event that FPL fails to meet certain production requirements.

For approximately four years, FPL failed to produce the agreed upon electricity and RECs. TXUPM filed suit seeking damages for FPL's breach of the contracts. FPL counterclaimed, arguing that it could not meet its obligations because of congestion on the ERCOT grid. When the grid lacks capacity to transmit all energy produced in an area, ERCOT issues curtailment orders instructing certain facilities to cease production. FPL claims it received curtailment orders from ERCOT which, along with an unexpected lack of wind in the area, caused it to produce less energy than promised. FPL blamed the congestion and resulting curtailment orders on TXUPM, insisting that TXUPM bore responsibility to ensure transmission capacity for all energy FPL could produce.

Both parties filed motions for partial summary judgment. Each sought declaratory judgment to clarify the portions of the contracts relating to transmission capacity and liquidated damages. The trial court issued several rulings. First, the court declared that the contracts unambiguously required TXUPM to provide all transmission services, including transmission capacity, to FPL. Second, the court determined that the liquidated damages provisions in the contracts were not enforceable, and thus void, because a liquidated damages amount of $50 per REC was not a realistic forecast of damages.

Consistent with these rulings, the trial court's instructions to the jury indicated that TXUPM was required to provide transmission capacity and that the liquidated damages were unenforceable. The jury found that TXUPM should receive $8.9 million in compensatory damages for FPL's failure to deliver renewable energy, yet the jury determined that TXUPM secured cover for the missing electricity by acquiring substitute electricity. The jury also found that TXUPM owed no compensatory damages to FPL for TXUPM's alleged failure to ensure transmission capacity. The

trial court entered judgment on the jury's verdict, ordering that (1) FPL take nothing on its claims; and (2) TXUPM take nothing, despite the jury's damage award, because TXUPM covered.

The court of appeals affirmed the take-nothing judgment for the damages claims but reversed and rendered judgment on the issues related to declaratory relief. 328 S.W.3d at 591. The court held that the contracts did not require TXUPM to provide the necessary transmission capacity. *Id.* at 587. As to liquidated damages, the court of appeals held that the provisions were enforceable because damages were difficult to estimate, the $50 rate was a reasonable estimate of just compensation, and FPL could not meet its burden to show that the $50 rate was disproportionate to TXUPM's actual damages. *Id*. at 587–90.

We granted FPL's petition for review and address the three issues before us—whether TXUPM was responsible for ensuring transmission capacity, whether the liquidated damages provisions apply to failure to deliver electricity, and whether the liquidated damages provisions are enforceable. 55 Tex. Sup. Ct. J. 320 (Feb. 17, 2012).

II. Contract Interpretation

Before deciding the enforceability of the liquidated damages provisions, we must resolve two matters of contract interpretation—TXUPM's responsibility for transmission capacity and the scope of the liquidated damages provisions. Our analysis begins with the legal question of the contracts' ambiguity. *See Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). If we can give a clear and definite legal meaning to a contract, it is not ambiguous as a matter of law. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 133 (Tex. 2010). An ambiguous contract, however, has a doubtful or uncertain meaning or is reasonably

susceptible to multiple interpretations; we will not find ambiguity simply because the parties disagree over a contract's meaning. *Dynegy Midstream Servs.*, 294 S.W.3d at 168. Our primary concern in contract interpretation is to "ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). We consider the entire writing to harmonize and effectuate all provisions such that none are rendered meaningless. *Id.* Further, we "construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served." *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (per curiam) (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987)).

A. Transmission Capacity

We first consider whether the contracts require TXUPM to provide adequate transmission capacity to FPL. The trial court and the court of appeals found section 2.03 unambiguous, a finding the parties do not challenge. 328 S.W.3d at 584–85. We may, nonetheless, declare a contract ambiguous, *see J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 231 (Tex. 2003), but we hold that section 2.03, when construed in light of the entire contracts, has a definite legal meaning and, thus, is unambiguous. *See Gilbert Tex. Constr.*, 327 S.W.3d at 133.

Section 2.03(a) of the contracts, entitled "Transmission," reads as follows:

> TXU Electric shall provide, by purchasing or arranging for, all services, including without limitation Transmission Services, Ancillary Services, any control area services, line losses except for line losses on [FPL's] side of the Delivery Point, and transaction fees, necessary to deliver Net Energy to TXU Electric's load from the Renewable Resource Facility throughout the Contract Term ("Required Transmission Services").

Section 1.02(a) of the contracts defines "Net Energy" as "the amount of electric energy in MWh produced by the Renewable Resource Facility and *delivered to the Connecting Entity*." (emphasis added). Under section 2.02, a Connecting Entity owns any "transmission or distribution system with which the Renewable Resource Facility is interconnected." The Connecting Entity serves as the "Delivery Point."

FPL urges a broad view of TXUPM's responsibility for transmission services. FPL contends that TXUPM's obligation to provide transmission services "without limitation" encompasses the *capacity* to deliver electricity from the Renewable Resource Facility (i.e. FPL) to the load (i.e. TXUPM's customer base). In support, FPL argues that Net Energy can refer only to a quantity and has no bearing on how and when delivery occurs. FPL further argues that the more specific language, "from the Renewable Resource Facility," should trump Net Energy, which is defined elsewhere in the contracts. *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133–34 (Tex. 1994) (stating the rule that, in contract interpretation, a more specific provision will control over a general statement). FPL points to congestion beyond the Delivery Point, explaining that as electricity is generated and delivered virtually simultaneously, it cannot stop and wait at the Delivery Point for congestion to clear. In a compelling visual, FPL suggests that the transmission towers might burn down if FPL generated and sent electricity without an available, guaranteed path to the consumer. FPL complains that TXUPM caused the grid congestion and thus prompted the resulting curtailment orders.[1]

[1] The record shows that FPL earlier claimed that TXUPM: (1) prioritized its own fossil fuel-derived energy; (2) knowingly overstated to ERCOT its intention to transmit fossil fuel energy, resulting in curtailment orders for wind-produced energy; and (3) exercised its authority as a "Qualified Scheduling Entity," whose responsibility is to report

TXUPM interprets the contracts as placing the risk of transmission system incapacity on FPL. TXUPM notes that the contracts identify "lack of transmission capacity" as an "Uncontrollable Force" outside the reasonable control of the parties. If capacity is beyond the control of the parties, TXUPM questions, how then can TXUPM bear responsibility for failure to provide capacity? Section 4.05 of the contracts reinforces this point by making clear that FPL must pay liquidated damages for failure to supply RECs *even if* the failure was the result of inadequate transmission capacity. Finally, TXUPM argues that the contracts' definition of Net Energy binds this Court; incorporating Net Energy, as defined, into section 2.03 means that TXUPM owes a duty to provide transmission services *only* after the Delivery Point. Under TXUPM's interpretation, if FPL could not deliver electricity because of congestion, FPL bore the risk and, thus, must bear the consequences. We agree with TXUPM's interpretation.

We begin by recognizing the apparent textual conflict. Read in isolation, section 2.03 contains language supportive of either a broad or narrow interpretation of TXUPM's transmission service responsibilities. "[F]rom the Renewable Resource Facility" implies that TXUPM would have to secure transmission capacity so FPL could deliver electricity. But the use of the term Net Energy, which exists only upon FPL's delivery to the Connecting Entity, suggests that TXUPM

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anticipated electricity generation to ERCOT, to influence ERCOT's schedule for energy transmission on the grid. FPL's briefs, however, do not pursue these arguments. FPL petitioned this Court to review the meaning of the contracts as to TXUPM's obligations to provide transmission services, not TXUPM's alleged role in creating congestion. Thus, we will not consider these arguments. *See Guitar Holding Co., L.P. v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) (holding issues waived if not presented in the petition for review or in the briefs).

bears responsibility only if the grid possesses capacity for TXUPM to deliver any generated electricity.

We cannot interpret a contract to ignore clearly defined terms, *see Frost Nat'l Bank*, 165 S.W.3d at 313, and, thus, we must accord Net Energy its due meaning. The contracts assigned TXUPM responsibility only for transmission services required to deliver Net Energy, and Net Energy represents the amount of energy produced by FPL *and* delivered to the Connecting Entity. TXUPM's responsibility for transmissions services, then, begins once FPL-generated electricity reaches the Connecting Entity on the grid—the Delivery Point. The contracts' use of the phrase "from the Renewable Resource Facility" is simply a designation of where the energy originated. It does not alter the definition of Net Energy provided in section 1.02 or in other sections throughout the contracts.

The placement of section 2.03 in the context of all interconnection requirements reinforces this conclusion. Section 2.02 requires FPL to "make all arrangements . . . necessary to interconnect . . . with a transmission or distribution system," i.e. the Connecting Entity. Transmission systems are owned and operated by transmission service providers. *See* 16 TEX. ADMIN. CODE § 25.5(143), (144). As between the original contracting parties, the contracts required a separate agreement to address interconnection if TXU Electric was the connecting entity; the parties do not suggest any such agreement exists. Between TXUPM and FPL, no such agreement can exist because TXUPM, as a power marketer, cannot own transmission systems. *See id.* § 25.5(83) (defining "power marketer" to exclude owners of transmission systems). The contracts obligate FPL to secure interconnection with a Connecting Entity, or transmission service provider,

which under the PUC rules cannot be TXUPM. *See id.* § 25.5(83), (143). Reading sections 2.02 and 2.03 together, FPL must make all interconnection arrangements so that electricity can reach the Delivery Point, and TXUPM must ensure that facilities exist beyond the Delivery Point to allow for delivery to consumers. These provisions do not speak to the situation here, where both parties claim to meet their responsibilities but congestion on the grid inhibits energy generation and delivery.

Given these facts, then, we must consider which party is responsible for congestion beyond the Delivery Point. While FPL blames grid congestion on TXUPM, we believe the contracts recognize such congestion as beyond both parties' control. Section 6.02(a) of the contracts addresses "Uncontrollable Force," including "[e]vents or circumstances that are outside of a Party's reasonable control," which "may include . . . lack of transmission capacity or availability." The contracts mention transmission capacity only in this section. Congestion and curtailment issues, which affect transmission capacity and availability, must fall within this provision. Section 6.02(b) goes on to excuse a party from performance in the event of an Uncontrollable Force if certain criteria are met; there is no dispute that FPL did not meet those criteria.

Section 4.05, entitled "Effect of Outages and Uncontrollable Force," outlines the general rule that payment and other calculations in sections 4.01–.10 *are not* impacted by Uncontrollable Force. The exception to this rule, discussed below, applies to reduce the Annual Quantity of RECs that FPL must produce for TXUPM only when PUC substantive rules would excuse the shortfall. The exception does not excuse FPL from its obligation to deliver electricity. In essence, the contracts allocate the risk of curtailment and congestion to FPL by clearly establishing that such events affect contract obligations only in certain instances not found here. We must respect and enforce this

assignment of risk. *See Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007) ("Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit.").

To summarize, the contracts obligate FPL to interconnect with a Connecting Entity, which cannot be TXUPM. TXUPM bears responsibility for providing transmission services from the Delivery Point at the Connecting Entity. To the extent that lack of transmission capacity impairs electricity generation at the wind farms, the contracts provide that such lack of capacity is an Uncontrollable Force and FPL, therefore, bears the risk.

We note that this analysis does not fail because of the unique nature of electricity, despite FPL's assertions. Admittedly, electricity generation, transmission, and distribution occur almost simultaneously. But even if electricity moves too fast to pinpoint its physical location, the parties certainly can conceptualize its location for the purpose of creating energy contracts like the ones in question today. Several contractual provisions make this clear: section 2.03(a) assigns FPL responsibility for any loss of electricity on its side of the Delivery Point; and section 3.01(b) makes FPL responsible for maintenance and operational compliance with ERCOT guidelines for facilities up to the Delivery Point. This conceptualization of electricity's location pervades the contracts, and the parties assigned different responsibilities and liabilities based upon that understanding.

Here, ERCOT issued curtailment orders, effectively constraining energy generation, rather than energy transmission. FPL was therefore prevented from generating electricity and meeting its contractual obligations. Although ERCOT made final curtailment decisions, that does not mean that neither party bore the risk in the event of congestion and curtailment.

We hold that the contracts did not require TXUPM to provide transmission capacity for FPL but rather allocated risk of inadequate transmission capacity to FPL.

B. Liquidated Damages

We next consider the breadth of the liquidated damages provision in section 4.04. The court of appeals did not address the ambiguity of the section, and neither party argues the provision is ambiguous. We conclude that the provisions are unambiguous because we may discern a definite legal meaning by construing the provisions in light of each contract as a whole. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 133 (Tex. 2010).

The provisions state in relevant part:

> If there is a Net Deficiency for a year . . . . [FPL] shall pay [TXUPM] a Deficiency Payment equal to the product of (i) the difference in MWh between (a) the Net Deficiency, and (b) the MWh of Transferred RECs, times (ii) the Deficiency Rate. The Deficiency Payment is intended to be liquidated damages and not a penalty.

Vastly simplified, a Net Deficiency occurs when FPL fails to meets its "Annual Quantity" REC quota, even taking into account past overproduction.

Section 4.04(f) sets the Deficiency Rate as follows:

> The initial Deficiency Rate is $50 per MWh, based upon the $50 per MWh number in [PUC] Substantive Rule § 25.173. If the $50 per MWh in that Rule is amended, then the Deficiency Rate is automatically adjusted to the amended number stated in that Rule. If [PUC] Substantive Rule §25.173 is amended or repealed without replacement so that the $50 number is no longer in the [PUC] Substantive Rules, then the Deficiency Rate is $50. To the extent that the [PUC] determines the annual average market value of RECs applicable to [TXUPM] for a year, then the Deficiency Rate for that year will be the lesser of (i) the $50 per MWh (as it may be later amended), and (ii) twice the annual average market value of RECs applicable to [TXUPM] as determined by the [PUC] . . . . For a year for which there is a Deficiency Payment due, [TXUPM] shall make reasonable efforts to obtain a determination of the annual average market value of RECs by the [PUC], but nothing

> in this Section or in this Agreement obligates [TXUPM] to turn in fewer RECs than are required of it by the [PUC] program administrator in order to obtain such a determination.

TXUPM argues that the contracts cover both energy and RECs, and, therefore, the liquidated damages clauses must apply to both. TXUPM reads subsections (d) and (f) in the context of contract Article IV (sections 4.01–.10), entitled "Payment, Records, and Billings." According to TXUPM, because FPL simultaneously produces RECs and energy, the parties simply use RECs as a counting mechanism for both, rather than a term limited strictly to RECs. In support, TXUPM references section 4.02, which provides the contracts' payment terms, whereby TXUPM must pay FPL a unified price for an Annual Quantity of MWhs of Renewable Energy comprised of both energy and RECs. Sections 4.03 and 4.04(a)–(c) outline a quarterly and annual reconciliation process to smooth any discrepancies based on the differences between continuous production of electricity and the quarterly issuance of RECs. Section 4.04(d), the argument goes, necessarily incorporates the language used in the other sections. That section states: "[FPL] may elect to obtain and transfer RECs to [TXUPM] that were not produced at the Renewable Resource Facility to completely or partially offset the Net Deficiency . . . not to exceed the sum of (i) 20% of the Annual Quantity, and (ii) the Uncontrollable Force Deficiency for that year." Thus, TXUPM argues, Section 4.04(d) as a whole must refer to the Annual Quantity of both energy and RECs.

In response, FPL points to the absence of "Net Energy" or "Renewable Energy" anywhere in the liquidated damages provisions and highlights several clauses consistent with an exclusive focus on RECs. First, section 4.04(d), quoted above, contains a mechanism for FPL to deliver RECs from another source if FPL cannot produce the RECs at its own facilities. That provision deals only

with RECs, and not electricity. Second, the Deficiency Rate is tied to the PUC's substantive rules on REC penalties. 24 Tex. Reg. 9142 (1999), *adopted* 25 Tex. Reg. 82 (2000), *amended by* 32 Tex. Reg. 5165 (2007), *proposed* 32 Tex. Reg. 487 (former 16 TEX. ADMIN. CODE § 25.173(o)) (Pub. Util. Comm'n of Tex.). The PUC rules impose penalties for failure to retire sufficient RECs, not for failure to deliver electricity. *Id.* Third, the Indian Mesa contract more clearly limits the liquidated damages provision to RECs by eliminating the entire provision in the event that RECs cease to exist. For the reasons below, we hold that the liquidated damages clauses apply only to RECs.

At the outset, we note that sophisticated parties have broad latitude in defining the terms of their business relationship. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 58 (Tex. 2008) (articulating the principle that Texas courts should uphold contracts "negotiated at arm's length by 'knowledgeable and sophisticated business players' represented by 'highly competent and able legal counsel'" (quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997)). We must construe contracts by the language contained in the document, with a mind to Texas's strong public policy favoring preservation of the freedom to contract. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 811–12 (Tex. 2012); *see also Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.3d 24, 26 (Tex. App.—Amarillo 2000, no pet.) ("In short, the parties strike the deal *they* choose to strike and, thus, voluntarily bind themselves in the manner *they* choose."). Therefore, the lack of reference to electricity or energy in the liquidated damages provisions is critical.

Where the parties intended to address both energy and RECs, the contracts do so. In section 4.02, the payments are based on "all RECs and Net Energy produced by [FPL]." Section 4.03

contains explicit references to section 4.02 and the payments under section 4.02. The liquidated damages provisions, in contrast, provide no such reference. We will not, as TXUPM urges, selectively import terms from other provisions to compensate for the absence of the term "energy"; rather, we conclude that the omission was intentional and deliberate. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996) ("We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.").

This interpretation does not conflict with, or render meaningless, any other provision of the contracts. To the contrary, other provisions recognize that RECs often receive differential treatment. Section 3.03(b) provides that if TXUPM cannot take delivery of electricity, FPL may sell electricity to the Connecting Entity, but must then sell the REC so produced to TXUPM. Section 4.04(d) allows FPL to cover REC deficiencies with RECs from other sources. These distinctions make sense because an electricity provider may readily obtain RECs on the open market, whereas it is more difficult for providers to arrange for substitute electricity to meet their commitments.

Support for differential treatment of RECs also flows from the regulatory scheme incorporated by reference into the contracts. Section 4.04(f) incorporates a Deficiency Rate from the PUC rules, then found in Texas Administrative Code Title 16, section 25.173. 24 Tex. Reg. 9142 (1999), *adopted* 25 Tex. Reg. 82 (2000), *amended by* 32 Tex. Reg. 5165 (2007), *proposed* 32 Tex. Reg. 487 (former 16 TEX. ADMIN. CODE § 25.173(o)) (Pub. Util. Comm'n of Tex.). Section 25.173, at the time of contracting, assignment, and breach, contained a mechanism for excusing REC deficiencies due to events "beyond [the] reasonable control of the provider." *Id.* Such events

included lack of transmission capacity or curtailment orders from ERCOT. *See id.* (former 16 TEX. ADMIN. CODE § 25.173(o)(4), (5)). The contracts incorporate this mechanism through section 4.05, which reduces the Annual Quantity to the extent that Administrative Code section 25.173 excused penalties for REC deficiencies. In sum, the contracts reduce FPL's REC obligations when the PUC provides an excuse for the deficiency.

The very inclusion of the Deficiency Rate, which reflects the *actual* penalty TXUPM would have to pay for a REC deficiency, suggests the liquidated damages clause was intended to compensate only for REC deficiencies. To underscore this point, we note that when the parties entered the contracts, TXU Electric was subject to regulatory penalties for REC deficiencies. *See id.* (former 16 TEX. ADMIN. CODE § 25.173(c)(1)). If FPL failed to deliver both electricity and RECs, and TXU Electric consequently could not meet its REC requirements, the PUC would assess a penalty against TXU Electric. The liquidated damages clause would yield $50 per REC, or the equivalent of the regulatory penalty. This would compensate TXU Electric for the undelivered REC, but what about the undelivered electricity? Liquidated damages would provide no compensation to TXU Electric for FPL's failure to deliver electricity. This belies TXUPM's assertion that the provisions were intended to compensate for both RECs and electricity. We conclude that the liquidated damages clauses compensate for REC deficiencies and leave common law remedies available for electricity deficiencies.

The Indian Mesa contract further solidifies our interpretation. Section 10.02 of the Indian Mesa contract provides that "if RECs cease to exist, then Section 4.03 and Section 4.04 of this Agreement will be automatically deleted." This section preserves the agreement as an electricity-

only contract if RECs disappear. Because the liquidated damages provision becomes a nullity without RECs, we must conclude that the provision is intended to compensate only for REC deficiencies. To do otherwise would render the provision meaningless, and this we cannot do. *See Coker*, 650 S.W.2d at 393.

Limiting the liquidated damages provisions to their plain language also has the benefit of advancing stability in the renewable energy marketplace, including the vital role of RECs. Under the legislative scheme, RECs and energy are "unbundled." TEX. UTIL. CODE § 39.904(b); ERCOT Nodal Protocols § 14.3.2(1) (January 1, 2013). Electric providers may either generate their own renewable energy or purchase RECs on the open market. 16 TEX. ADMIN. CODE § 25.173(d), (l). Though FPL and TXUPM chose to contract for both in this case, we should not allow that fact to cloud our analysis. As amici curiae REC stakeholders have pointed out, a contrary holding could impede the REC market, which facilitates renewable energy development by allowing prospective electric producers to secure a guaranteed long-term revenue stream. Yet if, as TXUPM urges, "REC" does not mean only REC, substantial uncertainty may arise regarding the desirability of such investments, the meaning of existing contracts, the negotiation of future contracts, and the ease of regulatory compliance. We are loath to interfere with a functioning market when the language of the contracts does not so require.

The plain language of the liquidated damages provisions, the differential treatment of RECs and electricity in the contracts, and the separate provisions of the Indian Mesa contract all support a limited interpretation of a REC. We hold that the liquidated damages provisions apply only to REC deficiencies.

III. Enforceability of Liquidated Damages

We next consider the enforceability of the liquidated damages provisions when applied only to RECs. FPL contends that the provisions impose an unenforceable penalty when applied to compensate only for REC deficiencies. Although TXUPM argues primarily that the provisions reasonably forecast damages for electricity *and* RECs—a position foreclosed by our holding in this case—TXUPM's arguments regarding the difficulty of estimation of REC-based damages and the reasonableness of the forecast of damages still resonate. Because the liquidated damages provisions fail our test for enforceability, however, we hold the provisions unenforceable.

The basic principle underlying contract damages is compensation for losses sustained and no more; thus, we will not enforce punitive contractual damages provisions. *See Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952). In *Phillips v. Phillips*, we acknowledged this principle and restated the two indispensable findings a court must make to enforce contractual damages provisions: (1) "the harm caused by the breach is incapable or difficult of estimation," and (2) "the amount of liquidated damages called for is a reasonable forecast of just compensation." 820 S.W.2d 785, 788 (Tex. 1991) (citing *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 n.2 (Tex. 1979)). We evaluate both prongs of this test from the perspective of the parties at the time of contracting.[2] In *Phillips* we recognized that, under this test, a liquidated damages provision

[2] *Polimera v. Chemtex Envtl. Lab., Inc.*, No. 09–10–00361–CV, 2011 Tex. App. LEXIS 3886, at *12 (Tex. App.—Beaumont May 19, 2011, no pet.) (mem. op.); *Baker v. Int'l Record Syndicate, Inc.*, 812 S.W.2d 53, 55 (Tex. App.—Dallas 1991, no writ); *Mayfield v. Hicks*, 575 S.W.2d 571, 576 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *Muller v. Light*, 538 S.W.2d 487, 488 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); *Schepps v. Am. Dist. Tele. Co. of Tex.*, 286 S.W.2d 684, 690 (Tex. Civ. App.—Dallas 1955, no writ); *Zucht v. Stewart Title Guar. Co.*, 207 S.W.2d 414, 418 (Tex. Civ. App.—San Antonio 1947, writ dism'd); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981) (identifying the time of making a contract as the moment to evaluate the reasonableness of a liquidated damages clause).

may be unreasonable "because the actual damages incurred were much less than the amount contracted for." 820 S.W.2d at 788. A defendant making this assertion may be required to prove the amount of actual damages before a court can classify such a provision as an unenforceable penalty. *Id.* While the question may require a court to resolve certain factual issues first, ultimately the enforceability of a liquidated damages provision presents a question of law for the court to decide. *Id.*

A. Difficulty of Estimating Damages

We first consider the difficulty of estimating damages at the time of contracting. TXUPM emphasizes the uncertainty of the market for RECs. FPL counters that all parties knew a REC marketplace would soon exist and provide transparent pricing by the time the obligations under the contracts became due. We agree with TXUPM that damages for RECs were difficult to estimate at the time of contracting.

The implementing legislation for the REC scheme passed in 1999, Act of May 27, 1999, 76th Leg., R.S., ch. 405, § 39, sec. 39.904, 1999 Tex. Gen. Laws 2543, 2598–99, but at the time of contract formation in 2000, the market for RECs did not yet exist. The nature of FPL's obligation compounded the difficulty. The contracts required FPL to deliver an annual quantity of RECs. TXUPM could not identify the specific time, and thus the spot price in the REC market, in order to calculate the damage for any specific REC deficiency. Even if the contracts anticipate a healthy marketplace for RECs, the uncertain success of a novel legislative scheme surely poses a challenge to predicting damages. Indeed, as explained previously, the Indian Mesa contract foresaw the potential disappearance of the REC scheme and provided for continuation of the contract in the

event of the scheme's demise. The uncertain marketplace for RECs suffices to meet the "difficulty of estimation" prong of the contractual damages test.

B. Reasonableness of Damage Forecast

We next turn to the second prong, the reasonableness of the forecast of damages. FPL argues that the liquidated damages provisions, which derive directly from the regulatory penalty scheme, impose the maximum penalty in all situations. FPL points to an ameliorative provision in the penalty regulations that excuses REC deficiencies due to lack of transmission capacity or the actions of a governmental authority, such as an ERCOT curtailment. *See* 24 Tex. Reg. 9142 (1999), *adopted* 25 Tex. Reg. 82 (2000), *amended by* 32 Tex. Reg. 5165 (2007), *proposed* 32 Tex. Reg. 487 (former 16 TEX. ADMIN. CODE § 25.173(o)) (Pub. Util. Comm'n of Tex.). Many of TXUPM's counter-arguments are inextricably tied to contractual damages provisions based on RECs and electricity, and we need not acknowledge those arguments here. TXUPM does assert, however, that the liquidated damages provisions were not intended as indemnity clauses and therefore are not limited to application only if TXUPM were actually assessed a penalty.

We view the reasonableness of the forecast from the time of contracting. *E.g.*, *Mayfield v. Hicks*, 575 S.W.2d 571, 576 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981) (identifying the time of making a contract as the moment to measure the reasonableness of anticipated loss). We are not persuaded, as FPL urges, to attach a "penalty" label merely because the liquidated damages clause derives from a "penalty" scheme; that does not, standing alone, make it a penalty. *Stewart*, 245 S.W.2d at 486 ("[T]he courts will not be bound by the language of the parties.").

Although the initial per-REC deficiency rate is $50, the contracts also provide:

> To the extent that the [PUC] determines the annual average market value of RECs applicable to [TXUPM] for a year, then the Deficiency Rate for that year will be the lesser of (i) the $50 per MWh (as it may be later amended), and (ii) twice the annual average market value of RECs applicable to [TXUPM] as determined by the [PUC].

The contracts thus anticipate that the amount of damages may be tied to market value, rather than an arbitrary number. Further, section 4.05 of the contracts anticipates that the PUC substantive rules will affect the REC requirements:

> The exception . . . is that the Annual Quantity for a year is decreased to the extent that [TXUPM] is excused from paying a penalty by reason of any event under Section 25.173(o)(4) and (5) of the [PUC] Substantive Rules that adversely affected production of RECs by the Renewable Resource Facility in that year.

As discussed above, former PUC rules, then found in Title 16, Section 25.173 of the Texas Administrative Code, excused REC deficiencies due to lack of transmission capacity or curtailment orders. 24 Tex. Reg. 9142 (1999), *adopted* 25 Tex. Reg. 82 (2000), *amended by* 32 Tex. Reg. 5165 (2007), *proposed* 32 Tex. Reg. 487 (former 16 TEX. ADMIN. CODE § 25.173(o)) (Pub. Util. Comm'n of Tex.). The contracts therefore contemplate that REC obligations of the parties, and the resulting damages, are a product of and intertwined with the regulatory scheme. The liquidated damages provisions attempt to integrate these ameliorative processes, and thus, on their face, reasonably forecast damages.

Yet the facts of this case demonstrate the chasm between the liquidated damages provisions as written and the result of the provisions under the court of appeals' judgment. First, the number of deficient RECs varies significantly between TXUPM's assertion and what the regulatory scheme would indicate. FPL had a collective deficiency of 580,000 RECs, yet 62% (or about 360,000) were

not produced because of transmission congestion and associated ERCOT curtailment orders, which are excused by the PUC rules. *Id.* TXU Electric was subject to PUC penalties for REC deficiencies at the time of contract formation. *Id.* (former 16 TEX. ADMIN. CODE § 25.173(c)(1)). Upon assignment to TXUPM, a power marketer, no party was subject to PUC penalties. *See* 16 TEX. ADMIN. CODE § 25.5(83) (defining power marketer as an wholesaler seller of electricity who does not own generation, transmission, or distribution facilities in Texas, which would exclude TXUPM from REC penalties). This change in relationship did not undermine each contract, but it fundamentally changed the basis for the liquidated damages provisions. Those provisions presuppose that TXU Electric or its successors would respond to potential penalties for REC deficiencies. When those successors have no REC penalty obligations, they may, as occurred here, fail to secure a regulatory excuse for deficiencies that would obviate any need for the liquidated damages provisions. If the PUC could assess a penalty against TXUPM, the penalty would be based on the 220,000 RECs attributable to lack of wind, not congestion.

Second, the Deficiency Rate calculation failed to tie the damages to market value as the contracts contemplate. Section 4.04(f) of the contracts allows for a Deficiency Rate of either $50 or twice the annual average market value of RECs "[t]o the extent that the [PUC] determines the annual average market value." The PUC expressly declined TXUPM's request for such a determination. The actual market value of a REC during the period in question ranged from $4 to $14. The fortuity of a PUC determination thus utterly controls the damages, irrespective of the actual market value. For instance, the appropriate amount of damages should fall in the range of $8

to $28 (twice the average market value), depending on what the PUC would have determined as the actual market value of a REC in each year.

In combination, this creates an unacceptable disparity. The court of appeals assessed damages at $29 million. If we use the REC deficiency of 220,000 (as reduced under PUC rules), and the reduced Deficiency Rate of $28 (the upper bound of the possible range), actual damages equal only $6,160,000. To reach damages of $29 million on a 220,000 REC deficiency would require an effective deficiency rate of $132 per REC. The disparity grows if we consider that TXUPM also avoided the contract price of $24 per MWh of Renewable Energy—which includes a REC and a MWh of electricity. Although only a portion of the $24 is attributable to the REC not purchased, it nonetheless would further diminish TXUPM's actual damages. In *Phillips*, we recognized that a liquidated damages provision may be unreasonable in light of actual damages. 820 S.W.2d at 788. The burden of proving unreasonableness falls to FPL. *See id.* The court of appeals held that FPL failed to meet this burden, yet the court's evaluation was based on evidence of damages for electricity *and* RECs. 328 S.W.3d at 589–90. Our holding on the scope of the liquidated damages clauses limits our consideration to damages for REC deficiencies. The evidence reviewed in this opinion demonstrates that FPL has met its burden.

Phillips did not create a broad power to retroactively invalidate liquidated damages provisions that appear reasonable as written. *See* 820 S.W.2d at 788. Nor do we create such a power here. But when there is an unbridgeable discrepancy between liquidated damages provisions as written and the unfortunate reality in application, we cannot enforce such provisions. The forecast of damages was flawed by its reliance on events that did not and perhaps cannot occur—a

PUC determination of the market value of RECs and a failure to secure a regulatory excuse for curtailment-based REC deficiencies. When the liquidated damages provisions operate with no rational relationship to actual damages, thus rendering the provisions unreasonable in light of actual damages, they are unenforceable. *See id.* Because the liquidated damages provisions operate as a penalty, we hold the provisions unenforceable.

IV. Conclusion

We hold that the contracts do not require TXUPM to provide transmission capacity to FPL, and thus TXUPM did not breach the contracts. FPL may owe damages for its breach, but the liquidated damages provisions in the contracts are unenforceable as a penalty. Accordingly, we reverse in part the judgment of the court of appeals and remand the case to the court of appeals to determine damages consistent with this opinion.

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Paul W. Green
Justice

OPINION DELIVERED: March 21, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0161

LARRY T. LONG, L. ALLAN LONG, AND B. VIRGINIA LONG, IN THEIR CAPACITIES AS TRUSTEES OF THE LAWRENCE ALLAN LONG TRUST, THE CHARLES EDWARD LONG TRUST, THE LARRY THOMAS LONG TRUST AND THE JOHN STEPHEN LONG TRUST D/B/A THE LONG TRUSTS, PETITIONERS,

v.

CASTLE TEXAS PRODUCTION LIMITED PARTNERSHIP, RESPONDENT

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

Argued November 5, 2013

JUSTICE GUZMAN delivered the opinion of the Court.

In this appeal from an oil and gas billing dispute, we determine the accrual date for postjudgment interest when a remand for further proceedings requires new evidence. To resolve this question, we assess the Texas Finance Code, our rules of procedure, and our precedent. The Finance Code provides that postjudgment interest accrues from a money judgment's date. But importantly, remanded cases such as this one involve multiple money judgments. Our Rules of Civil Procedure specify that only one final judgment exists in any case, and historically we have allowed postjudgment interest to accrue only upon a final judgment. But we have often addressed an exception to this accrual rule where a court of appeals can or does render the judgment the trial court

should have rendered. In such circumstances, our Rules of Appellate Procedure operate to substitute the subsequent final judgment in the place of the trial court's original, erroneous judgment—such that postjudgment interest accrues from original judgment date. The rationale behind the postjudgment-interest accrual rule and exception is that a claimant is entitled to postjudgment interest from the judgment date once the trial court possesses a sufficient record to render an accurate judgment.

Here, the court of appeals remanded the case to the trial court so that it could assess the prejudgment interest based upon when the defendant received certain billings from the plaintiff. The trial court determined that such evidence was not in the record and that the record had to be reopened. Rather than obtain the additional evidence, the claimant instead waived its claim for prejudgment interest. The trial court then awarded postjudgment interest from the date of its original, erroneous judgment, and the court of appeals affirmed. We find no abuse of discretion in the trial court's determination that new evidence was needed. But because the remand necessitated reopening the record for additional evidence, the Finance Code and our rules of procedure require that postjudgment interest accrue from the final judgment date rather than the original, erroneous judgment. Accordingly, we reverse the court of appeals' judgment and remand for the trial court to enter judgment in accordance with this opinion.

I. Background

Castle Texas Production Limited Partnership (Castle) operates gas wells in which the Lawrence Allan Long Trust, the Charles Edward Long Trust, the Larry Thomas Long Trust, and the

John Stephen Long Trust (collectively "the Long Trusts"[1]) have an interest. The Long Trusts sued Castle for breach of a joint operating agreement and the conversion of gas. Castle counterclaimed for amounts owed on joint interest billings and prevailed on its counterclaim. In its first judgment, entered in 2001, the trial court awarded Castle prejudgment interest of $73,998.90 without specifying its calculation. On appeal, the court of appeals held that prejudgment interest should have been calculated pursuant to the parties' joint operating agreement for joint interest billings not paid within fifteen days of receipt. 134 S.W.3d 267, 288. The court remanded to the trial court to recalculate prejudgment interest because "[i]t [was] apparent that the amount of prejudgment interest was not so calculated."[2] *Id.*

On remand, Castle made various motions beginning in March 2005, arguing that no new evidence was required for the trial court to recalculate prejudgment interest. When the trial court disagreed and set the matter on its trial docket, Castle sought writs of mandamus and prohibition, which the court of appeals denied in April 2006. In February 2009, Castle again moved for judgment on the existing record. At a hearing in March 2009, the trial court denied Castle's motion and once again set the matter on its trial docket. After obtaining this ruling, Castle waived its prejudgment-interest claim. The trial court entered a final judgment that same day awarding Castle

[1] Larry T. Long, Sammy Adamson, and Allan Long are the trustees of the Long Trusts and filed suit and pursued this appeal in their official capacities as trustees. For ease of reference, this opinion refers to the trustees in their official capacity as the Long Trusts.

[2] The court also suggested a remittitur on damages and attorney's fees and, when Castle filed the remittitur, affirmed the trial court's judgment as modified. 134 S.W.3d at 288–89.

postjudgment interest from the original judgment date in 2001.[3] The court of appeals affirmed, holding that "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." 330 S.W.3d 749, 753. We granted the Long Trusts' petition for review.[4]

II. Discussion

This appeal requires us to determine the date from which postjudgment interest begins to accrue when a remand requires further evidentiary proceedings. Prejudgment interest and postjudgment interest both compensate a judgment creditor for her lost use of the money due her as damages. *Phillips v. Bramlett*, 407 S.W.3d 229, 238 (Tex. 2013). Prejudgment interest accrues from the earlier of: (1) 180 days after the date a defendant receives written notice of a claim, or (2) the date suit is filed, and until the day before the judgment. TEX. FIN. CODE § 304.104; *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531 (Tex. 1998). Postjudgment interest accrues from the judgment date through the date the judgment is satisfied. *Bramlett*, 407 S.W.3d at 238. We have not previously addressed the accrual date for postjudgment interest if a trial court determines it must reopen the record for new evidence on remand and thus renders multiple judgments during the course of the suit.

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[3] The trial court subsequently entered a nunc pro tunc final judgment that made no substantive change to the March 2009 final judgment. No party contends the nunc pro tunc judgment has any effect on this proceeding.

[4] We previously granted review of this appeal and set the matter for oral argument in December 2012. Shortly before oral argument, Castle removed this proceeding to federal court because Castle and its parent corporation had filed for bankruptcy in December 2011. The federal bankruptcy court remanded this proceeding in July 2013, and we again set the matter for oral argument.

A claimant would prefer postjudgment interest to accrue from the date of the original, erroneous judgment for several reasons. First, postjudgment interest accrues on prejudgment interest[5] and, unlike prejudgment interest, postjudgment interest compounds annually.[6] Additionally, statutory limits such as the one on health care liability claims may prohibit recovery that includes prejudgment interest,[7] but we have never held that postjudgment interest is subject to that limitation. *Bramlett*, 407 S.W.3d at 239. Here, Castle waived its claim for prejudgment interest. Thus, resolving this issue determines whether Castle can recover postjudgment interest from the trial court's original judgment in 2001 or the final judgment after remand in 2009.

A. The Final Judgment Rule

To determine when postjudgment interest begins to accrue, we must interpret relevant statutes and our rules of procedure, which are issues we review de novo. *Morris v. Aguilar*, 369 S.W.3d 168, 171 n.4 (Tex. 2012). Under the Texas Finance Code, "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." TEX. FIN. CODE § 304.005(a). The Finance Code defines a money judgment as "a judgment for money" which "includes legal interest

[5] *See* TEX. FIN. CODE § 304.003(a) ("A money judgment of a court of this state . . . including court costs awarded in the judgment and prejudgment interest, if any, earns postjudgment interest at the rate determined under this section.").

[6] *Compare id.* § 304.104 ("Prejudgment interest is computed as simple interest and does not compound."), *with id.* § 304.006 ("Postjudgment interest on a judgment of a court in this state compounds annually.").

[7] *See Columbia Hosp. Corp. of Houston v. Moore*, 92 S.W.3d 470, 474 (Tex. 2002) (holding that prejudgment interest is subject to the limitation on recovery found in the statutory predecessor to the Medical Liability Act).

or contract interest, if any, that is payable to a judgment creditor under a judgment."[8] *Id.* § 301.002(a)(12). But this appeal hinges on the term "judgment," which the Finance Code fails to define. We observed in *American Paper Stock Co. v. Howard* that this statutory reference to "judgment" is to "the judgment of the trial court." 528 S.W.2d 576, 577 (Tex. 1975). Texas Rule of Civil Procedure 301 further instructs that "[o]nly one final judgment shall be rendered in any cause except where it is otherwise specially provided by law." TEX. R. CIV. P. 301; *see also Logan v. Mullis*, 686 S.W.2d 605, 609 (Tex. 1985) ("Tex. R. Civ. P. 301 provides that there will be only one final judgment."). A judgment that accrues postjudgment interest must necessarily be a final judgment because a partial summary judgment that grants relief on only one of several claims will not accrue postjudgment interest on the rendered claim until a final judgment resolves all issues among all parties. We therefore assess what constitutes a final judgment when a remand results in multiple trial court judgments.

We assess a judgment's finality differently, depending upon the context. For example, the finality test for the purpose of appeal differs from the finality test for when a court's power to alter a judgment ends or when the judgment becomes final for the purpose of claim and issue preclusion. *Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988) (orig. proceeding); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). As explained below, finality for the purpose of appeal bears the closest resemblance to finality for the purpose of accruing

[8] The Finance Code further defines contract interest as "interest that an obligor has paid or agreed to pay to a creditor under a written contract of the parties." TEX. FIN. CODE § 301.002(a)(1). Much of the present dispute has centered on the prejudgment interest set forth in the joint operating agreement between Castle and the Long Trusts, which is contract interest under the Finance Code.

postjudgment interest. A judgment is final for the purpose of appeal "if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree."[9] *Lehmann*, 39 S.W.3d at 195.[10] A judgment that disposes of all parties and claims begins appellate deadlines and generally triggers the accrual of postjudgment interest. *See* TEX. FIN. CODE § 304.005(a). But if an appellate court reverses that final judgment and remands for further proceedings, the original, erroneous trial court judgment is no longer final because it no longer disposes of all parties and claims. Generally then, if a remand results in multiple trial court judgments, postjudgment interest accrues from the date of the *final* judgment (rather than the original, erroneous judgment).

B. The "Can or Does Render" Exception

Texas Rule of Appellate Procedure 43.3 establishes a limited exception to the general rule that postjudgment interest accrues from the final judgment date. Rule 43.3 provides that, "[w]hen reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when (a) a remand is necessary for further proceedings; or (b) the interests of justice require a remand for another trial." TEX. R. APP. P. 43.3. Though our precedents on postjudgment interest have involved this exception rather than the general postjudgment-interest accrual rule, such precedents nonetheless offer guidance about the rule's purpose and contours.

[9] As addressed in Part II.B, *infra*, a trial court may, in appropriate circumstances, sever a rendered claim to make that ruling an appealable final judgment that accrues postjudgment interest from the date of severance.

[10] *See also Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding) ("A final judgment is one which disposes of all legal issues between all parties."); *West v. Bagby*, 12 Tex. 34, 34 (Tex. 1854) ("A final judgment is there defined to be the award of the judicial consequences which the law attaches to the facts, and determines the subject-matter of controversy between the parties. . . .").

We first interpreted the predecessor to Rule of Appellate Procedure 43.3 more than a half century ago. In *D.C. Hall Transport, Inc. v. Hard*, the jury rendered a verdict for the plaintiff, but the trial court granted the defendants' motion for judgment notwithstanding the verdict. 355 S.W.2d 257, 258 (Tex. Civ. App.—Fort Worth) *writ ref'd n.r.e. per curiam*, 358 S.W.2d 117 (Tex. 1962). Neither the jury nor the trial court, however, had made a finding concerning the disputed scope of a contract. *Id*. Because the existing record created a fact issue concerning the scope of the contract, we remanded for the trial court to make the omitted finding. *Id*. The trial court resolved the fact issue on remand without taking new evidence and entered a new final judgment that awarded interest from the date of the original, erroneous judgment. *Id*. The court of appeals affirmed the award of postjudgment interest from the date of the original judgment, reasoning that, "[i]n effect, the [remand] judgment was the judgment which should have been rendered . . . when the non obstante judgment was rendered." *Id*. at 260. We approved that decision.[11] *D.C. Hall*, 358 S.W.2d at 117. Thus, under *D.C. Hall*, if a remand does not require the trial court to reopen the record, the exception contained in Rule of Appellate Procedure 43.3 applies, and postjudgment interest will accrue from the date of the original, erroneous judgment.[12]

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[11] The court of appeals had addressed various factual determinations that were beyond our jurisdiction, so we could not refuse the writ and adopt that opinion as our own. *D.C. Hall*, 358 S.W.2d at 117. But we did "approve the decisions of law" of the court of appeals—including the decision regarding postjudgment interest—via per curiam opinion when refusing the writ due to no reversible error. *Id*.

[12] Similarly to *D.C. Hall*, we reversed and remanded a take nothing judgment in *Vassallo v. Nederl-Amerik Stoomv Maats Holland* and instructed the trial court to enter judgment for the plaintiff. 344 S.W.2d 421, 426 (Tex. 1961). On remand, the trial court entered judgment for the plaintiff with postjudgment interest accruing from the date of its original judgment, the court of appeals affirmed, and we found no reversible error. *Nederland sch-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.).

We have confirmed the principle of *D.C. Hall* in several appeals involving simpler postures—when a court of appeals renders the judgment the trial court should have rendered. In *American Paper*, the jury returned a verdict in favor of the plaintiff, but the trial court entered a take-nothing judgment notwithstanding that verdict. 528 S.W.2d at 576. The court of appeals reversed, rendered judgment on the verdict, and ordered that postjudgment interest should accrue from the date of the verdict. *Id*. at 576–77. We reformed that judgment to provide for postjudgment interest to accrue from the trial court's judgment date. *Id*. at 577. We explained that the predecessor to Finance Code section 304.005 required postjudgment interest to accrue from the date of the judgment, which "is the judgment of the trial court." *Id*. And citing *D.C. Hall*, we held that under the predecessor to Rule of Appellate Procedure 43.3, "the judgment of the court of civil appeals must take its place and plaintiff is entitled to interest from the date of the erroneous judgment." *Id*. Thus, under *American Paper*, if an appellate court renders the judgment the trial court should have rendered, postjudgment interest accrues from the date of the trial court's original, erroneous judgment.

We likewise applied the *American Paper* exception in *Thornall v. Cargill, Inc.*, 587 S.W.2d 384 (Tex. 1975). There, the court of appeals affirmed a judgment in part and reversed and rendered the remainder of the judgment. *Id*. at 384. But the court of appeals' judgment failed to award postjudgment interest, and we reformed the judgment to award postjudgment interest from the date of the trial court's erroneous judgment. *Id*. at 385.

Most recently, in *Bramlett*, we summarized *American Paper* and *Thornall* as holding 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." 407 S.W.3d at 239. But we viewed the *Bramlett* fact pattern as akin to that in *D.C. Hall* where, instead of rendering the judgment the trial court should have rendered, we remanded and the trial court made further determinations on the existing record. *Id*. at 240. As in *D.C. Hall*, we held that postjudgment interest accrues from the date of the original trial court judgment if the appellate court remands for entry of judgment consistent with its opinion and the trial court is not required to admit new or additional evidence to enter that judgment. *Id*. at 239. After discussing the court of appeals' opinion at issue here, we specifically left open the question of the date from which postjudgment interest accrues if there is a retrial or new evidence is required on remand. *Id*. at 242–43.

Thus, the general rule is that postjudgment interest accrues from the date of the judgment, which is the final judgment in a case where the trial court issues multiple judgments. TEX. FIN. CODE § 304.005(a); TEX. R. CIV. P. 301. The exception is when the appellate court renders (or could have rendered) judgment, in which case postjudgment interest accrues from the date of trial court's original, erroneous judgment. TEX. R. APP. P. 43.3. But when an appeal instead results in a retrial or a remand for further proceedings where new evidence is required, postjudgment interest will accrue from the trial court's subsequent judgment.

The purpose behind the long-standing exception under Rule of Appellate Procedure 43.3 confirms the general rule that postjudgment interest should accrue from the subsequent trial court judgment in cases where the trial court must reopen the record. If the trial court possessed a sufficient record to render a correct judgment, the Finance Code and the rules of procedure allow

postjudgment interest to accrue from the original judgment date. But if the trial court did not possess a sufficient record to render a correct judgment or the record otherwise must be reopened (as in a retrial),[13] postjudgment interest will only accrue on the final judgment date once the record is sufficient.

We cannot agree with Castle that postjudgment interest should always accrue from the date of the trial court's first judgment. Such an interpretation renders meaningless the Finance Code provisions and Rule of Civil Procedure 301, which require postjudgment interest to accrue from the final judgment date. Similarly, if postjudgment interest always accrues from the date of the original, erroneous trial court judgment, our precedents construing the rules of appellate procedure would have had no need to address whether the appellate court could or did render the judgment the trial court should have rendered. We must interpret statutes and rules of procedure to give them effect, and thus we decline to adopt Castle's blanket rule that postjudgment interest accrues from the date of the original, erroneous trial court judgment in every proceeding. *See City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) ("[C]ourts are to avoid interpreting a statute in such a way that renders provisions meaningless.").

[13] We recognize that the cause for a retrial might not be the fault of the claimant, and the record on retrial may be similar to the record from the initial trial. But even in such circumstances, the Finance Code requires interest to accrue from the date of the judgment, which is necessarily the final judgment. TEX. FIN. CODE § 304.005(a). And the exception in Rule of Appellate Procedure 43.3 cannot apply to retrials because, under such circumstances, the appellate court cannot render the judgment the trial court should have rendered. *See* TEX. R. APP. P. 43.3. While the Finance Code's postjudgment interest accrual rule and the exception under our rules of procedure should achieve fairness in most circumstances, fairness is not the test mandated by our statutes and rules to be applied to the calculation of postjudgment interest in a case-by-case fashion. Rather, the parties' awareness of these principles, and the appropriate use of severance, offers of proof, and bills of exception as discussed below, should yield fairness in a predictable context to the greatest extent possible.

Having determined the parameters of the postjudgment-interest accrual rule and its exception, the parties here raise two related procedural questions: (1) which court decides whether the record must be reopened on remand, and (2) at what point should that decision be based? As a practical matter, the trial court should determine whether the record must be reopened on remand. While Rule of Appellate Procedure 43.3 requires a court of appeals to render the judgment the trial court should have rendered, the limited nature of appellate records can make this task impossible. Such was the case in *Bramlett* where we remanded for the trial court to enter judgment consistent with our opinion, and the trial court did not reopen the record in order to enter judgment. 407 S.W.3d at 233. Thus, the trial court should determine whether it must reopen the record on remand.[14]

Likewise, the trial court should make the determination whether to reopen the record as of the time the court of appeals remanded the proceeding. As explained above, the purpose of the postjudgment-interest accrual rule and exception indicate that a claimant is entitled to accrue postjudgment interest from the judgment date following the time the trial court possessed a sufficient record to render a correct judgment. If, as here, a claimant fails to equip the trial court with a sufficient record on remand and decides to waive a claim, only at the time of this waiver does the trial court possess a sufficient record to enter a correct judgment. Thus, if a trial court determines

[14] If a party believes the trial court erred in its determination of whether it must reopen the record, such a decision is necessarily reviewable on appeal of the final judgment the trial court enters. Here, Castle disagreed with the trial court's determination that it must reopen the record. As explained in Part II.E, *infra*, we hold that the trial court did not abuse its discretion in determining that it needed to reopen the record.

that it must reopen the record on remand to comply with a court of appeals decision, it should make that determination based upon the claims and record as of the time of the remand.

Taken together, the Finance Code, our rules of procedure, and our precedent from *D.C. Hall* to *Bramlett* require the conclusion that postjudgment interest accrues from the date of the final judgment (rather than the original, erroneous judgment) unless the appellate court can or does render the judgment the trial court should have rendered. As the parties discussed at oral argument, however, our precedent and rules of procedure offer some methods through which courts and parties may affect postjudgment interest with severance, offers of proof, and bills of exception.

Under Texas Rule of Civil Procedure 41, a court may sever and proceed separately with a claim against a party and may sever different grounds of recovery before submission to the trier of fact.[15] TEX. R. CIV. P. 41; *State Dep't of Highways & Pub. Transp. v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993). And other rules of procedure provide limited exceptions to Rule of Civil Procedure 41, allowing a trial or appellate court to order retrial on only part of a matter affected by error if doing so will not result in unfairness to the parties. *See* TEX. R. CIV. P. 320[16]; TEX. R. APP. P.

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[15] We have held that a claim is properly severable if: "(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007) (quoting *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990)). Avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to sever. *Id.*

[16] Rule of Civil Procedure 320 provides:

> When it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

TEX. R. CIV. P. 320.

44.1(b)[17]; *Cotner*, 845 S.W.2d at 819. For example, in *Danziger v. San Jacinto Savings Association*, we severed and remanded a claim that had not been (but should have been) submitted to the fact-finder from other claims on which we rendered judgment. 732 S.W.2d 300, 304 (Tex. 1987). We specified that the rendered claims would accrue postjudgment interest from the date of the original trial court judgment.[18] *Id*. Further, we also rendered judgment for damages on a portion of another claim (with postjudgment interest to accrue from the date of the original trial court judgment) and severed and remanded the issue of attorney's fees.[19] *Id*. The trial court found no damages and thus adduced no evidence for an award of attorney's fees as the statute provided. *Id*.[20]

C. The Courts of Appeals

Before the court of appeals' decision at issue here, only two court of appeals' opinions had substantively addressed the accrual date for postjudgment interest if the trial court must reopen the record on remand. Both courts of appeals held that postjudgment interest accrues from the date of the original, erroneous trial court judgment. The court of appeals here had previously addressed the

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[17] Rule of Appellate Procedure 44.1 provides:

> If the error affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. The court may not order a separate trial solely on unliquidated damages if liability is contested.

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

[18] The severed and remanded claim would necessarily have accrued postjudgment interest from the trial court's subsequent judgment date.

[19] In addition to *Danziger*, we also severed the disputed issue of attorney's fees from the remainder of a claim on which we rendered judgment in *Great American Reserve Insurance Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966).

[20] Parties may also affect postjudgment interest with offers of proof or bills of exception, which allow parties to include in the appellate record matters that do not otherwise appear in the record, such as excluded evidence. TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.2; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006).

issue in *State Department of Highways and Public Transportation v. City of Timpson*, 795 S.W.2d 24 (Tex. App.—Tyler 1990, writ denied). In *Timpson*, the trial court erroneously failed to submit a jury question regarding a settling defendant's negligence, and the court of appeals remanded for a retrial only on the comparative negligence of the two defendants. *Id*. at 25. On retrial, the trial court awarded postjudgment interest from the date of the subsequent judgment. *Id*. at 27. The court of appeals reversed, and—without discussion—stated that "[i]nterest on the revised judgment should run from the date of the original or erroneous judgment." *Id*. As support, the court cited *D.C. Hall* and *Copper Liquor v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1985). But as addressed previously, *D.C. Hall* involved a remand where the trial court took no new evidence, and thus fell under the exception in the Rules of Appellate Procedure applicable to cases in which the court of appeals can or does render the judgment the trial court should have rendered. *Bramlett*, 407 S.W.3d at 240. *D.C. Hall* does not support the conclusion in *Timpson*.

Likewise, *Timpson* relied upon *Copper Liquor*, as support for the conclusion that postjudgment interest accrues from the date of the original, erroneous trial court judgment. 795 S.W.2d at 27. Federal cases such as *Copper Liquor* are necessarily predicated on federal rules of procedure and are of limited value.[21] Even so, the general rule regarding postjudgment interest in

[21] Following its decision in *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948), the United States Supreme Court promulgated Federal Rule of Appellate Procedure 37, which now provides:

> (a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.
>
> (b) When the Court Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

the Fifth Circuit appears to be that postjudgment interest accrues from the date of the subsequent judgment. *See Vickers v. Chiles Drilling Co.*, 882 F.2d 158, 159 (5th Cir. 1989) ("If an appellate court reverses or modifies a judgment with a direction that a judgment be entered against a party, the mandate from the appellate court must specifically order that interest run from the date of the first judgment, else interest runs from the date of the second, modified judgment." (citing FED. R. APP. P. 37; *Briggs v. Penn. R.R. Co.*, 334 U.S. 304 (1948))). Accordingly, *Copper Liquor* does not support the holding in *Timpson* that postjudgment interest accrues from the date of the first judgment.

The other court of appeals to have addressed the question before us was *Gamma Group v. Transatlantic Reinsurance Co.*, 365 S.W.3d 469 (Tex. App.—Dallas 2012, no pet.). In *Gamma Group*, the court of appeals first held that the trial court erroneously awarded reasonable losses of $1.3 million rather than incurred losses and ordered a retrial on the limited issue of damages. *Id.* at 471. After taking new evidence, the trial court awarded more than $2.7 million in incurred-loss damages, with postjudgment interest accruing from the date of its original, erroneous judgment. *Id.* at 471, 475. The court of appeals affirmed that holding, citing to the court of appeals opinion at issue here and *Timpson*. *Id.* at 476. But as explained previously, these opinions do not properly give effect to the Finance Code and our rules of procedure, under which postjudgment interest accrues from the final judgment date unless the appellate court can or does render the judgment the trial court should have rendered. To the extent *Timpson* and *Gamma Group* conflict with this opinion, we overrule them.

FED. R. APP. P. 37.

D. Other Jurisdictions

Other jurisdictions often rely on their particular statutes, rules, and interpreting caselaw, so their relevance here is particularly weak. Nonetheless, we note that California appears to follow this general approach. *See Stockton Theatres, Inc. v. Palermo*, 360 P.2d 76, 78 (Cal. 1961) ("When a judgment is modified upon appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment. On the other hand, when a judgment is reversed on appeal the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment." (citations omitted)).[22] And commentators have observed that our principle in *American Paper*—that postjudgment interest accrues from the original judgment date if the court of appeals renders the judgment the trial court should have rendered—is the majority rule.[23]

E. Application

Having construed the Finance Code and our rules of procedure to require postjudgment interest to accrue from the final judgment date unless the appellate court can or does render the judgment the trial court should have rendered, we turn to the facts of the case at hand. Castle counterclaimed against the Long Trusts for breach of the parties' joint operating agreement by

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[22] *See also Presbyterian Distrib. Serv. v. Chicago Nat'l Bank*, 183 N.E.2d 525, 527 (Ill. App. 1962) (allowing postjudgment interest to accrue from date of subsequent judgment entered after further proceedings on remand).

[23] 1 COMMERCIAL DAMAGES: A GUIDE TO REMEDIES IN BUSINESS LITIGATION ¶ 6-49 (Charles L. Knapp ed. 2011) ("The majority rule is that where a money award has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, interest on the award should accrue from the original judgment date."); Annotation, *Date from which Interest on Judgment Starts Running, as Affected by Modification of Amount of Judgment on Appeal*, 4 A.L.R.3d 1221, 1223, § 2 (1965) ("In most cases where a money award has been modified on appeal, and the only action necessary in the trial court has been compliance with the mandate of the appellate court, the view has been taken that interest on the award as modified should run from the same date as if no appeal had been taken, that is, ordinarily, from the date of entry of the verdict or judgment." (citation omitted)).

failing to pay their share of joint interest billings. The joint operating agreement provided for interest to accrue on joint interest billings not paid within fifteen days of their receipt. 134 S.W.3d at 288. In its 2001 judgment, the trial court failed to specify its calculation for $73,998.90 of prejudgment interest it awarded Castle. The court of appeals reversed and remanded, holding prejudgment interest should have been calculated pursuant to the joint operating agreement. *Id.* at 288. On remand, the trial court concluded multiple times that it required evidence indicating when the Long Trusts received the joint interest billings to adjudicate prejudgment interest under the joint operating agreement. Castle sought writs of mandamus and prohibition regarding one such ruling, which the court of appeals denied after concluding "there are issues before the trial court requiring factual determinations." *In re Castle Tex. Prod. Ltd. P'ship*, 189 S.W.3d 400, 405 (Tex. App.—Tyler 2006, orig. proceeding). Castle eventually waived its prejudgment interest claim, and on that same day in 2009, the trial court entered a final judgment that awarded Castle postjudgment interest from the 2001 judgment.

As explained above, postjudgment interest accrues from the final judgment date unless the appellate court can or does render the judgment the trial court should have rendered. And the determination of whether the record must be reopened on remand is one for the trial court in the first instance to be made based upon the time of remand. Here, the trial court determined new evidence was required at the time of remand—a decision the court of appeals did not overturn. *In re Castle*, 189 S.W.3d at 405 ("[T]here are issues before the trial court requiring factual determinations."). We review the trial court's decision to admit new evidence for an abuse of discretion. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 235 (Tex. 2011).

Castle argues that new evidence was not needed because (1) the record included evidence of when the Long Trusts received joint interest billings, and (2) even without such evidence, the trial court had a duty to rule that Castle failed to carry its burden of proving prejudgment interest on the existing record. The Long Trusts argue that, although evidence existed that Castle was entitled to prejudgment interest, the remand required reopening the record for evidence of when the Long Trusts received the billings. We agree with the Long Trusts and hold that the trial court did not abuse its discretion in concluding that it needed additional evidence.

Castle claimed in the trial court that the existing record could substantiate when the Long Trusts received certain joint interest billings because the record included a letter from Castle to the Long Trusts that purportedly enclosed joint interest billings. But the letter Castle filed with the trial court failed to include the allegedly enclosed joint interest billings, and Castle does not argue that any other evidence in the record establishes when the Long Trusts received the billings. Thus, we cannot agree with Castle that the existing record offered sufficient evidence of when the Long Trusts received the joint interest billings or that the trial court's decision to reopen the record abused its discretion.

Neither do we agree with Castle that the trial court had a duty to deny it recovery of prejudgment interest on the existing record. Castle relies on Texas Rule of Civil Procedure 270, which provides that a court may permit additional evidence to be offered at any time when it clearly appears necessary to the due administration of justice, except that "in a jury case no evidence on a controversial matter shall be received after the verdict of the jury." TEX. R. CIV. P. 270. But, Rule 270 is not designed to prohibit the trial court from reopening the record when a court of appeals

reverses and remands for further proceedings. The ability to remand a portion of a claim is instead governed by Rule of Appellate Procedure 44.1, and Castle has not challenged the court of appeals' decision to remand only the issue of prejudgment interest rather than the entirety of its claim. TEX. R. APP. P. 44.1(b). Moreover, the record in 2001 included some evidence that Castle was entitled to prejudgment interest because the Long Trusts had not paid certain amounts owed on joint interest billings by the date of the original judgment. But this was not evidence as to the specific amount of prejudgment interest the Long Trusts owed under the joint operating agreement. Because evidence existed that the Long Trusts owed prejudgment interest, the court of appeals remanded for a recalculation. *See Glover v. Tex. Gen. Indem. Co.*, 619 S.W.2d 400, 402 (Tex. 1981) (providing that the court of appeals must ordinarily remand for a new trial when, despite some evidence, the evidence is factually insufficient); *see also City of Laredo v. Montano*, 414 S.W.3d 731, 737 (Tex. 2013) (remanding for recalculation of attorney's fees when evidence of work performed existed but was insufficient to support the amount awarded in the judgment). And Castle does not argue here that the court of appeals was required to render judgment that Castle take nothing on its prejudgment interest issue rather than remanding it. Accordingly, we disagree with Castle that the trial court had a duty to deny its claim for prejudgment interest based upon the existing record, and the trial court did not abuse its discretion in determining that new evidence was required to properly calculate prejudgment interest.

Neither waiver nor severance affect our conclusion. After the trial court required additional evidence on Castle's prejudgment interest claim, Castle waived the claim. But this waiver of prejudgment interest does not affect the date on which postjudgment interest accrues. Because the

trial court did not possess a sufficient record on which to render a correct judgment on its claims in 2001, Castle is not entitled to postjudgment interest from the 2001 judgment. In 2009, Castle amended its pleadings to, for the first time, yield a sufficient record for the trial court to render a correct judgment. Castle is therefore entitled to postjudgment interest from the 2009 judgment.

Finally, the issue of severance does not affect our analysis. The court of appeals did not sever the portion of Castle's claim it affirmed from the portion it remanded—as we did in *Danziger*. The court of appeals was familiar with severance, a procedure it implemented in severing the Long Trusts' claim from Castle's counterclaim in the first appeal. 134 S.W.3d at 288–89. And Castle does not claim here that the court of appeals erred by not severing the prejudgment interest issue from the remainder of its claim. We express no opinion whether the court of appeals could have severed the prejudgment interest portion of Castle's counterclaim from the remainder of the claim.

III. Conclusion

In sum, under the Finance Code and our rules of procedure, postjudgment interest accrues from the final judgment date unless the appellate court can or does render the judgment the trial court should have rendered. If the trial court determines that it must reopen the record on remand based upon the record and pleadings as they existed at the time of the remand, postjudgment interest will accrue from the subsequent judgment. But if the court of appeals can or does render the judgment the trial court should have rendered, postjudgment interest accrues from the original, erroneous trial court judgment.

Here, the court of appeals remanded for the trial court to assess prejudgment interest based upon the date the Long Trusts received joint interest billings. The trial court determined it required

additional evidence to decide that issue. Because there was insufficient evidence in the record establishing when the Long Trusts received the billings and because the trial court had no duty to deny Castle's request for prejudgment interest on the existing record, we find no basis to conclude that the trial court's ruling to reopen the record was an abuse of discretion. Accordingly, postjudgment interest must accrue from the trial court's final judgment in 2009. We reverse the court of appeals' judgment and remand for the trial court to render judgment for Castle, with postjudgment interest to accrue in accordance with this opinion.

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Eva M. Guzman
Justice

OPINION DELIVERED: March 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0213

COINMACH CORP. F/K/A SOLON AUTOMATED SERVICES, INC., PETITIONER,

v.

ASPENWOOD APARTMENT CORP., RESPONDENT

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

Argued February 27, 2013

JUSTICE BOYD delivered the opinion of the Court.

JUSTICE GUZMAN filed a concurring opinion, joined by JUSTICE DEVINE and JUSTICE BROWN.

We have previously explained that a tenant "who remains in possession of the premises after termination of the lease occupies 'wrongfully' and is said to have a tenancy at sufferance." *Bockelmann v. Marynick*, 788 S.W.2d 569, 571 (Tex. 1990). This case involves a commercial tenant that remained in possession for six years after it lost its lease when the property was sold through foreclosure. After arguing to the contrary—at times successfully—for over ten years, the tenant ultimately conceded that the foreclosure terminated the lease and, because the new owner immediately and continually insisted that the tenant vacate the premises, the tenant became a tenant at sufferance. We must decide whether the tenant can be liable for breach of the terminated lease, for trespass and other torts, or for violations of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), and whether the property owner can recover attorney's fees under the Texas

Uniform Declaratory Judgments Act (UDJA). The trial court entered summary judgment for the tenant on all of the owner's claims, and the court of appeals reversed and remanded in part. Agreeing with the court of appeals, we hold that (1) a tenant at sufferance cannot be liable for breach of the previously-terminated lease agreement; (2) a tenant at sufferance is a trespasser and can be liable in tort (although the extent of liability depends on the nature of the trespass), including, in this case, tortious interference with prospective business relations; and (3) the tenant in this case cannot be liable under the DTPA because the property owner was not a consumer. Disagreeing with the court of appeals, we hold that (4) the property owner in this case cannot recover under the UDJA. We therefore affirm the court of appeals' judgment in part, reverse in part, render judgment for the tenant on the owner's claim for declaratory relief, and remand the case to the trial court for further proceedings.

I.
BACKGROUND

Coinmach Corp. installs and maintains coin-operated laundry machines in apartment complexes. Rather than lease its equipment to property owners, it leases laundry rooms from the owners and installs and operates its own machines in those rooms. In 1980, Coinmach entered into a ten-year lease of "the laundry room(s)" at the Garden View Apartments in Harris County, Texas. The lease was expressly "subordinate to any mortgage or deed of trust on the premises." In 1989, the parties extended the lease term until 1999. In 1994, the owner's lender foreclosed on its deed of trust. The individual who bought the complex at the foreclosure sale immediately deeded it to

a company he owned, and a few months later that company sold the complex to Aspenwood Apartment Corp.

Aspenwood immediately gave Coinmach written notice to vacate the laundry rooms, asserting that the foreclosure sale had terminated the lease and that Coinmach had failed to maintain the equipment in an adequate and safe condition. When Coinmach refused to vacate, Aspenwood removed Coinmach's equipment, began to remodel one of the laundry rooms, and filed a forcible entry and detainer (FED) action to evict Coinmach from the premises. Coinmach, in turn, obtained a writ of reentry from the justice court,[1] and refused to vacate the premises.

Two years later,[2] Aspenwood sent Coinmach another notice to vacate and filed a second FED action. This time, the justice court ordered Coinmach to vacate the property, but Coinmach appealed for a de novo trial and the county court at law reversed. Aspenwood appealed that judgment to the court of appeals, but that court ultimately dismissed the appeal for want of jurisdiction.[3] By then, the lease's 1999 termination date had passed, but Coinmach still refused to vacate. After Aspenwood contracted with a different laundry company and that company set up operations in a

[1] Aspenwood asserts that Coinmach obtained this writ ex parte based on a sworn affidavit that failed to disclose that the lease was expressly subordinate to a deed of trust that had been foreclosed, and that falsely stated that Coinmach's equipment was perfectly functional when in fact it was in bad condition and presented a danger to the complex's residents. We need not and do not consider these factual assertions to resolve this appeal.

[2] The record does not explain Aspenwood's delay in sending additional notices to vacate, or in filing this lawsuit. Again, we need not address these factual issues, other than to note the parties' agreement that Aspenwood continually objected, and never consented, to Coinmach's possession of the premises.

[3] See *Aspenwood Apartment Corp. v. Solon Automated Servs.*, No. 01-98-00516-CV, 1999 WL 1063435 (Tex. App.—Houston [1st Dist.] Nov. 24, 1999, no pet.) (not designated for publication); *see also* Acts of May 27, 1997, 75th Leg., ch. 1205 1997 Tex. Gen. Laws 4628-29 (amended 2011) (current version at TEX. PROP. CODE § 24.007(a)) (providing that final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises are used only for residential purposes).

laundry room that Coinmach had previously abandoned, Coinmach obtained another writ of reentry and forced that company to leave the premises, based this time on sworn testimony that the lease had automatically renewed for another nineteen-year term. Coinmach thus continually remained in possession of the premises, while Aspenwood continued to send additional notices to vacate, complaining of Coinmach's repeated failures to maintain the condition of its equipment, pay rent, and provide an accounting of its receipts. Aspenwood maintains it never cashed any checks it received from Coinmach.

Meanwhile, Aspenwood filed the present suit in district court in 1998, shortly after it filed the second FED action. Aspenwood originally asserted claims against Coinmach for trespass to try title, common law trespass, breach of the lease agreement, DTPA violations, statutory and common law fraud, tortious interference with prospective business relations, and a declaratory judgment that Coinmach had no right to possession and no leasehold interest in the property. Coinmach filed counterclaims for breach of the lease agreement, breach of warranties of possession, quiet enjoyment, fitness for a particular purpose, and suitability, defamation, tortious interference, bad faith, and harassment. The trial court first ruled as a matter of law that the 1994 foreclosure sale had terminated Coinmach's lease agreement. It then submitted the case to a jury, which found in favor of Aspenwood and awarded approximately $1.5 million, consisting of actual damages, DTPA treble damages, exemplary damages, attorney's fees, and prejudgment interest. In the spring of 2000, after the trial court entered judgment for Aspenwood on the jury's verdict, Coinmach vacated the premises.

Coinmach also filed a motion for new trial, however, and the trial court granted that motion. The parties subsequently amended their pleadings. Aspenwood reasserted all of its prior claims except for statutory and common law fraud, while Coinmach continued to deny liability but dropped all of its counterclaims. In May 2007, the trial court entered a partial summary judgment, ruling that the foreclosure sale terminated the lease and that Coinmach became a tenant at sufferance. Based on these holdings, the court struck all of Aspenwood's breach of contract claims. Coinmach then filed motions for summary judgment and Rule 166 motions asking the court to rule, as a matter of law, that a tenant at sufferance cannot be a trespasser; that Aspenwood could not seek declaratory relief and attorney's fees under the UDJA; that Aspenwood's trespass, trespass to try title, DTPA, and tortious interference claims were either moot or procedurally improper; and that, since Coinmach was not a trespasser, it could not be liable for such tort-based claims. In June 2008, the trial court issued orders granting Coinmach's motions, ruling that Aspenwood was not a consumer under the DTPA and that Coinmach had a possessory interest in the property from the time of foreclosure until it vacated the premises in 2000, and concluding that the effect of its legal rulings was to preclude Aspenwood's remaining claims as a matter of law. The court thus entered judgment that Aspenwood take nothing on its claims.

The court of appeals affirmed in part, reversed in part, and remanded. The court affirmed the dismissal of Aspenwood's breach of contract claims, holding that, because Aspenwood never consented to Coinmach's remaining on the premises, no actual or implied contractual relationship existed between the parties. 349 S.W.3d at 634. But the court reversed and remanded Aspenwood's claims for trespass, trespass to try title, tortious interference, and declaratory judgment, concluding

that Coinmach, as a tenant at sufferance, had no possessory interest in the property. *Id.* at 638–39. Finally, the court affirmed the dismissal of Aspenwood's DTPA claims, agreeing with the trial court that Aspenwood was not a consumer. *Id.* at 640. We granted both parties' petitions for review.

II.
DISCUSSION

Generally, a valid foreclosure of an owner's interest in property terminates any agreement through which the owner has leased the property to another. *B.F. Avery & Sons' Plow Co. v. Kennerly*, 12 S.W.2d 140, 141 (Tex. Comm'n App. 1929, judgm't adopted); *see also Twelve Oaks Tower I, Ltd. v. Premier Allergy, Inc.*, 938 S.W.2d 102, 108–09 (Tex. App.—Houston [14th Dist.] 1996, no writ); *ICM Mortg. Corp. v. Jacob*, 902 S.W.2d 527, 530–31 (Tex. App.—El Paso 1994, writ denied). This is particularly true when, as here, the lease agreement is expressly subordinate to a mortgage or deed of trust affecting the leased premises. Although Coinmach argued to the contrary in support of its effort to avoid eviction, even it now concedes that, "when an owner defaults on a mortgage and the property is sold at foreclosure, the purchaser takes the property free of any leases subordinate to the deed of trust being foreclosed upon." Agreeing that the 1994 foreclosure terminated Coinmach's lease of the laundry rooms, we address the effect of the termination on the parties' legal rights.

A. Tenant at Sufferance

The parties now agree that, upon termination of the lease, Coinmach became a "tenant at sufferance." Despite their agreement on this point, we must briefly address the nature of a tenancy at sufferance, as a foundation for our discussion of the points on which the parties do not agree. A

tenant who continues to occupy leased premises after expiration or termination of its lease is a "holdover tenant." *See Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 908 (Tex. 2007). The status and rights of a holdover tenant, however, differ depending on whether the tenant becomes a "tenant at will" or a "tenant at sufferance." *See, e.g.*, TEX. PROP. CODE § 24.002(a)(2) (providing that a person commits a forcible detainer if the person "is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease").

A tenant at will is a holdover tenant who "holds possession with the landlord's consent but without fixed terms (as to duration or rent)." BLACK'S LAW DICTIONARY 1604 (9th ed. 2009). Because tenants at will remain in possession with their landlords' consent, their possession is lawful, but it is for no fixed term, and the landlords can put them out of possession at any time. *Robb v. San Antonio St. Ry.*, 18 S.W. 707, 708 (Tex. 1891); *see also ICM Mortg.*, 902 S.W.2d at 530. By contrast, a tenant at sufferance is "[a] tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired." BLACK'S LAW DICTIONARY 1605 (9th ed. 2009); *see also Bockelmann*, 788 S.W.2d at 571 ("A tenant who remains in possession of the premises after termination of the lease occupies 'wrongfully' and is said to have a tenancy at sufferance."). The defining characteristic of a tenancy at sufferance is the lack of the landlord's consent to the tenant's continued possession of the premises. *See, e.g.*, *ICM Mortg.*, 902 S.W.2d at 530. With the owner's consent, the holdover tenant becomes a tenant at will; without it, a tenant at sufferance.

A lease agreement may provide that its terms continue to apply to a holdover tenant. *See Bockelmann*, 788 S.W.2d at 571–72. But if, as here, the lease does not address the issue, and if the

parties do not enter into a new lease agreement, the parties' conduct will determine whether the holdover tenant becomes a tenant at will or a tenant at sufferance. *See, e.g.*, *Mount Calvary Missionary Baptist Church v. Morse St. Baptist Church*, 2005 WL 1654752, at *7 (Tex. App.—Fort Worth 2005, no pet.) (mem. op.). "Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser"—that is, a tenant at sufferance—"or as a tenant holding under the terms of the original lease"—that is, a tenant at will. *Bockelmann*, 788 S.W.2d at 571; *see also Howeth v. Anderson*, 25 Tex. 557, 572 (1860) (holding that a landlord may treat a holdover tenant as either a trespasser or a tenant at will). Thus, an implied agreement to create a new lease using the terms of the prior lease may arise if both parties engage in conduct that manifests such intent. *See, e.g.*, *ICM Mortg.*, 902 S.W.2d at 532–33; *Twelve Oaks Tower*, 938 S.W.2d at 108–10. If the tenant remains in possession and continues to pay rent, and the landlord, having knowledge of the tenant's possession, continues to accept the rent without objection to the continued possession, the tenant is a tenant at will, and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary. *See, e.g.*, *Carrasco v. Stewart*, 224 S.W.3d 363, 368 (Tex. App.—El Paso 2006, no pet.); *Barragan v. Munoz*, 525 S.W.2d 559, 561–62 (Tex. Civ. App.—El Paso 1975, no writ). The mere fact that the tenant remains in possession, however, is not sufficient to create a tenancy at will; unless the parties' conduct demonstrates the landlord's consent to the continued possession, the tenant is a tenant at sufferance. *See ICM Mortg.*, 902 S.W.2d at 533–34.

Aspenwood's conduct demonstrated that it never consented to Coinmach's continued possession of the property. Immediately after purchasing the complex, Aspenwood gave Coinmach

written notice to vacate the laundry rooms. Aspenwood maintains that it never cashed any checks it received from Coinmach, and Coinmach has not disputed that fact on appeal. Aspenwood promptly filed an FED action, and later filed another—along with the present trespass to try title suit—seeking to establish that Coinmach had no right to possession or legal interest in the property. We agree with the parties that, as to Aspenwood, Coinmach has always been a tenant at sufferance.

The parties do not agree, however, on the implications of Coinmach's status as a tenant at sufferance. Aspenwood contends that Coinmach is liable both for breach of the lease agreement and for tortious conduct, while Coinmach argues it is liable for neither. We now turn to these questions on which the parties disagree.

B. Breach of Contract

The trial court and the court of appeals both held that, because the foreclosure terminated Coinmach's prior lease agreement, the lease did not contain a holdover provision, the parties did not expressly or impliedly form a new agreement, Aspenwood did not consent to Coinmach's continued possession, Coinmach became a tenant at sufferance, and no agreement between Aspenwood and Coinmach ever existed, Coinmach could not be liable for breach of any lease. We agree.

Aspenwood argues that, even though Coinmach was a tenant at sufferance, it still remained obligated under the terms of the prior lease and liable for its breaches of those terms. In support, however, Aspenwood relies on cases that address holdover tenants in general, not tenants at sufferance specifically. Aspenwood relies, for example, on *Barragan*, in which the El Paso Court of Appeals said "a holdover tenant continues to be bound by the covenants [that] were binding upon him during the term, in the absence of evidence to the contrary." 525 S.W.2d at 561. But in

Barragan, the tenant held over for nearly fifteen years after the lease agreement expired, and both parties operated as if the lease were continuously in effect. *Id.* The tenant paid rent as the lease required, and the landlord continuously accepted it. *Id.* The holdover tenant was thus a tenant at will, not a tenant at sufferance. *See id.* at 562.

Aspenwood contends that it is the tenant's continued possession, and not the payment or acceptance of rent, that determines the existence and nature of a holdover tenancy. The cases on which Aspenwood relies, however, do not support its contention. Instead, they confirm that the parties' conduct beyond the tenant's mere possession, or the terms of the parties' original agreement, may give rise to a tenancy at will. *See, e.g.*, *Carrasco*, 224 S.W.3d at 368 (holding that late-fee provision of expired lease applied to holdover tenant because tenant's testimony that the parties agreed it would not apply "is directly contrary to his course of conduct[,] which included paying a portion of the late fees assessed by [the landlord] in 2002 and 2003"); *Clark v. Whitehead*, 874 S.W.2d 282, 283–84 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding that "the holdover tenancy is an extension of the original lease term according to the provisions of the lease agreement," because the lease agreement "provided, among other things, . . . that in the event [tenant] held over after the term of the lease, the holding over would be on a month-to-month basis at a rental rate of $1500 a month").

In short, the cases on which Aspenwood relies involve holdover tenants who became tenants at will based on a holdover provision in the prior lease or on the parties' agreements or conduct after termination. Here, by contrast, the parties reached no agreements after the lease terminated. Aspenwood did not enter into a lease agreement with Coinmach and did not expressly or by its

conduct consent to Coinmach's continued presence.[4] Coinmach thus became a tenant at sufferance, and there existed no express or implied contract or agreement between the parties. Coinmach cannot be liable for breaching a contract that did not exist. We thus affirm the part of the court of appeals' judgment affirming the trial court's dismissal of Aspenwood's breach of contract claims.

C. Trespass & Trespass to Try Title

Coinmach contends that, even though it was a tenant at sufferance, it was not a "trespasser" and cannot be liable on any tort-based theories. The trial court agreed with Coinmach, finding that Coinmach had a limited right of possession during the holdover period. The court of appeals disagreed, based on our prior decisions that characterize a tenant at sufferance as a "trespasser" who occupies the premises "wrongfully." *See Bockelmann*, 788 S.W.2d at 571 ("A tenant who remains in possession of the premises after termination of the lease occupies 'wrongfully' and is said to have a tenancy at sufferance."); *Howeth*, 25 Tex. at 572 (explaining that a landlord may treat a holdover tenant as either a "trespasser" or as a tenant at will); *see also Carrasco*, 224 S.W.3d at 368 (stating that a tenant at sufferance occupies the premises "wrongfully").

Coinmach contends, however, that the Texas Legislature has relieved a tenant at sufferance of any trespasser status by providing a "grace period" during which the tenant is permitted to remain in possession pending statutory eviction proceedings. According to Coinmach, a tenant at sufferance

[4] Aspenwood further argues that the conduct of the justice court created a tenancy at will because the court "judicially compelled" Aspenwood to become a party to Coinmach's lease by granting the writ of reentry in the first FED action. But it is the landlord's intent, determined by its conduct, that determines the nature of the tenancy. *See ICM Mortg.*, 902 S.W.2d at 530; *Bockelmann*, 788 S.W.2d at 571; *Robb*, 18 S.W. at 708; *Howeth*, 25 Tex. at 572. Even though the justice court permitted Coinmach to remain in possession, Aspenwood never consented to Coinmach's possession and instead continued to insist that Coinmach vacate the property. Thus, as both parties agree, Coinmach was at all times a tenant at sufferance as to Aspenwood, despite the justice court's decision.

does not become a trespasser unless and until the tenant refuses to leave after the landlord has finally prevailed in the statutory eviction process. Coinmach is correct that the Texas Property Code provides specific procedures for adjudicating legal and possessory interests in real property. Specifically, chapter 22 governs trespass to try title suits to determine "title to lands, tenements, or other real property," and chapter 24 governs FED actions to determine a party's right to possession of real property. TEX. PROP. CODE §§ 22.001–.045 (Trespass to Try Title), 24.001–.011 (Forcible Entry and Detainer). We agree that these procedures governed Aspenwood's efforts to obtain possession of the property. As the Fourteenth Court of Appeals has explained, a foreclosure sale "transfers title from the debtor to another party, but it does not put the new owner in possession; it gives him a right to possession . . . . To remove a tenant by sufferance, the new owner must file a forcible detainer suit." *Lighthouse Church of Cloverleaf v. Texas Bank*, 889 S.W.2d 595, 603 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Coinmach notes that chapter 24 requires a landlord to provide a commercial tenant at least three days' written notice before filing an FED action, and to provide a residential tenant who has paid rent at least thirty days' written notice. *See* TEX. PROP. CODE § 24.005(b). In Coinmach's view, these "grace periods" grant to a tenant at sufferance a possessory estate that is "lesser" than one that a tenant at will would have, yet superior to that of the property owner. Because of this, Coinmach contends, the owner cannot engage in self-help to remove the tenant, but instead must pursue eviction through the statutory process. If the owner attempts to evict the tenant without complying with the statutory eviction process, Coinmach argues, the owner interferes with the tenant's right of possession, and thus the owner becomes the one liable for trespass. *See Russell v.*

Am. Real Est. Corp., 89 S.W.3d 204, 208–09 (Tex. App.—Corpus Christi 2002, no pet.) (holding that owner's property manager who interfered with tenant's possession during statute's 30-day notice period could be liable for trespass and conversion). The landlord is protected, however, because the tenant has only a "lesser" possessory estate, which cannot be assigned and can be terminated through a suit for forcible detainer. *See ICM Mortg.*, 902 S.W.2d at 530. Thus, Coinmach contends, when courts have said that tenants at sufferance occupy the premises "wrongfully," they meant only "without consent," not tortiously; and when they have called such tenants "trespassers," they meant only that the landlords can evict them, not that they can be liable for trespass. Because Coinmach only retained possession pursuant to its victories in the FED actions in the justice courts, and then promptly gave up possession when the district court entered judgment on the jury verdict requiring it to do so, Coinmach contends it cannot be liable for trespass.

Aspenwood, by contrast, points out that an FED action is not the exclusive means to obtain possession of one's property, but is in addition to any other available remedy. *Scott v. Hewitt*, 90 S.W.2d 816, 819 (Tex. 1936). Here, Aspenwood contends, an action for trespass to try title and for trespass damages was the proper means to resolve both Coinmach's claim to title under the lease and its rival claim to possession. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 755 (Tex. 2003); *Yoast v. Yoast*, 649 S.W.2d 289, 292 (Tex. 1983); *Hill v. Preston*, 34 S.W.2d 780, 787 (Tex. 1931). A judgment in an FED action is not res judicata against a related claim for trespass to try title,[5] and a party who loses possession in the FED action may still sue in district court to obtain adjudication

[5] *See* TEX. CIV. PRAC. & REM. CODE § 31.004(a), (c) (providing that a determination of fact or law in a proceeding in a lower trial court, including a justice of the peace court, is not res judicata or basis for estoppel by judgment in a district court proceeding).

of its title and its right to regain possession of the property. *See Villalon v. Bank One*, 176 S.W.3d 66, 70–71 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see also Reese v. Reese*, 672 S.W.2d 1, 2 (Tex. Civ. App.—Waco 1984, no writ). By retaining possession in reliance on the justice court's erroneous FED judgments, Aspenwood contends, Coinmach accepted the risk that it ultimately would lose the title claim and be held liable as a trespasser.

We agree that Coinmach can be held liable for trespass, but for slightly different reasons. As we have explained, under the common law a tenant at sufferance has no legal title or right to possession, and is thus a "trespasser" who possesses the property "wrongfully." The question that Coinmach raises is whether the Legislature has altered the common law through the statute governing FED actions. The Legislature has itself answered that question, expressly providing in section 24.008 that a suit for eviction under the FED statute "does not bar a suit for trespass, damages, waste, rent, or mesne profits." TEX. PROP. CODE § 24.008. We held long ago that the remedies against a holdover tenant include a forcible detainer action for possession and an action for recovery of damages, including trespass damages. *Holcombe v. Lorino*, 79 S.W.2d 307, 309 (Tex. 1935). In section 24.008, the Legislature made it clear that an FED action does not bar a suit to obtain these remedies.

"The only issue in a forcible detainer action is the right to actual possession of the premises." *Marshall v. Hous. Auth. of the City of San Antonio*, 198 S.W.3d 782, 785 (Tex. 2006). Such an action "is intended to be a speedy, simple, and inexpensive means to obtain immediate possession of property." *Id*. at 787. The judgment in a forcible detainer action is a final determination only "of the right to immediate possession;" it is not "a final determination of whether the eviction is

wrongful" or whether the tenant's continued possession was a trespass. *Id.*; *see also House v. Reavis*, 35 S.W. 1063, 1067 (Tex. 1896) (holding that FED action did not affect "merits of the title" and was "no bar to the recovery of the plaintiffs" in subsequent action for title and damages); *Johnson v. Highland Hills Drive Apartments*, 552 S.W.2d 493, 494 (Tex. Civ. App.—Dallas 1977, no writ) (holding that predecessor to section 24.008 "prevents a judgment of possession in a forcible entry and detainer action from barring a subsequent action for damages for wrongful eviction").[6]

We hold that chapter 24's procedural protections do not grant to tenants at sufferance any legal interests in or possessory rights to the property at issue; rather, the statute provides procedural protections that apply once the tenant has lost, or allegedly lost, all legal interests and possessory rights. Although the landlord must comply with the statute's procedural requirements to evict the tenant at sufferance, eviction is allowed only if the tenant has no remaining legal or possessory interest, which makes the tenant a tenant at sufferance. The FED action and judgment do not bar a separate action for trespass or for wrongful eviction, and if it is determined in that action that the tenant lacked any legal interest or right of possession, the tenant at sufferance is a trespasser. Nothing in the statute indicates that the procedural protections grant legal or possessory rights to a tenant at sufferance. To the contrary, the statute states that the "person entitled to possession of the property" is not the tenant but the person seeking the eviction, that is, the one who "must comply

[6] As we have noted, Coinmach obtained writs of reentry granting Coinmach possession of the property. A writ of reentry, however, merely "entitles the tenant to immediate and temporary possession of the premises, pending a final hearing on the tenant's sworn complaint for reentry," and "does not affect the rights of a landlord or tenant in a forcible detainer or forcible entry and detainer action." TEX. PROP. CODE § 92.009(c), (m); *see also id.* § 93.003(c), (m) (same for commercial tenants following an unlawful lockout). Like the judgment in a forcible detainer action, a writ of reentry does not determine whether the eviction was wrongful or whether the tenant's possession of the property constituted a trespass.

with the [procedural] requirements." TEX. PROP. CODE § 24.002(b). And, even more directly, the statute expressly provides that a suit for eviction under the FED statute "does not bar a suit for trespass." *Id.* § 24.008. Thus, despite the so-called "grace periods" and chapter 24's other procedural protections, the tenant at sufferance remains a trespasser on the property.

Coinmach and amicus curiae Texas Housing Justice League argue that this holding exposes innocent, low-income tenants to an unbearable risk of excessive liability in tort. We disagree. "The commission of a trespass does not necessarily mean the actor will be liable for damages." *Zapata v. Ford Motor Credit Co*., 615 S.W.2d 198, 201 (Tex. 1981) (addressing trespass to chattels, and citing *Lyle v. Waddle*, 188 S.W.2d 770 (Tex. 1945); Restatement (Second) of Torts § 218 (1965)). Although we have rarely addressed trespass damages in detail, Texas courts of appeals have provided helpful explanations of the common law principles that apply. Summarizing these principles, the Waco Court of Appeals has explained that a trespasser's liability for damages depends on the nature of the trespass and the nature of the harm:

> Every unauthorized entry upon land is a trespass even if no damage is done. However, to determine what damages, if any, are recoverable for a trespass, the type of conduct or nature of an activity that causes the entry must be identified. While a trespass is a trespass, different recoveries are available, depending on whether the trespass was committed intentionally, negligently, accidentally, or by an abnormally dangerous activity.

Watson v. Brazos Elec. Power Coop., 918 S.W.2d 639, 645 (Tex. App.—Waco 1996, writ denied) (citation omitted) (citing Rest. (Second) of Torts §§ 158, 165, 166 (1965)).

Thus, "one who invades or trespasses upon the property rights of another, while acting in the good faith and honest belief that he had the lawful and legal right to do so is regarded as an innocent

trespasser and liable only for the actual damages sustained." *Wilson v. Texas Co.*, 237 S.W.2d 649, 651 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.). In calculating the actual damages sustained, as the Dallas Court of Appeals has stated, "the measure of damages in a trespass case is the sum necessary to make the victim whole, no more, no less." *Meridien Hotels, Inc. v. LHO Financing P'ship 1, L.P.*, 255 S.W.3d 807, 821 (Tex. App.—Dallas 2008, no pet.). When the trespass causes a temporary injury, the "amount necessary to place the plaintiff in the position it would have been in but for the trespass" generally includes the cost to repair any damage to the property, loss of use of the property, and loss of any expected profits from the use of the property. *Id.; see also Vaughn v. Drennon*, 372 S.W.3d 726, 738 (Tex. App.—Tyler 2012, no pet.) (same); *Williams v. Garnett*, 608 S.W.2d 794, 797 (Tex. Civ. App.—Waco 1980, no writ) ("Loss of rentals is an appropriate measure of damages for the temporary loss of use of land occasioned by a trespass."); *Mangham v. Hall*, 564 S.W.2d 465, 468 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (holding that business owner can recover lost net profits).

Although we do not necessarily approve of the entirety of each of these decisions, taken together they provide a reliable summary of the damages recoverable against trespassers in general. Consistent with these decisions, our rules recognize that damages available in a trespass to try title suit include lost rents and profits, damages for use and occupation of the premises, and damages for any special injury to the property. *See* TEX. R. CIV. P. 783(f) (recognizing recoverability of "rents and profits" in trespass to try title actions); *id.* 805 ("use and occupation" and "special injury to the property"); *see also Musquiz v. Marroquin*, 124 S.W.3d 906, 912 (Tex. App.—Corpus Christi 2004, pet. denied). Similarly, Texas courts have recognized that a tenant at sufferance is generally liable

only for the reasonable amount of rent as damages for the trespass. *See Downwind Aviation, Inc. v. Orange Cnty.*, 760 S.W.2d 336, 340 (Tex. App.—Beaumont 1988, writ denied) (landlord's proper measure of damages is the reasonable rent for the time the tenant held over); *see also Standard Container Corp. v. Dragon Realty*, 683 S.W.2d 45, 48 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (same); *Kaplan v. Floeter*, 657 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1983, no writ) (same). In addition to the reasonable rents, a tenant at sufferance, like any other trespasser, could also be liable for any special injury to the property. But the fact that tenants at sufferance are trespassers under the law does not automatically expose innocent tenants, who remain in possession under a good faith belief that they are entitled to do so, to liability for additional damages in tort. Such tenants will be liable for reasonable rent (the landlord's loss of use), the cost to repair any damage that the tenant caused to the property, and—in a proper case—the landlord's lost profits, but nothing more.[7]

By contrast, tenants who knowingly and intentionally trespass, or who do so maliciously, may be liable for additional forms of damages. For example, Texas courts have required a showing of deliberate and willful trespass and actual property damage before awarding damages for emotional distress or mental anguish, thereby limiting the potential for such "excessive liability." *Pargas of Longview, Inc. v. Jones*, 573 S.W.2d 571, 574 (Tex. Civ. App.—Texarkana 1978, no writ)

[7] Typically, the landlord could not recover both reasonable rent and lost profits because "recovery . . . is limited to the amount necessary to place the plaintiff in the position it would have been in but for the trespass." *Meridien*, 255 S.W.3d at 821. Lost profits are measured by deducting operating expenses from gross earnings, resulting in net profits. *See, e.g., Mangham*, 564 S.W.2d at 468–69. Reasonable rent—i.e., the value of the use of the property—is calculated as part of the gross earnings, and thus is already included in the net profit calculation. To allow the plaintiff to recover both reasonable rent and lost profits would, in most cases, constitute a double recovery. In a residential lease—where there is no business or for-profit endeavor—lost profits would constitute the profits normally associated with reasonable rent.

("[A]ctual damages resulting from mental distress may be recovered, as a separate and independent element, *when caused by a deliberate and willful trespass* in which *actual damage* to plaintiff's property is sustained." (emphases added)); *see also Michels v. Crouch*, 150 S.W.2d 111, 112–13 (Tex. Civ. App.—Eastland 1941, writ dism'd judgm't cor.); *Cartwright v. Canode*, 171 S.W. 696, 697 (Tex. 1914). Similarly, exemplary damages are recoverable only when "the harm . . . results from: (1) fraud; (2) malice; or (3) gross negligence." TEX. CIV. PRAC. & REM. CODE § 41.003(a). So a defendant will not be liable for exemplary damages when the trespasser acted "in good faith," "without wrongful intention," or "in the belief that he was exercising his rights." *Wilen v. Falkenstien*, 191 S.W.3d 791, 800 (Tex. App.—Fort Worth 2006, pet. denied) ("Exemplary damages are recoverable for the tort of trespass if the trespass was committed maliciously."); *see also*, *e.g.*, *Pargas*, 573 S.W.2d at 574 (citing *Hood v. Adams*, 334 S.W.2d 206, 208–09 (Tex. Civ. App.—Amarillo 1960, no writ)) ("In the case of a trespass, punitive damages may be recovered if actual damage has been sustained and the trespass upon the plaintiff's property is shown to have been deliberate and intentional.").

Thus, if a new owner following foreclosure seeks to evict a tenant at sufferance in violation of the FED statute, the tenant can take advantage of the statute's procedural protections by objecting to that violation and maintain possession until the owner complies with the statute's requirements. But the tenant will generally be liable for reasonable rent for the period the tenant remains in possession, and for any additional damages the tenant may cause to the property. If the new owner complies with the FED statute's requirements and the tenant vacates as and when required, the result

is the same. Because the tenant vacates and does not contest the loss of its legal interest under the lease, title never becomes an issue, and only eviction proceedings are required.

Here, Aspenwood, as the new owner, immediately gave Coinmach notice to vacate the premises, in compliance with the statute, and Coinmach refused to vacate, claiming for over ten years that the foreclosure sale did not terminate the lease and that it still had a legal interest in the property. Coinmach's position (which it has since abandoned) required Aspenwood to resolve a title dispute, and not just sue for possession under chapter 24. Having remained in possession as a trespasser, Coinmach is liable for the reasonable rent and for any other damage it may have caused to the property. Its liability for any additional damages will depend on whether its trespass was willful, intentional, or malicious. For these reasons, we affirm the part of the court of appeals' judgment reversing the trial court's dismissal of Aspenwood's claims for trespass and trespass to try title, and we remand those claims to the trial court for further proceedings.

D. Tortious Interference

Texas law protects prospective contracts and business relations from tortious interference. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc*., 793 S.W.2d 660, 665 (Tex. 1990), *superseded on other grounds by statute as stated in Prop. Tax Assocs., Inc. v. Staffeldt*, 800 S.W.2d 349, 350 (Tex. App.—El Paso 1990, writ denied). To prevail on a claim for tortious interference with prospective business relations, the plaintiff must establish that (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or

substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. *Sturges*, 52 S.W.3d at 726 (addressing requirement of predicate tort or unlawful conduct); *Bradford v. Vento*, 48 S.W.3d 749, 757 (Tex. 2001) (holding defendant must intend to interfere); *see Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 475 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (listing elements); *see also Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 115 (Tex. App.—El Paso 1997, pet. denied) (same).

Here, the trial court granted Coinmach's motion for summary judgment on Aspenwood's tortious interference claim, finding that Coinmach did not commit any independent tort or unlawful act and, in any event, the two-year statute of limitations bars Aspenwood's claim.[8] The court of appeals reversed, holding that, because Coinmach was a trespasser that did not have any possessory interest in the property, Aspenwood raised a fact issue as to the independent tort element. As to Coinmach's limitations defense, the court of appeals held that Coinmach's ongoing trespass continually interfered with Aspenwood's ability to lease the laundry rooms to another tenant, and thus limitations was tolled under the continuing tort doctrine.

Coinmach first contends that the court of appeals erred because Coinmach's assertion of a right to remain on the property during the eviction process, without more, does not constitute an independent tort sufficient to support a tortious interference claim. As we have held, however,

[8] In her concurrence, Justice Guzman addresses the "intent to interfere" element of a tortious interference claim. While we do not necessarily disagree with her thoughts on that element, we do not address them because neither the trial court, court of appeals, or parties in this case raised or addressed any issue regarding that element of Aspenwood's claim.

Coinmach remained a trespasser from the time Aspenwood first sent a notice to vacate until Coinmach vacated the premises six years later. "Even in the absence of damages, a trespass has occurred which is important in determining the legal relations between the parties." *Zapata*, 615 S.W.2d at 201 (citing Rest. (Second) of Torts § 217, cmt. A (1965)). Here, the trespass is an independently tortious or wrongful act that could support a claim for tortious interference with prospective business relations.

Coinmach next argues that, even if remaining on the premises could support a claim for tortious interference, the two-year statute of limitations bars Aspenwood's claim. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a); *First Nat'l Bank Of Eagle Pass v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986) (holding suit for tortious interference is subject to two-year statute of limitations). Aspenwood alleged that Coinmach's tortious interference began when it refused to vacate the premises in 1994 and continued until it finally vacated in 2000. Relying on the continuing tort doctrine, Aspenwood argues that its cause of action continually accrued throughout that period, and thus Aspenwood timely filed its claim in March 1998.

We have "neither endorsed nor addressed" the continuing tort doctrine. *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 n.8 (Tex. 2005). Coinmach argues that we need not do so in this case because of the unique nature of a suit for tortious interference with prospective business relations. Specifically, Coinmach relies on courts of appeals' decisions that have refused to apply the doctrine because a plaintiff asserting tortious interference with prospective business relations must prove not only that the defendant committed an independently tortious or wrongful act, but also that the act interfered with a reasonably probable contract that would have been entered into but for

the interference. *See Richardson-Eagle*, 213 S.W.3d at 475–76; *see also Tex. Disp. Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 588 (Tex. App.—Austin 2007, pet. denied). We agree with Coinmach. Aspenwood must not only establish that Coinmach committed a trespass or other independent tort, it must also prove that Coinmach's conduct actually interfered with a reasonably probable contract. Aspenwood has neither pled nor proven a "continually available" prospective contract, so we need not consider whether the continuing tort doctrine would or should be available for this claim.

Instead, the question is whether Aspenwood has established that (or at least created a fact issue as to whether) Coinmach's refusal to vacate the premises interfered with a reasonably probable contract during the two years prior to Aspenwood's filing of this suit in March 1998. Aspenwood points to evidence that in 1999, a year after Aspenwood filed this suit, Aspenwood contracted with another company, which moved into a laundry room that Coinmach had abandoned, only to be evicted by Coinmach in July 1999. Coinmach contends that there is no evidence that Aspenwood actually entered into a contract with that company in 1999, and in any event, an alleged act of interference occurring after Aspenwood filed the claim does not retroactively save the claim from having been barred by limitations at the time it was filed. Because the trial court granted summary judgment on this claim based on its legal ruling, rather than the evidence, that court has never yet considered whether Aspenwood created a fact issue to defeat summary judgment on Coinmach's limitations defense. Having clarified the legal standards that govern this claim, we believe the trial court should consider the parties' evidentiary arguments in the first instance, in light of our legal

holdings. For this reason, we affirm the part of the court of appeals' judgment reversing and remanding Aspenwood's tortious interference claim.

E. DTPA violations

The trial court granted Coinmach's motion for summary judgment on Aspenwood's DTPA claims on the ground that Aspenwood is not a "consumer," and the court of appeals affirmed. A "consumer" under the DTPA is one who "seeks or acquires by purchase or lease, any goods or services." TEX. BUS. & COM. CODE § 17.45(4). The parties agree that a party's status as a consumer is typically a question of law for the courts to decide. *See Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 401 (Tex. App.—San Antonio 2000, no pet.).

The court of appeals held that Aspenwood is not a consumer because it did not seek or acquire goods or services from Coinmach but instead was entitled only to receive rent payments as consideration for Coinmach's occupancy of the premises. Aspenwood contends that the court of appeals erred because Coinmach's own annual reports and marketing materials proclaim that Coinmach is a "supplier of outsourced laundry-equipment *services* for multi-family housing properties," and that its customers are "landlords, property management companies, and owners of rental apartment buildings" (emphasis added). Based on these statements, Aspenwood contends that Coinmach provided Aspenwood with laundry equipment, maintenance services on that equipment, and "money-collection and accounting services." Relying on our decision in *DeWitt Cnty. Electric Coop. v. Parks*, 1 S.W.3d 96 (Tex. 1999), in which we held that an electricity co-op that received an easement interest in real property also agreed to provide electricity services to the landowner,

Aspenwood contends that Coinmach both received a leasehold interest and agreed to provide laundry and related services to its landlords.

We are not persuaded. Although Coinmach's marketing materials may have emphasized the benefits that a landlord can receive by leasing laundry rooms to Coinmach, the landlord derives these benefits from Coinmach's provision of laundry services *to the landlord's tenants*, not to the landlord itself. Under Coinmach's business model, Coinmach did not lease equipment to the landlord, nor did it service equipment that belonged to the landlord. Instead, Coinmach leased premises from the landlord, and paid rent to the landlord based on the income that it earned from the use of those premises. The use of the premises, however, was to provide laundry services to the landlords' tenants, not to the landlords themselves. While it is true that a contractual relationship can include both the granting of a property interest and an agreement to provide goods or services, in *DeWitt* the co-op provided services *to the landowner*. Here, Coinmach provided laundry services to Aspenwood's other tenants.

We agree with Coinmach. A party is not a consumer when it merely arranges for a service to be provided to its customers, even if the party indirectly benefits from the provision of that service. *See Kennedy v. Sale*, 689 S.W.2d 890, 893 (Tex. 1985) ("A plaintiff establishes his standing as a consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant." (quoting *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983)); *see also Favor v. Hochheim Prairie Farm Mut. Ins. Ass'n*, 939 S.W.2d 180, 182 (Tex. App.—San Antonio 1996, writ denied); *Shelton Ins. Agency v. St. Paul Mercury Ins. Co.*, 848 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1993, writ denied). A barber shop that leases space in a shopping mall

may indirectly provide benefits to the mall's owner by drawing more customers to the mall, but it provides its barber services to its own customers, not to the mall's owner. The same could be said of a shoeshine stand in an airport, a grocery store in a strip center, or any number of other lease arrangements through which the landlord benefits from the tenant's provision of goods or services to others. Because the benefits Aspenwood received from Coinmach's provision of services at the complex were at best indirect, we hold that those services were insufficient to make Aspenwood a consumer under the DTPA. We thus affirm that part of the court of appeals' judgment affirming the trial court's summary judgment in favor of Coinmach on Aspenwood's DTPA claims.

F. Declaratory Relief

Finally, we turn to Aspenwood's claim under the Texas Uniform Declaratory Judgments Act. TEX. CIV. PRAC. & REM. CODE §§ 37.001–.011. The trial court granted summary judgment for Coinmach on this claim, and the court of appeals reversed. Coinmach contends that Aspenwood's claim for declaratory relief is redundant of its claim for trespass to try title, and that Aspenwood included this claim merely as a means to seek an award of attorney's fees under section 37.009.

As Aspenwood notes, the UDJA permits parties to obtain judicial declarations of their rights, status, and legal relations under contracts and other written agreements. *Id.* § 37.004(a). In this case, however, Aspenwood sought a determination of its legal interests and possessory rights to the rooms that Coinmach occupied, which is the very relief that the trespass-to-try-title statute governs. We have previously held that, when "the trespass-to-try-title statute governs the parties' substantive claims . . . , [the plaintiff] may not proceed alternatively under the Declaratory Judgments Act to recover their attorney's fees." *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004). In so

holding, we noted that the Legislature has provided the trespass-to-try-title statute as "*the* method of determining title to . . . real property," and the Legislature did not provide for attorney's fees in such actions. *Id.* (citing TEX. PROP. CODE § 22.001(a)) (emphasis added).

Aspenwood points out that, since our decision in *Martin*, some courts of appeals have held that the UDJA remains an appropriate alternative avenue to determine property interests, at least when the dispute involves construction of a written agreement. *See, e.g.*, *Roberson v. City of Austin*, 157 S.W.3d 130, 133 (Tex. App.—Austin 2005, no pet.) (UDJA available to determine validity of an easement agreement); *Florey v. Estate of McConnell*, 212 S.W.3d 439, 449 (Tex. App.—Austin 2006, pet. denied) (UDJA available in suit to determine validity of deed of trust). While we neither approve nor disapprove of the holdings in these cases, we note that they distinguish themselves from cases that involve determinations of possessory interests in property. *Roberson*, 157 S.W.3d at 136; *Florey*, 212 S.W.3d at 449.

It is undisputed that the present case requires determination of the parties' possessory rights to the property. We see no legitimate basis to distinguish this case from *Martin*, in which we affirmed and upheld the Legislature's intent that chapter 22 of the Texas Property Code govern the resolution of disputes involving legal interests in real property. We therefore reverse the part of the court of appeals' judgment reversing the trial court's summary judgment on Aspenwood's claim for declaratory judgment, and we render judgment against Aspenwood on that claim.

III.
CONCLUSION

The lease from which this case arises terminated nearly twenty years ago. Unfortunately, we cannot say the same about the parties' disputes. We agree with the court of appeals that the trial court erred in dismissing some of Aspenwood's claims against Coinmach. We affirm the parts of the court of appeals' judgment affirming the trial court's dismissal of Aspenwood's breach of contract and DTPA claims. We reverse the part of the court of appeals' judgment reversing the trial court's summary judgment on Aspenwood's declaratory judgment claim, and we render judgment against Aspenwood on that claim. Finally, we affirm the part of the court of appeals' judgment reversing and remanding Aspenwood's claims for trespass, trespass to try title, and tortious interference with prospective business relations, and we remand those claims to the trial court for further proceedings consistent with this opinion.

_____

Jeffrey S. Boyd
Justice

OPINION DELIVERED: November 22, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0213

COINMACH CORP. F/K/A SOLON AUTOMATED SERVICES, INC., PETITIONER,

v.

ASPENWOOD APARTMENT CORP., RESPONDENT

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

JUSTICE GUZMAN, joined by JUSTICE DEVINE and JUSTICE BROWN, concurring.

In this dispute between an aptly represented commercial tenant and landlord, the Court holds that a tenant at sufferance is a trespasser, which satisfies the predicate tort requirement of a tortious interference claim. But because the rule the Court announces today also impacts residential tenants, many of whom are "ordinary working families, without the resources for legal counsel," I write separately to expound in a more nuanced manner the heightened proof required to support a tortious interference claim.[1] Under the Court's holding, such tenants will now potentially be required to defend against actions for trespass and tortious interference. Importantly, in facing a tortious interference claim, tenants are exposed not only to damages traditionally recognized under landlord-

[1] Brief of Amicus Curiae Texas Housing Justice League, *Coinmach Corp. v. Aspenwood Apartment Corp*., No. 11-0213 at 5 (Tex. May 10, 2012).

tenant law—that is, rent or lost profits and property damage—but also to heightened emotional distress or exemplary damages.

The Texas Housing Justice League, in its amicus brief, voices particular concern that this "tortification" of landlord-tenant law could subject residential tenants, such as those left in a property after foreclosure, to excessive liability.[2] In an effort to assuage these concerns, the Court today clarifies that although it holds a tenant at sufferance is a trespasser, this holding does not expose innocent tenants to liability for additional tort damages, such as when tenants remain in possession under a good faith belief that they are entitled to do so. __ S.W.3d __, __. But the Court's opinion only implicitly acknowledges similar limitations with respect to liability arising out of a claim for tortious interference. *See id.* at __.

For this reason, I write separately to emphasize that in a claim for tortious interference, which may seek more than actual damages, the landlord must satisfy a greater burden of proof: it must prove the tenant at sufferance specifically intended to interfere with the landlord's relationship or contract with the prospective lessee. If a valid court order obtained in good faith grants a tenant at sufferance the right to possess property, the order will generally demonstrate the tenant's lack of the heightened intent necessary to support a claim for more than actual damages.

I. Background

As the Court observes, the parties in this case have been litigating issues surrounding possession for well over a decade. __ S.W.3d at __. Though the Court ultimately concludes that as

[2] *Id.* at 4.

a tenant at sufferance, Coinmach is a trespasser and may be held liable in tort for actual damages, it is undisputed that over many years Coinmach maintained possession of the premises pursuant to court orders rendered in its favor by various Harris County courts. Beginning in 1994, after receiving written notice from Aspenwood to vacate the premises, Coinmach[3] filed a writ of reentry action in the Justice Court of Harris County and was awarded the right to possession. In the subsequent forcible entry and detainer actions Aspenwood filed in 1994 and 1996, Coinmach similarly obtained orders granting it the right to immediate possession of the premises. Finally, in 1999 after Aspenwood removed Coinmach's laundry machines from the premises, Coinmach again filed for and successfully obtained a writ of reentry granting it immediate possession. Thus, for a significant portion of this litigation, by asserting its right to possession of the property, Coinmach was acting under court orders.[4]

Aspenwood first raised its tortious interference claims in 1998, filing the instant suit in district court. 349 S.W.3d 621, 627–28. After nearly a decade of protracted litigation, the trial court found Coinmach was a "tenant at sufferance as a matter of law." *Id.* at 629. Coinmach subsequently filed a motion for summary judgment on Aspenwood's tortious interference claims, arguing that

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[3] At the time, Coinmach was doing business under the name of Solon Automated Services, Inc.

[4] Aspenwood maintains that Coinmach "made a false representation of a right to property which it did not have, for the purpose of inducing [the Harris County courts] to allow Coinmach to remain in possession" of the premises. As explained in Part III, *infra*, if Aspenwood ultimately proves this allegation, the prior orders in favor of Coinmach's immediate possession would not act to negate the specific intent to interfere. Such protections would necessarily only be available to tenants who procured such court orders in good faith.

because it was a tenant at sufferance and had a possessory interest in the property, its conduct could not have been tortious. *Id*. The trial court agreed, finding that "Coinmach cannot have tortiously interfered with [Aspenwood's] prospective contractual relations because it was exercising its own lawful rights of possession and that there is no independent tort which is a required predicate to such claim[.]" *Id*. at 630 (first alteration in original). But the court of appeals reversed, concluding that as a tenant at sufferance Coinmach had no possessory interest and thus was not entitled to judgment as a matter of law with respect to Aspenwood's claims for tortious interference. *Id*. at 638–39. Today, we affirm the court of appeals' judgment reversing and remanding Aspenwood's tortious interference claims because trespass is an independently tortious or wrongful act. __ S.W.3d at __.

II. Tortious Interference

As the Court notes, to establish a cause of action for tortious interference with prospective business relations the plaintiff must show: (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. __ S.W.3d at __; *see Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001); *Bradford v. Vento*, 48 S.W.3d 749, 757 (Tex. 2001).

The Court correctly concludes that "Coinmach was and remained a trespasser from the time Aspenwood first sent a notice to vacate until Coinmach vacated the premises six years later." __

S.W.3d at __. And, because trespass is an independently tortious or wrongful act that may potentially support a claim for tortious interference with prospective business relations, the trial court necessarily erred in granting Coinmach's motion for summary judgment on the basis that there was no independent tort—a necessary predicate to a tortious interference claim. *Id.* Importantly, the Court's holding necessarily means that a plaintiff who raises a claim for tortious interference against a tenant at sufferance will nearly always satisfy the predicate tort requirement.

But the relative ease with which a landlord may prove the predicate tort requirement in a tortious interference claim against a tenant at sufferance does not diminish its high hurdle of proving specific, heightened intent. As explained below, a tenant who maintains possession in good faith pursuant to a valid court order will typically lack this heightened intent.

III. Intent to Interfere

To sustain a claim for tortious interference with prospective business relations, the plaintiff must demonstrate that the tenant at sufferance, by maintaining possession of the premises at issue, acted with an intent to interfere with the prospective contract between the landlord and the prospective lessee. __ S.W.3d at __; *see also Bradford*, 48 S.W.3d at 757 (finding no tortious interference in the absence of intent to harm the plaintiff's business relations). This Court has explained that interference is intentional "'if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result.'" *Bradford*, 48 S.W.3d at 757 (quoting RESTATEMENT (SECOND) OF TORTS § 766B cmt. d (1979)). We further reasoned that "'[i]f [the actor] had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found

to be not improper.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 766B cmt. d (1979)) (alterations in original); *see also Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 861 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("Mere participation in the transaction is not sufficient to establish an intentional action to harm [the plaintiff].").

Accordingly, in *Bradford* we declined to find that the defendant's statements to police during a criminal trespass investigation constituted legally sufficient evidence of intent to harm the plaintiff's prospective business relations with customers. 48 S.W.3d at 758. Instead, the plaintiff's inability to do business with customers was merely an incidental result of the defendant's efforts to end the present disturbance and protect property. *Id.* Similarly, when a tenant at sufferance exercises a right of possession pursuant to a court order, the landlord's inability to lease the premises to others is necessarily "a mere incidental result of conduct [the tenant] was engaging in for another purpose"—that is, for the purpose of exercising its court-sanctioned right to possession. *Id*. at 757. Under such circumstances, a defendant's good faith belief in its right to possess the property premised on court orders will likely preclude a plaintiff from establishing the heightened intent necessary to support a claim for tortious interference.[5]

In the present case, Coinmach remained in possession of the premises pursuant to favorable court orders obtained in the course of litigation. Under most circumstances, this would almost

[5] Of course, a tenant at sufferance may have a good faith belief in its right to possession even in the absence of court orders. Under these circumstances, the landlord still carries the heavy burden of proving the tenant specifically intended to interfere with the landlord's potential business relations. *Bradford*, 48 S.W.3d at 757–58. The tenant's mere intent to maintain possession will not sustain a claim for tortious interference.

certainly demonstrate a tenant lacked the specific intent to interfere. But here it is unclear whether Coinmach's possession under these court orders was in good faith. Indeed, Aspenwood has put forth some evidence that Coinmach may have procured these court orders through fraud. For one, to obtain a writ of reentry Coinmach presented a sworn affidavit to the justice court that relied on the lease agreement but omitted any mention of the lease's express provision that it was "subordinate to any mortgage or deed of trust on the premises." Aspenwood has also presented some evidence regarding the dangerously poor condition of Coinmach's equipment and argues that the same affidavit falsely claimed the equipment was functional. Thus, summary judgment in favor of Coinmach on Aspenwood's tortious interference claim is not possible because there is a remaining fact issue as to whether Coinmach procured the court orders through fraud.[6]

IV. Conclusion

Although I join the Court's opinion, I am mindful of the implications of the holding to residential tenants, particularly those with limited resources. Despite the Court's assurances that "innocent" trespassers—a term that includes those who remain on premises pursuant to valid court orders—will only be held liable for actual damages sustained, in a claim for tortious interference it is possible that a tenant at sufferance may be held liable for far more than actual damages. A successful plaintiff may potentially recover emotional distress and exemplary damages.

For this reason, the Court's remand on Aspenwood's tortious interference claim should not be read so broadly as to extend liability for these additional damages to tenants at sufferance who

[6] The existence of fraud is a question typically left to the trier of fact. *Quinn v. Dupree*, 303 S.W.2d 769, 774 (Tex. 1957).

remain on premises in good faith reliance on previously obtained court orders. Because the Court does not reach discussion of this issue with respect to Aspenwood's tortious interference claim, I respectfully concur.

Eva M. Guzman
Justice

OPINION DELIVERED: November 22, 2013

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. We created no such rule in *McIlvain*, and the facts of this case likewise do not require us to create such a rule. While it is possible for the gist of a broadcast to be mere allegation reporting (such that the truth of such a broadcast might be measured by its accuracy), 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 hold the physician raised a genuine issue of material fact as to the truth

[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).

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.[3]

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.

[3] On rehearing, no party challenges our holding that we have not yet recognized a rule establishing accuracy as the test for the substantial truth of a broadcast that repeats third-party allegations. Briefing submitted in support of rehearing construes our opinion as foreclosing such a rule and as affirmatively requiring the underlying allegation be proven substantially true to prevail on the truth defense. That interpretation, however, misconstrues our holding. We conclude there is a fact issue as to the truth or falsity of the gist of the media defendants' broadcast indicating the physician was disciplined for operating on patients while taking dangerous drugs or controlled substances. Importantly, this fact issue as to truth is likewise a fact issue as to accuracy. Though the media defendants advocate for accuracy as the test for truthfulness of the gist, given our holding concerning the gist, such a rule would not shield the media defendants here. We thus, as we must, leave open the question of whether a broadcast whose gist is merely that allegations were made is substantially true if the allegations were accurately repeated. *See Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 147 (Tex. 2012) (discussing prohibition on rendering advisory opinions).

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 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:

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[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).

[5] The Board also investigated the Wu case and found no wrongdoing, but that order issued after the broadcast in question.

> 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 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

[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.

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. 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 suit for 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

[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).

figure seeking defamation damages from a media defendant.[9] *WFAA-TV, Inc. v. McLemore*, 978 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.

KEYE frames a central issue in this proceeding as 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).

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[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).

[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.");1 ROBERT D. SACK, SACK ON DEFAMATION § 2.7.1 (3d ed. 2009) ("'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.

[11] SACK, *supra* note 10, § 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 she serves 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 the truth or falsity of a broadcast: if a broadcast taken as a whole is more damaging to the plaintiff's

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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.

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).

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

[16] We have also described this standard as the "average listener" standard. *McIlvain*, 794 S.W.2d at 16.

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.

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. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 581A, cmt. e (1977). We did not establish a third-party allegation rule in *McIlvain*. Rather, we measured the truth of the allegations in *McIlvain* against the government investigation that found them to be true. *Id*. In other words, a government investigation that finds allegations to be true is one of many methods of proving substantial truth. But we do not foreclose the possibility that the gist of some broadcasts may merely be allegation reporting, such that one measure for the truth of the broadcast could be whether it accurately relayed the allegations of a third party. *See, e.g.*, *Global Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973, 986 (7th Cir. 2004) (broadcast that government was investigating a nonprofit organization's alleged funding of terrorism was substantially true based upon government affidavits indicating it was investigating the reported allegations). As addressed below, even if we adopted such a rule today, it could not enable KEYE to prevail here because there is a genuine issue of material fact as to whether Neely was disciplined for the conduct the broadcast suggests.[18]

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[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).

[18] As amicus The Dallas Morning News observes, our ruling that *McIlvain* did not create a third-party allegation rule does not necessarily mean the previous cases misinterpreting *McIlvain* reached incorrect results. Specifically, The Dallas Morning News observes that the following cases nonetheless properly held that the gist of the statements were substantially true: *Green*, 286 F.3d at 284–85; *Boyd*, 2005 WL 1140369, at *3; *Ardmore, Inc.*, 82 S.W.3d at 612; *Randolph*, 19 S.W.3d at 921. Amicus Br. of The Dallas Morning News on Rehearing, at 8–11.

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."[19] 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.[20] KEYE 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

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[19] We have previously stated that an introduction can be especially misleading. *See Turner*, 38 S.W.3d at 118.

[20] 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 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.

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.[21] *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 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

[21] 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.

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."[22]
- Wilson reported not finding any independent evidence that Neely performed surgery while impaired.

[22] 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 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.
- 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,[23] 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

[23] 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.

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 was more damaging to Neely's reputation than a truthful and accurate broadcast would have been, the substantial truth defense cannot support the trial court's summary judgment.

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).

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.[24] *Id*. at 885.

1. Unnecessary Surgery

One gist of the KEYE broadcast we have not previously addressed is that Neely was performing unnecessary surgeries.[25] 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

[24] 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.

[25] *See supra* note 20.

[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 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,[26] 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

[26] As we noted above, this broadcast addressed a matter of public concern. *See supra* note 12.

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 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.[27]

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

[27] 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.

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.[28]

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

[28] 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 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.

. . .

> 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*.
>
> 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.[29] 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

[29] 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.[30] *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 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

[30] 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. Nor does the gist of the article appear to be that Neely was disciplined for operating on patients while using dangerous drugs and controlled substances.

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.[31] *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 the United States Supreme Court has only discussed the truth defense as a creature of state common law and not the First Amendment. *Masson*, 501 U.S. at 516 ("The common law of libel . . . overlooks minor inaccuracies and concentrates upon substantial truth."). Accordingly, the only collision is between the dissent's implicit findings and our six-decade-old standard for reviewing summary judgments. *See*

[31] The dissent's reliance on *Global Relief Foundation*, 390 F.3d at 973, 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").

Gulbenkian v. Penn, 252 S.W.2d 929, 931 (Tex. 1952) (requiring a trial court at summary judgment to give the nonmovant "the benefit of every reasonable inference which properly can be drawn in favor of his position" and that if "a mere ground of inference" supports the motion, it will not be granted).

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. 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

APPENDIX

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. 11-0228

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

JUSTICE LEHRMANN, dissenting to the denial of the motion for rehearing.

"Our liberty depends on the freedom of the press, and that cannot be limited without being lost." Letter from Thomas Jefferson to James Currie (Jan. 28, 1786), *in* 9 THE PAPERS OF THOMAS JEFFERSON: 1 NOV. 1785–22 JUNE 1786, at 239 (Julian P. Boyd ed., 1954). As the Court recognizes, this case concerns bedrock constitutional guarantees that protect the right to free speech and a free press. __ S.W.3d at __. The U.S. Supreme Court has said that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). In turn, media reporting of investigations regarding matters of public concern is vital to a vigilant and active press. However, it is inherent in the nature of investigative reporting that some allegations will be reported that are later

discovered to be untrue. Shielding media defendants from defamation liability for accurately reporting such allegations is a critical and well-settled practice, yet the Court's opinion declines to recognize as a definitive statement of Texas law 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." __ S.W.3d at __. Because I would grant rehearing in this case to clarify that this statement correctly describes Texas law, I respectfully express my dissent.

In a brief filed by numerous amici in support of Respondents' Motion for Rehearing, amici assert that the Court's opinion, albeit in dicta, mischaracterizes our holding in *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990). The Court's opinion describes our approach in *McIlvain* as "measur[ing] the truth of [reported] allegations . . . against the government investigation that found them to be true." __ S.W.3d at __. This language, coupled with the statement that "one is liable for republishing the defamatory statement of another," *id.* at __, may cause some to understand our holding in *McIlvain* too narrowly. In *McIlvain*, we considered a broadcast reporting that certain city employees were under investigation for alleged misconduct. 794 S.W.2d at 15. The broadcast also relayed specific allegations regarding the underlying misconduct. *Id.* We verified the substantial truth of the broadcast in several ways. First, we considered affidavits from the city's legal department "confirm[ing] the existence of the investigation." *Id.* at 16. Second, we relied on documented sworn statements from a city employee describing the alleged misconduct. *Id.* Finally, on those portions of the broadcast that presented the most direct accusations of misconduct, we measured the accusations against the findings of the investigation to establish their substantial truth. *See id.*

I would read *McIlvain*, as have the Fifth Circuit and several Texas courts of appeals, to support the proposition that when the gist of a media defendant's report is that allegations were made and those allegations are being investigated, proof that the allegations were in fact made and are in fact being investigated is sufficient to establish substantial truth. *E.g.*, *Green v. CBS, Inc.*, 286 F.3d 281, 283–84 (5th Cir. 2002); *Grotti v. Belo Corp.*, 188 S.W.3d 768, 775 (Tex. App.—Fort Worth 2006, pet. denied); *KTRK Television v. Felder*, 950 S.W.2d 100, 106 (Tex. App.—Houston [14th Dist.] 1997, no writ). The Court disagrees with this interpretation of *McIlvain* and notes only that "we do not foreclose the possibility that the gist of some broadcasts may merely be allegation reporting, such that one measure for the truth of the broadcast could be whether it accurately relayed the allegations of a third party." __ S.W.3d at __. I would go further and would affirmatively recognize the third-party allegation rule espoused by the Fifth Circuit and the Texas courts of appeals after *McIlvain* as an accurate statement of Texas law.[1]

As amici argue, media defendants should not hesitate to report on allegations that are under investigation for fear that those allegations may later be proven false. Because the Court's opinion may lead to uncertainty in this critical area of the law, and as a result may have a chilling effect on the press, I would grant rehearing. Accordingly, I respectfully dissent to the denial of Respondents' Motion for Rehearing.

[1] The Court's opinion notes that such a rule would not enable KEYE to prevail in light of the Court's determination that the gist of the broadcast at issue went beyond allegation reporting. __ S.W.3d at __. For the reasons expressed in the dissenting opinion in this case, I continue to disagree with the Court's characterization of the gist of the broadcast and its determination that a fact issue exists as to the substantial truth of the broadcast. However, that is not the basis of my dissent today. In any event, since the Court could reconsider the characterization of the gist of the broadcast on rehearing, it is possible that the merits of the third-party allegation rule would be reached if the motion for rehearing were granted.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: January 31, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0425

PETROLEUM SOLUTIONS, INC., PETITIONER,

v.

BILL HEAD D/B/A BILL HEAD ENTERPRISES AND TITEFLEX, INC., RESPONDENTS

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

Argued December 4, 2012

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

JUSTICE BOYD delivered an opinion dissenting in part.

Bill Head, doing business as Bill Head Enterprises (Head), hired Petroleum Solutions, Inc. to manufacture and install an underground fuel system. Following a large diesel leak, Head sued Petroleum Solutions for its resulting damages, and the trial court rendered judgment on the jury's verdict in Head's favor. The trial court also rendered judgment in favor of third-party defendant Titeflex, Inc., the alleged manufacturer of a component part incorporated into the fuel system, on Titeflex's counterclaim against Petroleum Solutions for statutory indemnity. The court of appeals affirmed the judgment. Petroleum Solutions presents two principal issues for our review. First,

Petroleum Solutions challenges the trial court's issuance of spoliation sanctions against it, which included submitting a spoliation instruction to the jury and striking Petroleum Solutions' statute-of-limitations defense. Second, Petroleum Solutions complains that Titeflex's statutory indemnity claim fails as a matter of law.

We hold that the trial court abused its discretion by charging the jury with a spoliation instruction and striking Petroleum Solutions' statute-of-limitations defense because those sanctions do not conform to the standards set forth in our recent decision in *Brookshire Brothers, Inc. v. Aldridge*, ___ S.W.3d ___ (Tex. 2014). Because the trial court's abuse of discretion was harmful, we reverse the court of appeals' judgment as to Head and remand to the trial court for further proceedings between Head and Petroleum Solutions. However, we agree with the trial court and the court of appeals that Titeflex was entitled to statutory indemnity from Petroleum Solutions. Therefore, we affirm the court of appeals' judgment as to Titeflex's indemnity claim.

I. Factual and Procedural Background

Head owns and operates the Silver Spur Truck Stop in Pharr, Texas. Head contracted with Petroleum Solutions to install a diesel-fuel storage system that included pipes necessary to transport the fuel from the tanks to the station's fuel pumps. The parties agree that flex connectors—parts of the piping system—were components of the new fuel system. However, they disagree about who manufactured the connectors that Petroleum Solutions used in Head's system.

After installing the fuel system, Petroleum Solutions recommended installing an automatic tank-gauging system to detect any fuel releases. Head agreed, and Petroleum Solutions completed the system's installation in October 1999. Shortly after both the fuel and gauging systems were

installed, Head began to experience problems, mainly with the gauging system, and requested maintenance and repair work from Petroleum Solutions on numerous occasions. In November 2001, Head contacted Petroleum Solutions about fluctuations in the fuel inventory data from the gauging system. Petroleum Solutions investigated and discovered that a major diesel-fuel release had occurred. The Texas Natural Resource Conservation Commission (now the Texas Commission on Environmental Quality) recorded a recovery of approximately 20,000 gallons of diesel fuel from the surrounding ground.

Petroleum Solutions workers immediately notified Head and Petroleum Solutions' president, Mark Barron, about the leak, and Barron traveled to the Silver Spur to help determine the cause. After testing, Petroleum Solutions concluded that the leak originated in the piping that ran from the tanks to the fuel dispensers. Barron subsequently informed the Silver Spur's general manager, Robert Carpenter, that the source of the leak was a faulty flex connector located under "Dispenser Number 4." Barron showed Carpenter the allegedly faulty connector and asked if Petroleum Solutions could retain it for safekeeping and possible testing. Carpenter agreed to Barron's request. That was the last time Carpenter or Head saw the flex connector. Petroleum Solutions would later say that Titeflex had manufactured the flex connector, but photos of the connector did not reveal the manufacturer, and Petroleum Solutions was unable to produce records showing that Titeflex was the manufacturer.

Petroleum Solutions reported the incident to its liability insurer, which engaged attorney Elizabeth Neally to represent Petroleum Solutions. In February 2002, Barron gave the flex connector to Neally, who sent it to metallurgist David Hendrix for evaluation along with instructions not to

perform destructive testing. Hendrix performed an unspecified analysis on the component, then processed it into inventory for storage at WH Laboratories. In April 2002, Neally sent Hendrix a letter inquiring about his review and inspection of the flex connector, and Hendrix responded with an invoice for his professional engineering services, which included photographing the flex connector, four hours of professional time, and one hour of laboratory time. Petroleum Solutions did not contact Hendrix again or otherwise inquire about the connector until March 2006, shortly after Head filed suit. By that time, the storage facility at WH Laboratories had been demolished, and certain contents of the building had been discarded or destroyed in conjunction with the building's demolition. Howard Heinsohn, the lab's manager, testified at a deposition that he orally advised Hendrix that the building would be torn down and its contents destroyed, and that Hendrix retrieved some items and told Heinsohn he could throw out the rest. However, nothing in the record suggests Petroleum Solutions was informed that WH Laboratories would be torn down or even knew that the connector was being stored there.

Beginning in December 2001, Head withheld payments from Petroleum Solutions, which it blamed for causing the leak. In May 2002, Head's attorney wrote a letter to Petroleum Solutions threatening suit. While the letter requested that Petroleum Solutions contact Head to resolve their dispute amicably, the letter did not request production of the flex connector. Head eventually filed suit against Petroleum Solutions on February 13, 2006, asserting claims for breach of the warranty of fitness, breach of the implied warranty of good and workmanlike services, and negligence.[1]

[1] Head's sixth amended petition is the live pleading in this action. In accordance with that pleading, the claims submitted to the jury included negligence, negligent undertaking, breach of contract, fraud, breach of implied warranty of good and workmanlike services, and breach of fiduciary duty.

Because the lawsuit was filed more than four years after the leak was discovered, Head also pleaded the discovery-rule and fraudulent-concealment exceptions to the statute of limitations. Petroleum Solutions answered, asserting limitations and other affirmative defenses. It also alleged that Titeflex had manufactured the missing flex connector that caused the leak.

Petroleum Solutions then filed a third-party petition against Titeflex, claiming indemnity and contribution based on a products-liability theory. Head followed in Petroleum Solutions' footsteps and amended its petition to assert a strict products-liability claim directly against Titeflex. The amended petition attributed the leak and the resulting damages to several deficiencies, including: a failure of the line leak detector and gauging system; the faulty flex connector, which was "part of the [fuel] system" and which Titeflex allegedly sold to Petroleum Solutions; and Petroleum Solutions' failure to properly install or repair the fuel and gauging systems.

Titeflex moved for summary judgment on both Petroleum Solutions' and Head's claims, urging that no evidence showed that a Titeflex-manufactured connector was used in the Silver Spur's fuel system. The trial court ultimately denied Titeflex's motion. Petroleum Solutions also twice moved for summary judgment on limitations grounds, but the trial court denied both motions. Petroleum Solutions then designated an expert to opine that the damages resulting from the leak were attributable to the flex connector, but the expert failed to attend three noticed depositions.

In January 2008, Titeflex moved for sanctions against Petroleum Solutions. Titeflex claimed that Petroleum Solutions spoliated evidence by failing to produce the allegedly faulty flex connector and sought a jury instruction to that effect. Head then nonsuited its claims against Titeflex and also moved for sanctions against Petroleum Solutions. Head argued that Petroleum Solutions

intentionally destroyed crucial evidence and requested that the trial court consider a broad range of sanctions, including striking Petroleum Solutions' pleadings. Petroleum Solutions responded to the sanctions motions with affidavits from Neally, Hendrix, and Heinsohn. Petroleum Solutions argued that it did not deliberately destroy any evidence, it had not engaged in culpable or negligent conduct with respect to the flex connector, and it did not have a duty to preserve the flex connector once the limitations period had expired.

While the sanctions motions were pending, Titeflex filed a counterclaim against Petroleum Solutions, claiming it owed Titeflex a statutory duty of indemnity under Texas Civil Practice and Remedies Code chapter 82. Eventually, unable to produce the allegedly faulty flex connector or, after three failed attempts, an expert for deposition to state that a faulty flex connector caused the leak, Petroleum Solutions nonsuited its third-party claims against Titeflex shortly before trial. Titeflex's indemnity counterclaim remained pending. Head's live petition at the time of trial alleged that Petroleum Solutions had misrepresented that the flex connector caused Head's damages, and that those damages were caused by defects in the systems that Petroleum Solutions manufactured as well as Petroleum Solutions' failure to properly install, maintain, and repair the systems.

At a pretrial hearing on Titeflex's and Head's motions for sanctions, the trial court struck Petroleum Solutions' affirmative defenses, including its statute-of-limitations defense, and ruled that a spoliation instruction would be given to the jury. Head's and Titeflex's claims against Petroleum Solutions then proceeded to trial. At trial, Head urged that Petroleum Solutions had repeatedly misrepresented the cause of the leak. Head offered expert testimony that Petroleum Solutions'

improper installation of a union at a shear valve, not the flex connector, caused the leak. The jury charge included the following spoliation instruction:

> You, the jury, are instructed that Petroleum Solutions, Inc. destroyed, lost, or failed to produce to this Court material evidence that by law should have been produced as evidence for your deliberations. You are further instructed you may, but are not required to, presume this evidence is unfavorable to Petroleum Solutions, Inc.

The jury found in Head's favor and awarded Head nearly $1.2 million. The jury also found in favor of Titeflex on its statutory-indemnity claim, awarding Titeflex approximately $450,000. The trial court rendered judgment on the jury's verdict, and Petroleum Solutions appealed.

The court of appeals, with one justice dissenting, affirmed the trial court's judgment except as to the amount of prejudgment interest. ___ S.W.3d ___, ___. The court concluded that the sanctions order was not an abuse of discretion because Petroleum Solutions' failure to preserve the flex connector significantly prejudiced Head and Titeflex, and Petroleum Solutions' repeated attempts to minimize its fault amounted to bad faith deserving of severe sanctions. *Id.* at ___. The court of appeals also concluded that Petroleum Solutions' arguments regarding the statute of limitations were not relevant, that there was legally and factually sufficient evidence supporting the verdict on Head's claims, and that Titeflex was entitled to statutory indemnity from Petroleum Solutions. *Id.* at ___, ___. The dissenting justice took issue with the trial court's failure to articulate any connection between Petroleum Solutions' inability to produce the flex connector and the striking of Petroleum Solutions' statute-of-limitations defense. *Id.* at ___ (Vela, J., dissenting). The dissent would have remanded the case for a new trial in which Petroleum Solutions could assert its defenses. *Id.* at ___.

II. The Trial Court's Sanctions

Petroleum Solutions challenges the trial court's imposition of spoliation sanctions and, more specifically, the court's submission of a spoliation jury instruction and striking of Petroleum Solutions' affirmative defenses, particularly its limitations defense. Petroleum Solutions contends that the trial court imposed death-penalty sanctions that violate the test set forth in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991). Applying the standard for spoliation sanctions we recently adopted in *Brookshire Brothers*, ___ S.W.3d at ___, we hold that the trial court abused its discretion and remand for a new trial.[2]

In *Brookshire Brothers*, we adopted a framework governing the imposition of remedies for evidence spoliation. We explained that whether a party spoliated evidence and whether a particular remedy is appropriate are questions of law for the trial court. ___ S.W.3d at ___. Because the trial court bears this responsibility, evidence of the circumstances surrounding alleged spoliation is generally inadmissible at trial, as such evidence is largely irrelevant to the merits and unfairly prejudicial to the spoliating party. *Id.* at ___. We further held in *Brookshire Brothers* that, to find that spoliation occurred, the trial court must make affirmative determinations as to two elements. First, the party who failed to produce evidence must have had a duty to preserve the evidence. *Id.* at ___. "[S]uch a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be

[2] Petroleum Solutions contends it is entitled to rendition of judgment on grounds that the evidence was legally insufficient to support the jury's findings in Head's favor on its claims for negligence, fraud, breach of fiduciary duty, breach of contract, and breach of warranty. Because Petroleum Solutions failed to challenge the sufficiency of the evidence supporting the jury's finding in Head's favor on its negligent undertaking claim, which provides an independent basis to support the trial court's judgment, we need not address this issue.

material and relevant to that claim." *Id*. at ___ (citation and internal quotation marks omitted). Second, the nonproducing party must have breached its duty to reasonably preserve material and relevant evidence. *Id*. at ___. A party cannot breach its duty without at least acting negligently. *Id*. at __.

Upon finding that spoliation occurred, the trial court must exercise its discretion in imposing a remedy. In determining what remedy, if any, is appropriate, the court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party. *Id.* at ___. Prejudice is evaluated based on the spoliated evidence's relevancy to key issues in the case, whether the evidence would have been harmful to the spoliating party's case (or, conversely, helpful to the nonspoliating party's case), and whether the spoliated evidence was cumulative of other competent evidence that may be used in its stead. *Id*. at ___ (citing *Trevino v. Ortega*, 969 S.W.2d 950, 958 (Tex. 1998) (Baker, J., concurring)).

While the trial court's discretion to remedy an act of spoliation is broad, it is not limitless. *Id.* at ___. We review a trial court's imposition of sanctions under an abuse of discretion standard. *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). Texas Rule of Civil Procedure 215.2 allows a trial court to impose "just" sanctions for discovery abuse. TEX. R. CIV. P. 215.2. As we reaffirmed in *Brookshire Brothers*, courts generally follow a two-part test in determining whether a particular sanction for discovery abuse is just. ___ S.W.3d at ___ (citing *TransAmerican*, 811 S.W.2d at 917). First, a direct relationship must exist between the offensive conduct, the offender, and the sanction imposed. *See id.*; *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003) (per curiam). To meet this requirement, a sanction must be directed against the wrongful conduct and toward remedying

the prejudice suffered by the innocent party. *TransAmerican*, 811 S.W.2d at 917. Second, a sanction must not be excessive, which means it should be no more severe than necessary to satisfy its legitimate purpose. *Id.* This prong requires the trial court to consider the availability of lesser sanctions and, "in all but the most exceptional cases, actually test the lesser sanctions." *Cire*, 134 S.W.3d at 841.

In *Brookshire Brothers*, we also articulated more specific restrictions on a trial court's discretion to issue a spoliation instruction to the jury. ___ S.W.3d at ___. We held that a trial court may submit a spoliation instruction only if it finds (1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense.[3] *Id*. at ___. We noted in imposing this strict limitation that a spoliation instruction "can, in some sense, be tantamount to a death-penalty sanction," in that such an instruction can remove the focus of the trial from the merits of the case and redirect it to the alleged conduct that gave rise to the sanctions. *Id*. at ___. It follows, and we hold today, that in the context of remedying spoliation, the restrictions articulated in *Brookshire Brothers* with regard to spoliation instructions also limit a trial court's discretion to issue other remedies akin to death-penalty sanctions, such as striking a party's claims or defenses.

[3] Generally, we have stated that, consistent with due process considerations, discovery sanctions that "are so severe as to preclude presentation of the merits of [a claim or defense] should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery." *TransAmerican*, 811 S.W.2d at 918; *Spohn*, 104 S.W.3d at 883. Similar reasoning underlies the limitations we placed on spoliation sanctions in *Brookshire Brothers*.

In this case, we need not and do not decide whether Petroleum Solutions spoliated evidence. We hold that, assuming it did, the trial court's sanctions were an abuse of discretion because no proof exists that Petroleum Solutions intentionally concealed evidence or that Petroleum Solutions' spoliation irreparably deprived Head of any meaningful ability to present its claims. First, no evidence shows that Petroleum Solutions acted with intent to conceal the flex connector,[4] as nothing in the record suggests that Petroleum Solutions was ever informed that the facility where the connector was being stored would be destroyed. To the contrary, the record shows the following undisputed facts: (1) Barron took a component from the Silver Spur with the express consent of the manager, Carpenter; (2) Barron gave the component to independent counsel, Neally; (3) Neally engaged the services of a metallurgist, Hendrix; (4) Hendrix took possession of the component and performed non-destructive testing; (5) Hendrix placed the component in a warehouse for storage; (6) the warehouse was torn down; (7) Petroleum Solutions was not told the warehouse was being torn down; (8) Head did not request that Petroleum Solutions produce the connector before the warehouse was demolished or at any time before filing suit; and (9) Petroleum Solutions asked Hendrix to return the connector when Head filed suit, but neither the warehouse staff nor Hendrix could find it. In sum, no evidence demonstrates that Petroleum Solutions intentionally lost or destroyed the connector.

Further, no evidence shows that the missing connector irreparably deprived Head of any meaningful ability to present its claims. At trial, Head's theory of Petroleum Solutions' liability was

[4] Only Head maintains that Petroleum Solutions acted intentionally. Titeflex notes in its briefing that it "has never contended that misplacement of the flex connector was deliberate or intentional."

unrelated to the flex connector; Head successfully urged that Petroleum Solutions' improper installation of a union at a shear valve, not the flex connector, caused the leak. This fact, in conjunction with the fact that Head never requested access to the connector before filing suit,[5] confirms that the missing flex connector did not irreparably hinder Head's presentation of its claims.

In sum, the trial court abused its discretion in charging the jury with a spoliation instruction and striking Petroleum Solutions' statute-of-limitations defense because that sanction does not comply with the procedural and substantive standards set forth in *Brookshire Brothers*. The harm of such sanctions, which foreclose (or at least severely impede) a party from presenting the merits of its claims or defenses, is patent. *See Brookshire Bros.*, ___ S.W.3d at ___; *Wal-Mart Stores, Inc.*, 106 S.W.3d at 724. This harm was compounded by the improper presentation of evidence and argument to the jury on the spoliation issue. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings between Petroleum Solutions and Head consistent with this opinion.[6]

III. Titeflex's Statutory-Indemnity Claim

Finally, we address whether Titeflex, a component-product manufacturer and seller, is entitled to indemnity from Petroleum Solutions, a finished-product manufacturer, under Texas Civil

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[5] To the extent Head argues that Petroleum Solutions misrepresented the cause of the leak so as to prevent Head from filing suit within the limitations period, such an argument will be relevant to the evaluation of Petroleum Solutions' statute-of-limitations defense on remand.

[6] Petroleum Solutions contends that we should render judgment on its statute-of-limitations defense. As noted above, the trial court twice denied Petroleum Solutions summary judgment on this defense. Because the trial court struck the defense before trial, even if the court did so erroneously, it would be improper to render judgment for Petroleum Solutions on limitations grounds on appeal of the final judgment. *See Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966) (refusing to review order denying summary judgment on appeal from final judgment).

Practice and Remedies Code section 82.002, a provision of the Texas Products Liability Act. As described above, Head sued Petroleum Solutions and Titeflex under a products-liability theory, Petroleum Solutions filed third-party claims against Titeflex for contribution and indemnity, and Titeflex filed a counterclaim against Petroleum Solutions for statutory indemnity under section 82.002. Although both Head and Petroleum Solutions nonsuited their claims against Titeflex, the parties proceeded to trial on Titeflex's indemnity counterclaim. The jury found in favor of Titeflex, awarding it approximately $450,000 in attorney's fees and expenses, and the trial court rendered judgment on that verdict. The court of appeals affirmed.

A. Duty to Indemnify Between Finished-Product Manufacturers and Component-Product Manufacturers

Section 82.002 requires the manufacturer of an allegedly defective product to indemnify an innocent seller for any loss arising out of a products-liability action. TEX. CIV. PRAC. & REM. CODE § 82.002(a); *see also Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999). The Act describes a manufacturer's duty to indemnify as follows:

> A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

TEX. CIV. PRAC. & REM. CODE § 82.002(a). The term "loss" is defined to include "court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages." *Id.* § 82.002(b). The Act broadly defines "products liability action," "seller," and "manufacturer":

> "Products liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product . . . .

> "Seller" means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.
>
> "Manufacturer" means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.

Id. § 82.001(2)–(4). Under these definitions, "all manufacturers are also sellers, but not all sellers are manufacturers." *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 256 (Tex. 2006) (*Hudiburg*). And, with one exception not relevant here, nothing in the Act precludes one person from being both a manufacturer and a seller of the same product or component. *See id.*

Titeflex contends that Petroleum Solutions owes it a duty to indemnify under section 82.002 because the fuel system is a product, Petroleum Solutions is the manufacturer of that product, and Titeflex is the innocent seller of a component part allegedly used in Petroleum Solutions' defective finished product. In light of our analysis of the indemnity statute in *Hudiburg*, we agree.

In *Hudiburg*, a truck driver was injured and the driver of another vehicle was killed when the truck, which had been assembled by attaching a service body to a cab chassis, split apart during a collision. *Id.* at 252. A personal-injury and wrongful-death suit followed against both the chassis manufacturer and Hudiburg, the dealer who had sold the truck and arranged for it to be assembled. *Id.* In that suit, which eventually settled, the plaintiffs alleged that the vehicle, including its fuel system, was unreasonably dangerous. *Id.* Hudiburg then brought a statutory-indemnity action against the manufacturers of the cab chassis (GM) and the service body (Rawson-Koenig), the "component products" of the truck. *Id.*

Clarifying the framework governing a manufacturer's duty to indemnify under the Act, we reaffirmed that the duty is triggered by the injured claimant's pleadings. *Id.* at 256. Specifically, the duty is triggered by allegations of a defect in the manufacturer–indemnitor's product and is not dependent on an adjudication of the indemnitor's liability.[7] *Id*. By contrast, section 82.002(a)'s exception to the duty to indemnify for loss caused by the seller is triggered not by the pleadings, but by an affirmative finding that the seller–indemnitee is independently liable. *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001) ("[I]t is the manufacturer's 'duty to indemnify' that applies regardless of outcome, . . . [b]ut for the Manufacturers to implicate section 82.008(a)'s exception to that duty, it must be established that seller's conduct 'caused' the loss.").

Further elaborating on the statutory-indemnity framework in the context of claims involving both a finished-product manufacturer and seller as well as the manufacturer and seller of a component part incorporated into that finished product, we held:

> Under the statute, and disregarding the exception in section 82.002(d), the manufacturer of a component product alleged by a claimant to be defective has a duty to indemnify an innocent seller/manufacturer of a finished product which incorporates the component from loss arising out of a products liability action related to the alleged defect, *but the manufacturer of an allegedly defective finished product has a duty to indemnify the innocent seller/manufacturer of a component product for the same loss.* If neither the component-product manufacturer nor the finished-product manufacturer is innocent, depending not on allegations but on proof, both indemnity claims under the statute will fail. If both are innocent, again depending on proof, the indemnity claims offset each other.

Hudiburg, 199 S.W.3d at 256–57 (emphasis added). In other words, depending on the alleged product defect or defects, an injured claimant's pleadings may trigger a duty to indemnify on the part

[7] Under the common law, however, an indemnitor's liability for the product defect must be adjudicated or admitted. *Hudiburg*, 199 S.W.3d at 255.

of the finished-product manufacturer, the component-product manufacturer, or both. *See id.* If competing duties to indemnify are triggered, the ultimate success of those claims will depend on what the evidence shows as to the fault of the indemnitee sellers. *See id.*

In light of the claimant's allegations in *Hudiburg* that the component product manufactured by GM—the chassis—was defective, we held that GM owed Hudiburg a duty to indemnify for losses related to the personal-injury suit, to the extent Hudiburg was not independently liable.[8] *Id.* at 262. We also noted that, consistent with the statutory framework, "GM would be entitled to statutory indemnity from Hudiburg—although GM has not sought indemnity—for losses related to allegations of defects unrelated to the chassis, if GM was not independently liable for such losses." *Id.*

Applying *Hudiburg* to the case at hand, we hold that Petroleum Solutions owed Titeflex a statutory duty of indemnity. Head initially sued only Petroleum Solutions for damages resulting from the fuel leak, alleging the leak was caused by both a defective flex connector as well as a "faulty" line leak detector and leak-detection system. Shortly after Petroleum Solutions brought third-party claims against Titeflex, Head amended its petition to assert a strict-liability claim directly against Titeflex and to clarify the allegations that the leak-detection system as a whole was defective and was manufactured by Petroleum Solutions. After nonsuiting Titeflex, Head again amended its petition to retract the allegations of a defective flex connector and to allege only product defects that were attributable solely to Petroleum Solutions. Based on Head's pleadings, Petroleum Solutions,

[8] Rawson-Koenig, on the other hand, did not owe Hudiburg a duty to indemnify because the claimant's pleadings, which alleged only that the vehicle as a whole and the fuel system in particular were defective, could not fairly be read to allege a defect in the service body, which was the component product Rawson-Koenig manufactured. *Hudiburg*, 199 S.W.3d at 257–58; *see also Meritor Auto., Inc.*, 44 S.W.3d at 91.

the alleged manufacturer of an allegedly defective finished product (the fuel system), owed Titeflex, the alleged seller of a component part of that product, a duty to indemnify it under section 82.002 for losses arising out of this products-liability action, to the extent Titeflex was not independently liable for those losses.[9]

Notably, Petroleum Solutions does not contend that any evidence in the record supports a finding that Titeflex was independently liable. Indeed, Petroleum Solutions was never able to adduce evidence that Titeflex actually manufactured the flex connector, much less that the connector was defective. And while Titeflex's losses are limited to its attorney's fees and costs incurred in the suit, such expenditures qualify as "losses" under the indemnity statute. TEX. CIV. PRAC. & REM. CODE § 82.002(b).

Citing *Hudiburg* and *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*, 251 S.W.3d 481 (Tex. 2008), the dissent contends that, even if Head's pleadings did trigger Petroleum Solutions' duty to indemnify Titeflex for its losses in this action, that duty did not extend to alleged defects in the flex connector that Petroleum Solutions did not manufacture. Similarly, Petroleum Solutions argues that *Hudiburg*'s reasoning does not apply here because Titeflex was sued only for alleged defects in the flex connector, and "[Petroleum Solutions] could not be liable to indemnify Titeflex for a product that [Petroleum Solutions] did not manufacture." That Petroleum Solutions did not manufacture the flex connector, however, is immaterial. The indemnity statute broadly provides that

[9] We note that, based on Head's early pleadings, Titeflex also owed Petroleum Solutions a competing duty to indemnify it for losses related to alleged defects in the flex connector, to the extent Petroleum Solutions was not independently liable. *Hudiburg*, 199 S.W.3d at 262. However, Head amended its pleadings to delete any allegations of a defective flex connector, and Petroleum Solutions nonsuited its indemnity and contribution claims against Titeflex before trial.

"[a] manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action," except to the extent the seller is independently liable. TEX. CIV. PRAC. & REM. CODE § 82.002(a). The purpose of section 82.002 is to protect innocent sellers by assigning responsibility for the burden of products-liability litigation to product manufacturers. *Hudiburg*, 199 S.W.3d at 255, 262. When an injured claimant pleads that a manufacturer's product is defective, an innocent seller who suffers loss is protected regardless of whether it is upstream or downstream of that product's manufacturer. *Id.* at 256. Thus, as the manufacturer of an allegedly defective finished product, Petroleum Solutions has a duty to indemnify an innocent seller of a component integrated into that product, such as Titeflex, for its loss arising out of Head's products- liability action.

The dissent's reliance on *Owens & Minor* is inapposite. In that case, we held that a latex-glove manufacturer did not owe an innocent distributor a duty to defend and indemnify it against claims involving gloves that other companies manufactured. 251 S.W.3d at 482. From this holding, the dissent opines that Titeflex cannot recover for its losses because Head's pleadings did not attribute the defective fuel system to Titeflex, only the flex connector. This application is improper in light of the circumstances presented and renders the framework recognized in *Hudiburg* a nullity.[10] *Owens & Minor* involved a one-way duty to indemnify owed by multiple manufacturers to a non-manufacturing seller[11] for its losses. By contrast, this case involves the competing duties to

[10] While the dissent couches its analysis in terms of the scope of the duty, the result of the dissent's interpretation is that a component-product manufacturer could only be entitled to indemnity if an injured plaintiff alleged it was directly responsible for unrelated defects in other components or the finished product. As a practical matter, that will rarely, if ever, happen.

[11] Only manufacturers owe a duty to indemnify under chapter 82. TEX. CIV. PRAC. & REM. CODE § 82.002(a).

indemnify owed to each other by a finished-product manufacturer and a component-product manufacturer. As we held in *Hudiburg*, the duty to indemnify when both of these products are alleged to be defective runs both ways, as Petroleum Solutions and Titeflex are both manufacturers and sellers of their respective products *vis-a-vis* each other. 199 S.W.3d at 256. When these competing claims are pursued, *Hudiburg* explains that the burden will ultimately fall on the party whose product is found to be defective. *See id.* at 256–57 (recognizing that such competing claims will both fail if the evidence shows that neither party is innocent, and will offset each other if the evidence shows that both are innocent).

In this case, only Titeflex pursued its indemnity claim through trial, and Petroleum Solutions failed to seek or procure a finding that Titeflex was independently liable for its loss. Accordingly, Titeflex is entitled to recover for its loss arising out of this products-liability action.

B. Improvement to Real Property May Constitute a Product

Petroleum Solutions next argues that the fuel system was an improvement to real property, not a "product" that it manufactures, and that the indemnity statute therefore does not apply. Our decision in *Fresh Coat, Inc. v. K-2, Inc.* forecloses this argument. 318 S.W.3d 893 (Tex. 2010). The issue in *Fresh Coat* was whether a synthetic-stucco system comprised of components that were installed on a house's exterior walls constituted a product for purposes of the indemnity statute. *Id.* at 895. We explained that, pursuant to the statute, "a product is something distributed or otherwise placed, for any commercial purpose, into the stream of commerce for use or consumption." *Id.* at 897. We held that the stucco system was a product under that broad definition and rejected the

manufacturer's argument that "products placed into the stream of commerce are not products once they become integrated into . . . real property." *Id.*

Here, Petroleum Solutions makes the same argument we rejected in *Fresh Coat*. Petroleum Solutions cites several courts of appeals' decisions for the general premise that the law distinguishes between products and improvements to real property. However, none of the cases Petroleum Solutions cites involved the indemnity statute, and they all predate our decision in *Fresh Coat*. We therefore hold that the fuel system qualifies as a product under chapter 82 notwithstanding its integration into real property.

For these reasons, we agree with the trial court and court of appeals that Petroleum Solutions owed Titeflex a duty to indemnify under section 82.002. Further, as noted above, Petroleum Solutions did not procure a finding that Titeflex was independently liable for its loss, as would be required to defeat its indemnity claim. *Meritor Auto., Inc.*, 44 S.W.3d at 91. Accordingly, our reversal of the court of appeals' judgment as to the claims between Head and Petroleum Solutions does not affect the validity of the judgment in favor of Titeflex,[12] and we affirm that portion of the judgment.

* * * *

We hold that the trial court's sanctions order was an abuse of discretion and that the court of appeals erred in affirming the judgment in Head's favor. However, we agree with the portion of

[12] The only findings the jury made with respect to the indemnity claim were that Petroleum Solutions was a manufacturer and Titeflex was a seller. In its judgment, the trial court found that Titeflex was "an innocent seller" and was entitled to indemnity as a matter of law. Accordingly, the improper spoliation instruction was irrelevant to the indemnity claim and does not necessitate a new trial on that claim.

the court of appeals' judgment in favor of Titeflex. We therefore affirm the court of appeals' judgment in part, reverse it in part, and remand for further proceedings between Head and Petroleum Solutions consistent with this opinion.

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 11, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0425

PETROLEUM SOLUTIONS, INC., PETITIONER,

v.

BILL HEAD D/B/A BILL HEAD ENTERPRISES AND TITEFLEX CORPORATION, RESPONDENTS

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

Argued December 4, 2012

JUSTICE BOYD, dissenting in part.

The Court holds in this case that the trial court abused its discretion by charging the jury with a spoliation instruction and striking Petroleum Solutions's statute-of-limitations defense because those sanctions do not comport with the standards set forth in our recent decision in *Brookshire Bros., Inc. v. Aldridge*, ___ S.W.3d ___ (Tex. 2014). I agree, and I join that part of the Court's opinion. But the Court also holds that section 82.002 of the Texas Civil Practices and Remedies Code requires Petroleum Solutions to indemnify Titeflex for the attorney's fees and expenses Titeflex incurred in defending against allegations that Titeflex manufactured and sold a defective flex connector. Until now, we have consistently held that, in a products liability action involving allegations that more than one product is defective, section 82.002 requires a manufacturer to indemnify another manufacturer only against losses arising from allegations that the first

manufacturer's product was defective. And, conversely, we have held that the statute does not require the first manufacturer to indemnify the second manufacturer against losses arising from allegations that the second manufacturer's own product was defective. Because Titeflex incurred all of the losses for which it seeks indemnity in this case defending against claims that Titeflex's own flex connector was defective, and because Petroleum Solutions is not the manufacturer of Titeflex's allegedly defective flex connector, I respectfully dissent from that part of the Court's judgment.

I.
The Duty, the Scope, and the Exception

Section 82.002(a) of the Texas Civil Practices and Remedies Code provides that "[a] manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's . . . act or omission . . . for which the seller is independently liable." TEX. CIV. PRAC. & REM. CODE § 82.002(a). A "products liability action" is "any action against a manufacturer or seller for recovery of damages . . . allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." *Id.* § 82.001(2). Reading this language within the context of the rest of chapter 82, we have construed the statute to address three main issues: (1) who has the duty to indemnify a seller in a products liability action, (2) what is the scope of that duty, and (3) when does the exception to the duty apply?

As to the issue of who has the duty, we have explained that "[t]he duty to indemnify is triggered by the injured claimant's pleadings," and "is imposed only on 'the manufacturer of a

product claimed in a petition or complaint to be defective.'" *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc*., 199 S.W.3d 249, 256 (Tex. 2006) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc*., 996 S.W.2d 864, 866 (Tex. 1999) (quoting TEX. CIV. PRAC. & REM. CODE § 82.002(f)). The pleadings need not "actually name" the manufacturer to trigger the manufacturer's duty, *id.* at 257, but they must at least allege that the manufacturer's product was defective. *Id.*; *see also Fitzgerald*, 996 S.W.2d at 867 ("[O]nly manufacturers of a product alleged by a plaintiff to have been defective are subject to a claim of indemnity.").

As to the scope of the manufacturer's duty, we held in *Fitzgerald* that the manufacturer must indemnify "[a]nyone who qualifies as a 'seller,'" even if the seller is not "proven to have been in the chain of distribution." 996 S.W.2d at 867 (citing TEX. CIV. PRAC. & REM. CODE § 82.001(3)). We later held that the statute requires the manufacturer of the allegedly defective product to indemnify the seller against "all direct allegations against the seller that relate to [the] plaintiff's injury." *Meritor Auto., Inc. v. Ruan Leasing Co*., 44 S.W.3d 86, 90 (Tex. 2001). We clarified that the duty includes an obligation to pay the attorney's fees and costs that a seller incurs defending against claims that the seller negligently maintained the product and was therefore independently liable for the plaintiff's injuries. *Id*. at 87.

Finally, addressing the statutory exception to the duty, we have explained that, although the duty is triggered by the pleadings, the exception applies only upon an actual finding, and not merely an allegation, "that the seller's independent conduct was a cause of the plaintiff's injury." *Id*. at 91; *see also id*. at 90 (holding that the statute excepts from the duty "only those losses 'caused by' the seller") (quoting TEX. CIV. PRAC. & REM. CODE § 82.002(a)). Thus, "[t]o escape this duty to

indemnify, the [manufacturer] must prove the [seller's] independent culpability." *Hudiburg*, 199 S.W.3d at 255.

II.
Multiple-Product Cases

While our holdings on these three issues are relatively straightforward, construing the statute becomes significantly more complicated when a single products liability action includes allegations that two or more different products, each produced by a different manufacturer, are defective. Such an action may involve allegations that multiple different products produced by separate manufacturers are defective, *e.g.*, *Owens & Minor, Inc. v Ansell Healthcare Prods., Inc*., 251 S.W.3d 481 (Tex. 2008), or allegations that a finished product and one or more of its component parts (which themselves are also products) are defective, *e.g.*, *Hudiburg*, 199 S.W.3d at 253. Under the statute's definitions, "all manufacturers are also sellers." *Id*. at 256. Thus, in actions involving allegations that more than one manufacturer's product was defective, each manufacturer owes a duty to indemnify, but each is also a "seller" and thus entitled to be indemnified. Multiple-product cases thus present issues of which manufacturers owe a duty to indemnify whom, and what happens if the different manufacturers all owe a duty to each other and to other sellers.

Unfortunately, the statute does not explicitly address product liability actions involving multiple allegedly defective products. We have construed and applied the statute, however, to cases involving allegations that multiple different products are defective and cases involving allegations that a finished product and one or more of its component parts are defective. In both types of cases, we have consistently held that each manufacturer of an allegedly defective product must indemnify

against losses related to allegations of a defect in its own product but need not indemnify another manufacturer against losses related to the other manufacturer's allegedly defective product. Today, the Court modifies—or, perhaps, abandons—this rule, holding that the manufacturer of a finished product must indemnify the manufacturer/seller of a component part of the finished product, even against losses related to allegations that the seller's own component part was itself defective, unless the component-part manufacturer is actually found liable.

We first addressed these issues in the context of a finished-product/component-product scenario in *Hudiburg*, specifically to decide whether the statute required component-part manufacturers to indemnify a dealer (a "seller" under the statute) who sold the finished product that contained the component parts. To resolve the duty issue, we returned to the basic rule discussed above: "the duty [to indemnify] is imposed only on 'the manufacturer of a product claimed in a petition or complaint to be defective.'" *Hudiburg*, 199 S.W.3d at 256 (quoting *Fitzgerald*, 996 S.W.2d at 866 (citing TEX. CIV. PRAC. & REM. CODE § 82.002(f)). Applying this rule in the component-part context, we concluded that the statute imposes the duty to indemnify on each manufacturer of each component part that the claimant alleges to be defective. We rejected the argument, however, "that an allegation that a [finished] product is defective necessarily includes assertions that all of its components are defective." *Hudiburg*, 199 S.W.3d at 257. Instead, we held that a pleading triggers a component-part manufacturer's duty to indemnify only if the pleading

"fairly allege[s] a defect in the component itself, not merely a defect in the [finished] product of which the component was part." *Id*.[1]

We also addressed in *Hudiburg* the scope of the duty to indemnify in a multiple-product case. GM, which had manufactured one of the allegedly defective component parts (the truck chassis), argued that the statute "does not require a component-product manufacturer to indemnify a finished-product manufacturer against *losses arising from defects in the finished product unrelated to the component*." *Id*. at 261 (emphasis added). GM asserted that since it had settled all claims that its component part (the chassis) was defective, "the only remaining claims—and those for which [the seller] seeks indemnity—necessarily relate to [a different component part] or its attachment to the chassis, claims for which GM has no duty to indemnify." *Id*.

We agreed that the statute "does not impose on a component-product manufacturer a duty to indemnify for *losses due to alleged defects unrelated to its component*." *Id*. at 261–62 (emphasis added). We thus held that GM had "no statutory duty to indemnify [the seller] for losses arising out of the plaintiffs' action due to allegations that the truck, as distinct from one of its components, the chassis, was defective." *Id*. at 262. Even though GM was the manufacturer of an allegedly defective product in this products liability action and thus had the statutory duty to indemnify sellers for their losses in the action, we held that the scope of that duty only covered "losses related to allegations that the chassis was defective." *Id*. We ultimately concluded, however, that the court of appeals had

[1] In *Hudiburg*, we discussed the similar decision we issued the previous year in *Bostrom Seating, Inc. v. Trane Carrier Co*., 140 S.W.3d 681 (Tex. 2004), in which the manufacturer of a garbage truck sought indemnity from the manufacturer of the driver's seat that was incorporated into the truck. The claimant in that case alleged that the garbage truck was defective but "never alleged that the seat was defective, and for that reason alone," we held, the seat's manufacturer had no statutory duty to indemnify the manufacturer/seller of the truck. *Hudiburg*, 199 S.W.3d at 261.

correctly reversed a summary judgment in GM's favor because the record did "not establish that the indemnity claimed against GM is solely for losses unrelated to any defect in its chassis." *Id*.

In the case before us today, the Court relies on language from a paragraph that appears earlier in our *Hudiburg* opinion, in which we introduced concepts related to indemnity claims between component-product manufacturers and finished-product manufacturers with the following four statements:

> [1] "the manufacturer of a component product alleged by a claimant to be defective has a duty to indemnify an innocent seller/manufacturer of a finished product which incorporates the component from loss arising out of a products liability action related to the alleged defect";
>
> [2] "the manufacturer of an allegedly defective finished product has a duty to indemnify the innocent seller/manufacturer of a component product for the same loss";
>
> [3] "[i]f neither the component-product manufacturer nor the finished-product manufacturer is innocent, depending not on allegations but on proof, both indemnity claims under the statute will fail"; and
>
> [4] "[i]f both are innocent, again depending on proof, the indemnity claims offset each other."

Hudiburg, 199 S.W.3d at 256–57.

These statements are consistent with our basic rules and the actual holdings that we announced later in our *Hudiburg* opinion. The first statement is straightforward: if a claimant alleges that a component product is defective,[2] the manufacturer of that component product[3] has a

[2] "The duty to indemnify is triggered by the injured claimant's pleadings." *Hudiburg*, 199 S.W.3d at 256.

[3] The duty to indemnify "is imposed only on 'the manufacturer of a product claimed in a petition or complaint to be defective.'" *Fitzgerald*, 996 S.W.2d at 866 (quoting TEX. CIV. PRAC. & REM. CODE § 82.002(f)).

duty to indemnify any seller (which would include the finished product manufacturer)[4] from loss arising out of a products liability action *to the extent the loss is "related to the alleged defect" in the component product*.[5] The second statement is consistent and correct for the same reasons: if the claimant alleges that the *finished* product is defective, the manufacturer of the *finished* product must indemnify sellers (including manufacturers of *component* parts included within the finished product) for their losses, *but only to the extent that their losses are related to the alleged defect in the finished product.*

If the claimant alleges that both the component part and the finished product containing it are defective, then under the first two statements each manufacturer will owe a duty to indemnify the other (because each is both a manufacturer of an allegedly defective product and a "seller" in the products liability action), unless the other is actually found to be independently liable, thus triggering the exception.[6] The third statement is thus also correct: "if neither of the manufacturers is innocent, depending on proof," can only mean that the jury or court actually finds that they are both independently liable, and in that case the exception to the duty to indemnify would apply to both manufacturers' duties. Because of the exception, "both indemnity claims under the statute will fail." And the fourth statement—"if both are innocent, again depending on proof"—can only refer

[4] The manufacturer must indemnify "[a]nyone who qualifies as a 'seller,'" even if the seller is not "proven to have been in the chain of distribution." *Fitzgerald*, 996 S.W.2d at 867.

[5] The scope of the duty only covers "losses related to allegations that the [component part] was defective," and does not include "losses due to alleged defects unrelated to its component." *Hudiburg*, 199 S.W.3d at 262.

[6] The applies only upon a finding, and not merely an allegation, "that the seller's independent conduct was a cause of the plaintiff's injury." *Meritor Auto.*, 44 S.W.3d at 91.

to the situation in which there is no finding that either is independently liable, so the exception does not apply to either and each still owes a duty to indemnify the other, so one would offset the other.[7]

But, as the remainder of our *Hudiburg* opinion explains, all of these statements are necessarily subject to the limit on the scope of the duty described in the first statement. Today, the Court construes these statements to mean that, "[i]f competing duties to indemnify are triggered, the ultimate success of those claims will depend on what the evidence shows as to the fault of the indemnitee sellers." *Ante* at ___. This construction is correct only to the extent it refers to the issue of whether the exception applies to either manufacturer's duty to indemnify, because it is only the exception (and not the duty) that "depend[s] on what the evidence shows." More importantly, this statement ultimately overlooks what we said in *Hudiburg* regarding the limits to the *scope* of the manufacturers' respective duties even in the absence of the exception. The Court says, for example, that we held in *Hudiburg* that "GM owed Hudiburg a duty to indemnify *for losses related to the personal injury suit*, to the extent Hudiburg was not independently liable." *Ante* at ___ (emphasis added). That is simply not what we said in *Hudiburg*; to the contrary, what we actually said was that GM owed Hudiburg a duty to indemnify to the extent of any "*losses related to allegations that [GM's component part] was defective*," and does not include "losses due to alleged defects *unrelated to its component*." *Hudiburg*, 199 S.W.3d at 262 (emphases added).

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[7] In this regard, I do not understand the Court's statement that, "[w]hen these competing claims [for indemnity] are pursued, *Hudiburg* explains that the burden [to indemnify] will ultimately fall on the party whose product is *found* to be defective." *Ante* at ___ (emphasis added). We have repeatedly held, including in *Hudiburg*, that the duty to indemnify is triggered by an *allegation*, not a *finding*, that a product is defective. *Hudiburg*, 199 S.W.3d at 256. A finding that the seller is independently liable will create an exception to the other manufacturer's duty to indemnify, but each manufacturer's duty to indemnify exists regardless of whether its product is "found to be defective." An allegation triggers the duty; a finding triggers the exception, not the duty.

Continuing to overlook the limits on the scope of indemnity in a multiple products action, the Court goes on to hold that, based on the allegations in this case that Titeflex's flex connector (the component product) and Petroleum Solutions' fuel system (the finished product) were both defective, Petroleum Solutions had a duty to indemnify Titeflex "for *losses arising out of this products liability action*, to the extent Titeflex was not independently liable for those losses." *Ante* at ___ (emphasis added). That is simply not how we have construed the statute in *Hudiburg* or any of our other multiple-product cases. Consistent with our holding in *Hudiburg*, I would hold that Petroleum Solutions had a duty to indemnify Titeflex for losses related to allegations that the fuel system (Petroleum Solutions' finished product) was defective, but not for losses related to allegations that the flex connector (Titeflex's component product) was defective. Because Titeflex incurred all of its losses defending only against allegations that the flex connector was defective, the scope of Petroleum Solutions' duty to indemnify does not encompass those losses.

If there were any doubt about our holding in *Hudiburg* regarding the limited scope of the duty to indemnify in an action involving multiple allegedly defective products, this Court resolved that doubt in *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*, 251 S.W.3d 481, 482 (Tex. 2008). In *Owens & Minor* we held that the statute "does not require a manufacturer to indemnify a distributor against claims involving products other manufacturers released into the stream of commerce." *Id.* at 482. We explained that, "while it is correct that the claimant's petition triggers each manufacturer's duty to indemnify an innocent seller under Section 82.002," it is the statute, and not the petition, that "define[s] the scope of that duty." *Id.* at 484. From the language of the statute, we concluded "it is unmistakable that the duty under Section 82.002 is premised on a nexus

between a given manufacturer and its product." *Id*. at 485. Thus, we explained, manufacturers "can be 'manufacturers' under Section 82.002 only with respect to their own products," because section 82.002 does not "require a manufacturer to indemnify a seller for *claims relating to products it did not produce*." *Id.* at 485 & n.2 (emphasis added).

Our construction of the statute in *Owens & Minor* relies on and confirms our holding in *Hudiburg* that the scope of the manufacturer's duty to indemnify in a multiple-products action is limited to a seller's losses that are related to the manufacturer's allegedly defective product. *Id.* at 485 n.2 (holding that section 82.002 does not "require a manufacturer to indemnify a seller *for claims relating to products it did not produce*") (emphasis added); *Hudiburg*, 199 S.W.3d at 261–62 (holding that "section 82.002 does not impose on a component-product manufacturer a duty to indemnify for *losses due to alleged defects unrelated to its component*") (emphasis added). As we explained when the *Owens & Minor* case came before us a second time, "[w]e held in *Owens & Minor* that manufacturers must indemnify and hold harmless an innocent seller *only for the portion of the defense* associated with [the manufacturers'] own products." *Ansell Healthcare Prods., Inc. v. Owens & Minor*, 251 S.W.3d 499, 500 (Tex. 2008) (emphasis added).

The Court concludes today that it is "improper" to apply our holding in *Owens & Minor* to the present case because *Owens & Minor* "involved a one-way duty to indemnify owed by multiple manufacturers to a non-manufacturing seller for its losses," while the present case involves "competing duties to indemnify owed to each other by a finished-product manufacturer and a component-product manufacturer." *Ante* at ___. But that is not what we said in *Owens & Minor*. To the contrary, in *Owens & Minor* we defended our reliance on *Hudiburg*'s discussion of the scope

of the duty to indemnify by rejecting the argument (which the Court itself makes today) that there is a substantive difference between the two types of multiple-product cases. "While this case does not involve the duty of a manufacturer of component parts," we explained, "the principle we applied in *Hudiburg* remains the same. There is no substantive difference between the position of the component-part manufacturer in *Hudiburg* and the position of [the product manufacturers] in this case." *Owens & Minor*, 251 S.W.3d at 485. "In both instances," we concluded, "it would be contrary to the Legislature's intent to require a defendant to indemnify a seller *for claims regarding products the defendant never manufactured*." *Id*. at 486 (emphasis added).

III.
Application

Applying these principles in the present case, I would hold that section 82.002 does not impose on Petroleum Solutions a duty to indemnify Titeflex for the fees and expenses that Titeflex incurred in this case, because Titeflex incurred all of its losses defending against allegations that Titeflex's own flex connector was defective, not allegations that Petroleum Solutions' fuel system was defective. Petroleum Solutions argues that Head's claims against Titeflex "complained only of Titeflex'[s] product, and did not seek damages from Titeflex ***unrelated*** to allegations of defects in Titeflex's component." I agree. When Petroleum Solutions joined Titeflex as a third-party defendant, it alleged only that *a defective flex connector* manufactured by Titeflex had caused the leak. When Head amended his petition to assert a claim directly against Titeflex, he alleged that "Titeflex manufactured the flex connector" and that "Titeflex is strictly liable for damages caused by the defective flex connector."

Here, as the majority notes, "because the fuel system is a product, Petroleum Solutions is the manufacturer of that product, and Titeflex is the innocent seller of a component part allegedly used in Petroleum Solutions' defective finished product," *ante* at ___, Petroleum Solutions has a statutory duty to indemnify Titeflex. But the majority ends its analysis there, instead of continuing on to address the question of whether the *scope* of Petroleum Solutions' duty encompasses Titeflex's losses. The Court overlooks our holdings in *Hudiburg* and in *Owens & Minor* regarding the scope of the duty to indemnify, and thus misses the effect of the fact that the losses for which Titeflex seeks indemnity all arise from allegations that Titeflex's component part, and not Petroleum Solutions' fuel system, was defective.

Under *Hudiburg* and *Owens & Minor*, the scope of the duty the statute imposed on Petroleum Solutions' to indemnify Titeflex did not extend to losses that Titeflex incurred as a result of claims that a *different product*—the flex connector that Titeflex manufactured—was defective. Titeflex was sued only for alleged defects in the flex connector, and I agree with Petroleum Solutions that, under our constructions of the statute in *Fitzgerald*, *Hudiburg*, and *Owens & Minor*, Petroleum Solutions could not be liable to indemnify Titeflex for losses relating to a product that Petroleum Solutions did not manufacture. I would hold that Petroleum Solutions must indemnify Titeflex "only for the portion of the defense associated with [Petroleum Solutions'] own products." *Ansell Healthcare Prods.*, 251 S.W.3d at 500.

Under this construction of section 82.002, Petroleum Solutions is a "manufacturer" under chapter 82 only with respect to the product it manufactured: the underground fuel system. *See id.* Petroleum Solutions did not design, formulate, construct, rebuild, fabricate, produce, compound,

process, or assemble the flex connector. Petroleum Solutions was a manufacturer with respect to the finished product but it was not a manufacturer with respect to the flex connector. *See id*. I agree that Petroleum Solutions would therefore have a duty to indemnify a seller like Titeflex against losses arising out of allegations that the finished product was defective, but the scope of its duty to indemnify Titeflex does not extend to losses arising out of the allegations that the flex connector itself was defective. *See id.*; *Owens & Minor*, 251 S.W.3d at 485–86. Titeflex therefore has no losses for which Petroleum Solutions owes a statutory duty to indemnify Titeflex.

IV.
Conclusion

Section 82.002 requires "[a] manufacturer" to indemnify "a seller" against losses arising out of "a products liability action," which means an action against "a manufacturer or seller" to recover damages allegedly caused by "a defective product." TEX. CIV. PRAC. & REM. CODE §§ 82.001(2), 82.002(a). The statute's silence on how this duty applies when a products liability action includes allegations that more than one product is defective presents several issues that are difficult to resolve. But we have already done our best to resolve them, relying on our observation that "it is unmistakable that the duty under Section 82.002 is premised on a nexus between a given manufacturer and its product." *Owens & Minor*, 251 S.W.3d at 485. We have thus held that, in multiple-products cases, the scope of each manufacturer's duty includes only those losses that a seller incurs related to the manufacturer's product, and does not include losses that another manufacturer incurs defending claims that its own product was defective. Because Titeflex seeks indemnity only for losses that it incurred defending claims that its own product was defective, I

disagree with the Court's holding that Petroleum Solutions' has a duty to indemnify Titeflex under section 82.002, and I dissent from that portion of the Court's judgment.

Jeffrey S. Boyd
Justice

Opinion delivered: July 11, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0447

LEE C. RITCHIE, ET AL., PETITIONERS,

v.

ANN CALDWELL RUPE, AS TRUSTEE FOR THE DALLAS GORDON RUPE, III 1995 FAMILY TRUST, RESPONDENT

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

Argued on February 26, 2013

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

JUSTICE GUZMAN filed a dissenting opinion, in which JUSTICE WILLETT and JUSTICE BROWN joined.

In this case, a minority shareholder in a closely held corporation alleged that the corporation's other shareholders, who were also on the board of directors, engaged in "oppressive" actions and breached fiduciary duties by, among other things, refusing to buy her shares for fair value or meet with prospective outside buyers. The directors essentially admit to this conduct but insist that they were simply doing what was best for the corporation. For the most part, the jury sided with the minority shareholder, and the trial court ordered the corporation to buy out her shares for $7.3 million. The court of appeals agreed that the directors' refusal to meet with prospective purchasers was "oppressive" and upheld the buy-out order. We hold that this conduct was not "oppressive"

under the statute on which the minority shareholder relies, and in any event, the statute does not authorize courts to order a corporation to buy out a minority shareholder's interests. Moving beyond the statutory claims, we decline to recognize or create a Texas common-law cause of action for "minority shareholder oppression." We thus reverse the court of appeals' judgment. Because the court of appeals upheld the judgment based on the oppression claim and did not reach the breach-of-fiduciary-duty claim, we remand the case to the court of appeals.

I.
Background

Rupe Investment Corporation (RIC) is a Texas closely held corporation.[1] Before this dispute arose, RIC's board of directors had four members: Paula Dennard, who chaired the board; Dallas Gordon Rupe, III (Buddy), who was Dennard's brother; Lee Ritchie, who served as president of RIC; and Dennis Lutes, an attorney whose clients included RIC, Dennard, and her family. Paula Dennard and Buddy Rupe were the descendants of RIC's founder, and Ritchie is the descendant of one of its early owners. Three different family trusts collectively owned approximately 72% of RIC's voting stock.[2] Dennard, Ritchie, and Lutes served as trustees of those trusts and thus collectively controlled a majority of RIC's voting power. Ritchie and his family also owned an additional 10% of the shares directly, increasing the combined voting power to 82%. Buddy owned the remaining 18% directly. There was no shareholders' agreement.

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[1] A corporation is "closely held" if it has fewer than thirty-five shareholders and its stock is not publicly traded. *See* TEX. BUS. ORGS. CODE § 21.563.

[2] Since the filing of this suit, one of the trusts, known as Ruby's Trust, has been terminated and its shares distributed amongst Dennard's three children and her step-sister, Robin Rupe.

Ann Rupe joined the family when she married Buddy in 1983. Rupe was Buddy's second wife, and their marriage and the birth of their son, Guy, took place after the death of Dennard and Buddy's father, Gordon. Gordon's will created Gordon's Trust, which named Gordon's wife, his children (Dennard and Buddy), and Dennard's three children as beneficiaries. Buddy and Rupe wanted their son to be added as a beneficiary of Gordon's Trust, but Dennard and her children refused, and this created some friction between Rupe and Dennard. According to Rupe, Dennard treated Rupe "as an outsider" from the very beginning, and told her that she would "never get any money in this family." With Buddy's encouragement, Rupe began considering a lawsuit to reform Gordon's Trust to add Guy as a beneficiary.

Buddy died in 2002. His 18% interest in RIC had been placed in a trust for the benefit of Rupe and their son (Buddy's Trust), naming Rupe as trustee.[3] In Rupe's view, Dennard, Ritchie, and Lutes immediately became "hostile" towards her and feared that she would sue to reform Gordon's Trust. At one point, Ritchie, with Dennard's and Lutes's approval, offered to appoint Rupe to replace Buddy on RIC's board of directors, but only if she would agree not to file suit against Gordon's Trust. Rupe declined, and instead asked Ritchie if RIC would be interested in buying out her shares. Ritchie replied that RIC could not at that time because one of RIC's subsidiaries, Hutton Communications, was going through a financial crisis. Soon thereafter, Rupe's attorney sent a letter

[3] Rupe brought this lawsuit in her capacity as trustee for Buddy's Trust, the actual owner of the 18% voting shares in RIC. We will generally refer to Rupe and to "Rupe's shares," however, meaning Rupe in her trustee capacity and the shares owned by Buddy's Trust.

to Lutes, requesting the opportunity to review and copy RIC's corporate documents[4] and directing the Rupe and Ritchie family members not to communicate directly with Rupe regarding RIC or any other business matters.

On behalf of RIC, Lutes later offered to redeem Rupe's shares for $1 million. With this offer, he told Rupe that "any further discussions regarding a possible stock redemption would be pointless until the Hutton Communications situation is finally resolved," and he encouraged Rupe not to redeem the shares until they "ultimately" increased in value. Rupe's attorney declined the redemption offer. Because RIC's sales exceeded $150 million and it had assets in excess of $50 million, he considered it "absurd" and an attempt "to take advantage of [Rupe]."

Rupe subsequently terminated her relationship with her attorney and personally requested a new redemption offer from Ritchie. Ritchie reiterated that he did not recommend selling her shares at that time, but he agreed to raise the issue at an upcoming board meeting. After the board meeting, Ritchie made a new offer of $1,760,947, which he said was based on a formula that RIC had previously used to value RIC's shares and, in any event, was "the highest cash offer that RIC directors believed they could make without jeopardizing the company and its other shareholders." Rupe declined the offer and decided to try to sell her shares to an outside party. She hired a new attorney and a broker, George Stasen, to market her shares. At Rupe's request, Dennard and Ritchie

[4] Either personally or through her various attorneys, Rupe requested RIC documents on several occasions. The record indicates that RIC repeatedly provided some documents or access in response to these requests. Nevertheless, in correspondence and at trial, Rupe's attorneys contended that RIC was not as forthcoming with its corporate books and records as their fiduciary duties and the Texas Business Organizations Code require. The jury agreed, but the court of appeals determined that the evidence was legally insufficient to support this finding, and Rupe has not challenged that holding in this Court. *See* 339 S.W.3d 275, 304–05. We therefore omit these details, and our judgment preserves the court of appeals' unchallenged holding on this issue.

met with Stasen in March 2005. The meeting did not go well. Stasen, who described the meeting as "hostile," informed Dennard and Ritchie that he felt RIC's financial performance was "very, very unsatisfactory" and accused them of mismanagement. Stasen admitted at trial, however, that he had only a limited understanding of the company at the time. Nevertheless, throughout late 2005, Ritchie and Lutes worked with Stasen and Rupe's latest attorney to draft confidentiality agreements to allow Stasen to disclose some of RIC's confidential business information to Rupe's prospective outside purchasers.

In January 2006, Rupe sent a note to Ritchie, asking for dates when he could meet with prospective purchasers. After conferring with Lutes and an outside attorney with expertise in securities law, Ritchie sent a reply to Rupe declining to participate in such meetings. Ritchie stated that, because RIC would not be a party to the sale of her shares to an outside buyer, "it would be inappropriate for me or any other officer or director of [RIC] to meet with your prospects or otherwise participate in any activities relating to your proposed sale of stock." Stasen prepared marketing materials and provided them to potential buyers, but he did not succeed in selling the stock because, in his opinion, "everybody wanted to be able to meet Lee Ritchie and talk to the executives . . . as part of their due diligence." Although he determined that the book value of Rupe's stock was $3.9 million, he discounted that to $3.4 million because of the directors' refusal to meet with prospective buyers. In his view, however, it would be "incredibly difficult" to market Rupe's shares without such meetings, and the likelihood of selling the shares was "zero."

In July 2006, Rupe filed this suit against Dennard, Ritchie, Lutes, and RIC,[5] alleging that they engaged in "oppressive" conduct and breached fiduciary duties to her. Rupe requested an accounting and valuation and an order requiring RIC to purchase her shares at fair market value or, alternatively, appointing a receiver to liquidate RIC. The jury found in Rupe's favor on essentially all of her claims and found that the fair value of Rupe's stock was $7.3 million. The trial court rendered judgment on the jury's verdict, concluding that Dennard, Ritchie, Lutes, and RIC had "engaged in oppressive conduct to the rights of [Buddy's Trust] that is likely to continue in the future," that "the most equitable remedy" for this oppression was to require RIC to redeem Rupe's shares, and that this remedy was "less drastic" than liquidating the company or appointing a receiver. Based on these conclusions and the jury's findings, the trial court ordered RIC to purchase Rupe's shares for $7.3 million. Dennard, Ritchie, Lutes, and RIC appealed.

The court of appeals held that their refusal to meet with Rupe's prospective purchasers constituted oppressive conduct as a matter of law. Having reached that conclusion, it did not consider whether other actions by Dennard, Ritchie, and Lutes were oppressive, as Rupe had alleged. The court upheld the trial court's order requiring RIC to purchase Rupe's shares, but concluded that the trial court had erred by instructing the jury not to discount the shares' value to account for their lack of marketability and control. 339 S.W.3d 275, 301–02. The court thus affirmed the finding of oppressive conduct but reversed as to the $7.3 million purchase price, and remanded the case to the

[5] Rupe originally sued Dennard, Ritchie, and Lutes in their individual capacities, but later added them in their capacities as RIC directors and as trustees of the trusts that owned RIC's shares.

trial court for a new determination of the shares' fair value. Dennard, Ritchie, and Lutes petitioned this Court for review, which we granted.

II.
Oppressive Actions Under the Receivership Statute

We begin by determining the meaning of "oppressive" as the Legislature used that word in the Texas receivership statute. This statute, former article 7.05 of the Texas Business Corporations Act, and its successor, section 11.404 of the Texas Business Organizations Code, authorize Texas courts to appoint a receiver to rehabilitate a domestic corporation under certain circumstances.[6] *See* TEX. BUS. ORGS. CODE § 11.404. Although Rupe sought appointment of a receiver to liquidate RIC rather than rehabilitate it,[7] only sought that remedy as an alternative to other remedies, did not obtain that relief in the judgment, and does not request that relief on appeal, she relies on this statute as authority for the trial court's judgment ordering RIC to buy out her shares.

Former article 7.05 authorizes courts to appoint a rehabilitative receiver when it is "necessary" to do so "to conserve the assets and business of the corporation and to avoid damage to parties at interest," but only if "all other requirements of law are complied with" and "all other

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[6] *See* Act of Mar. 30, 1955, 54th Leg., R.S., ch. 64, art. 7.05, 1955 Tex. Gen. Laws 239, 290–91, *amended by* Act of May 3, 1961, 57th Leg., R.S., ch. 169, 1, 1961 Tex. Gen. Laws, 319, 319 (formerly TEX. BUS. CORP. ACT art. 7.05), *expired Jan. 1, 2010*, Act of May 13, 2003, 78th Leg., R.S., ch. 182, § 2, 2003 Tex. Gen. Laws 267 (current version at TEX. BUS. ORGS. CODE § 11.404) [herein, former article 7.05]. The Business Corporations Act, now expired, was in large part recodified in the Texas Business Organizations Code. *See* Act of May 13, 2003, 82nd Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267. Although section 11.404 governs current actions for rehabilitative receivership, former article 7.05 was the governing statute when the trial court rendered its judgment in this case. *See* TEX. BUS. ORGS. CODE § 402.001–.005. The language of the two statutes is not identical, but for purposes of this case their differences are not material.

[7] Former article 7.05 and current Section 11.404 only authorize the appointment of a receiver to rehabilitate a corporation. Under other circumstances, different sections of the statutes authorize courts to appoint a receiver to liquidate a corporation's property and business. *See* TEX. BUS. ORGS. CODE §§ 11.402, 11.405; former TEX. BUS. CORP. ACT art. 7.06.

remedies available either at law or in equity, including the appointment of a receiver for specific assets of the corporation, are determined by the court to be inadequate." Former art. 7.05(A); *see also* TEX. BUS. ORGS. CODE § 11.404(b). In addition, when the party seeking a receivership is a shareholder of the corporation, the party must also establish:

> (a) that the corporation is insolvent or in imminent danger of insolvency; or
>
> (b) that the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
>
> (c) *that the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent*; or
>
> (d) that the corporate assets are being misapplied or wasted; or
>
> (e) that the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors.

Former art. 7.05(A)(1) (emphasis added); *see also* TEX. BUS. ORGS. CODE § 11.404(a)(1). Rupe relies on subpart (c), and asserts that Dennard's, Ritchie's, and Lutes's actions were "oppressive." Thus, we must determine what the Legislature meant when it used the term "oppressive" in this statute, whether the refusal to meet with Rupe's potential buyers fits within that meaning, and what remedies the statute provides for such actions.

A. Cases Construing "Oppressive"

This Court has not previously construed former article 7.05 or current section 11.404. Initially, Texas courts of appeals construed the statute quite narrowly. In *Texarkana College Bowl,*

Inc. v. Phillips, the court reversed a trial court order appointing a receiver based on oppressive actions, holding that a "stockholder's dissatisfaction with corporate management is not by [former] Article 7.05 made grounds for a receivership," and the shareholder was not entitled to a receivership based on acts that were "not inconsistent with the honest exercise of business judgment and discretion by the board of directors." 408 S.W.2d 537, 539 (Tex. Civ. App.—Texarkana 1966, no writ). The court thus incorporated the concept of the "business judgment rule" into its analysis of whether actions were oppressive under the statute. *See id.*; *see also In re Schmitz*, 285 S.W.3d 451, 457, 457 n.33 (Tex. 2009) (addressing the "business judgment that Texas law requires a board of directors to exercise").

Twenty-two years later, another court of appeals affirmed a trial court's denial of a petition for appointment of a receiver, holding that, in light of the statute's requirement that "'all other remedies available either at law or in equity' are inadequate," the trial court "properly required an emergency on which to base the relief sought." *Balias v. Balias*, 748 S.W.2d 253, 257 (Tex. App.—Houston [14th Dist.] 1988, writ denied). Both *Phillips* and *Balias* involved closely held corporations like RIC, but neither court held that such corporations were entitled to any special treatment under the receivership statute, which does not distinguish between closely held and other types of corporations.[8] *See id.*; *Phillips*, 408 S.W.2d at 539.

[8] Closely held corporations have unique attributes that may justify different protections under the law. We discuss these considerations in Section III, *infra,* in our analysis of whether to recognize a common-law cause of action for oppression. We do not discuss them here because former article 7.05 and section 11.404 apply equally to all corporate forms, whether closely held or publicly traded, without distinction.

That same year, another court of appeals became the first Texas appellate court to affirm a judgment based on the statute's oppressive-actions provision. *Davis v. Sheerin*, 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied). In *Davis*, which has since become the seminal Texas opinion on the issue, a 45% owner of a closely held corporation, Sheerin, sued the company's president and 55% owner, Davis, alleging that Davis engaged in oppressive conduct and breached fiduciary duties owed to Sheerin and the company. *Id.* at 377. The jury agreed with Sheerin, and the trial court appointed a rehabilitative receiver and ordered Davis to buy out Sheerin's interest. *Id.* at 378. Although the court of appeals acknowledged that the statute does not expressly authorize a buy-out order and that no Texas court had previously forced a shareholder buyout in the absence of a buy-out agreement, *id.* at 378–79, it concluded that "Texas courts, under their general equity power, may decree a [buyout] in an appropriate case where less harsh remedies are inadequate to protect the rights of the parties." *Id.* at 380.

When determining what constitutes "oppressive" action under the statute, the *Davis* court concluded that "[c]ourts take an especially broad view of the application of oppressive conduct to a closely-held corporation, where oppression may more easily be found," *id.* at 381, and then recited two standards for oppression:

- a New York court's definition of oppression as occurring "when the majority's conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture," and
- an Oregon court's collection of oppression definitions, which included "'burdensome, harsh and wrongful conduct,' 'a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members,' or 'a visible departure

> from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.'"

Id. at 381–82. These two standards—generally referred to as the "reasonable expectations" test and the "fair dealing" test—have since echoed throughout Texas oppressive-actions cases.[9]

In the present case, the trial court used the fair dealing test to define "oppressive" for the jury. On appeal, the court of appeals concluded that the directors' refusal to meet with Rupe's potential purchasers was oppressive under both tests: it substantially defeated Rupe's reasonable expectations and constituted a "visible departure from the standards of fair dealing and a violation of fair play on which each shareholder is entitled to rely." 339 S.W.3d at 297. In addition, the court rejected the application of the business judgment rule, reasoning that the rule applies only in derivative suits and only to protect directors from individual liability. *Id.* at 295–96. The court thus affirmed the trial court's finding that Dennard, Ritchie, and Lutes had engaged in oppressive conduct. *Id.* at 309.

B. The Meaning of "Oppressive" Under the Receivership Statute

The construction of former article 7.05, like any other statute, is a question of law for the courts, and we review the court of appeal's determination of this question de novo. *Atmos Energy Corp. v. Cities of Allen*, 353 S.W.3d 156, 160 (Tex. 2011). "Our task is to effectuate the Legislature's expressed intent," *In re Allen*, 366 S.W.3d 696, 703 (Tex. 2012); it is not to impose our personal policy choices or "to second-guess the policy choices that inform our statutes or to

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[9] *See, e.g.*, *Kohannim v. Katoli*, No. 08-11-00155-CV, 2013 WL 3943078, at *9–11, — S.W.3d —, — (Tex. App.—El Paso July 24, 2013, pet. denied); *Boehringer v. Konkel*, 404 S.W.3d 18, 24 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Redmon v. Griffith*, 202 S.W.3d 225, 234 (Tex. App.—Tyler 2006, pet. denied); *Cotton v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 699–701 (Tex. App.—Fort Worth 2006, pet. denied); *Pinnacle Data Servs., Inc. v. Gillen,* 104 S.W.3d 188, 196 (Tex. App.—Texarkana 2003, no pet.); *Willis v. Bydalek*, 997 S.W.2d 798, 801 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

weigh the effectiveness of their results." *Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011) (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003)). We focus on the words of the statute, because "[l]egislative intent is best revealed in legislative language." *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013).

We begin by noting that the Legislature has never defined the term "oppressive" in the Business Corporations Act or the Business Organizations Code. And although it has used the terms "oppress," "oppressive," or "oppression" in a handful of other Texas statutes, they do not include a definition either.[10] In the absence of a statutory definition, we give words their common meaning. *City of Dall. v. Abbott*, 304 S.W.3d 380, 393 (Tex. 2010). Dictionary definitions of "oppression" include "[t]he act or an instance of unjustly exercising authority or power," "[c]oercion to enter into an illegal contract," and—reflective of case law addressing claims like Rupe's claim in this case—"[u]nfair treatment of minority shareholders (esp. in a close corporation) by the directors or those in control of the corporation." BLACK'S LAW DICTIONARY 1203 (9th ed. 2009). As these definitions and the Legislature's other uses of the term demonstrate, "oppressive" is a broad term that can mean different things in different contexts. Under the other statutes, a government

[10] *See, e.g.*, TEX. BUS & COM. CODE § 2.614 (providing that payment in the manner required by a government regulation is sufficient to discharge a buyer's obligation "unless the regulation is discriminatory, oppressive or predatory."); *Id*. § 2A.404 (same for lease payments); TEX. CIV. PRAC. & REM. CODE § 22.024(2) (court may compel journalist to testify if, *inter alia*, "the subpoena is not overbroad, unreasonable, or oppressive"); TEX. CODE OF CRIM. PROC. art. 38.11 Sec. 5(b)(1) (subpoena may not be "overbroad, unreasonable, or oppressive"); *Id*. art. 17.15 ("The power to require bail is not to be so used as to make it an instrument of oppression."); TEX. FIN. CODE § 392.302(1) (listing conduct by which a debt collector "may not oppress, harass, or abuse a person"); TEX. GOV'T CODE § 432.138 (prohibiting military officers from "cruelty toward, or oppression or maltreatment of, any person subject to his order"); *Id*. § 665.052(4) (public officers may be removed for "oppression in office"); TEX. OCC. CODE § 2301.455 (auto dealer's franchise agreement may be terminated considering, *inter alia*, "oppression, adhesion, and the parties' relative bargaining power"); TEX. PENAL CODE § 1.02 (objective of Penal Code is to prevent "arbitrary or oppressive treatment of persons suspected, accused, or convicted"); *Id*. § 39.03 (defining "official oppression" as "intentionally" inflicting various harm on others).

regulation, a subpoena, the amount of bail, the use of military or official authority, a franchise agreement, and a debt collector's actions can all be "oppressive."[11] Generally, these statutes indicate that "oppressive" actions involve an abuse of power that harms the rights or interests of another person or persons and disserves the purpose for which the power is authorized. But the test for determining whether something is oppressive will necessarily vary from one context to the next, and thus the term has multiple meanings, depending on the circumstances.

"[W]hen an undefined [statutory] term has multiple common meanings, the definition most consistent within the context of the statute's scheme applies." *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 180–81 (Tex. 2013) (per curiam). To determine the meaning of "oppressive" in the receivership statute, our text-based approach to statutory construction requires us to study the language of the specific provision at issue, within the context of the statute as a whole, endeavoring to give effect to every word, clause, and sentence. *In re Office of Att'y Gen.*, 422 S.W.3d at 629; *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999). We therefore examine not only the language of the oppression provision but also the language and context of the entire receivership statute, including the other specific grounds on which it authorizes a receivership and the general requirements that apply to all of the specific grounds.

1. General Requirements for Receivership

The term "oppressive" in former article 7.05 occurs within a statute that authorizes courts to appoint a receiver to take over a corporation's governance, displacing those who are otherwise legally empowered to manage the corporation. Within this context, two aspects of this receivership

[11] *See* authorities cited *supra* note 10.

statute are particularly relevant. First, both former article 7.05 and current section 11.404 are not limited to closely held corporations. *See* former art. 7.05; TEX. BUS. ORGS. CODE § 11.404. The Legislature has adopted a single standard for rehabilitative receivership based on oppressive actions that applies to all corporations (and, under the current statute, any "domestic entity") without regard to the number of its shareholders or the marketability of its shares. *See id.* Nothing in the language suggests that this statute provides a special right or remedy unique to minority shareholders in closely held corporations. *See id.* We must thus construe the statute in a manner that is meaningful and workable not only for the peculiarities of minority shareholders in a closely held corporation, but also for shareholders and owners of other business entities.

Second, the statute places significant restrictions on the availability of a receivership: (1) the receivership must be "necessary . . . to conserve the assets and business of the corporation and to avoid damage to parties at interest," (2) "all other requirements of law [must be] complied with," and (3) "all other remedies available either at law or in equity" must be "inadequate." Former art. 7.05(A) (emphasis added); *see also* TEX. BUS. ORGS. CODE § 11.404(b). These requirements demonstrate the Legislature's intent that receivership—which replaces the managers the shareholders chose with the courts' chosen managers—is a "harsh" remedy that is not readily available. *See Balias*, 748 S.W.2d at 257. In fact, by requiring termination of the receivership immediately after the condition that necessitated the receiver is remedied, the Legislature has expressed its intent that receivership be a temporary fix for exigent circumstances. *See* former art. 7.05(B); *see also* TEX. BUS. ORGS. CODE § 11.404(c). We thus agree with the *Balias* court that, to qualify as the type of "oppressive" actions

that justify a rehabilitative receivership, the complained-of actions must create exigent circumstances for the corporation. *See Balias*, 748 S.W.2d at 257.

2. Other Grounds for Receivership

In addition to the statute's three general requirements, a shareholder who seeks a rehabilitative receivership under former article 7.05 must also prove at least one of five specific grounds, one of which is the "illegal, oppressive or fraudulent" actions provision on which Rupe relies. *See* former art. 7.05(A)(1)(c); *see also* TEX. BUS. ORGS. CODE § 11.404(a)(1)(C). The other four specific grounds are (1) the corporation is insolvent or in imminent danger of becoming insolvent; (2) an unbreakable deadlock among the corporation's managers is causing or threatening irreparable injury to the corporation; (3) a deadlock among the shareholders prevents the election of the corporation's management; or (4) the corporation's assets are being misapplied or wasted. Former art. 7.05(A)(1)(a), (b), (d), (e); *see also* TEX. BUS. ORGS. CODE § 11.404(a)(1)(A), (B), (D), (E). These are all situations that pose a serious threat to the well-being of the corporation. We must construe "illegal, oppressive, or fraudulent" actions, when alleged as a ground for receivership, in a manner consistent with these types of situations. *See, e.g.*, *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629 (Tex. 2011) (construing "public interest" to reference only public interest in natural resources, not public interest in traffic safety, when other considerations identified in statute exclusively concerned matters relating to oil and gas).

3. "Illegal, Oppressive, or Fraudulent" Actions

Finally, we consider the statute's specific provision, which requires a finding that the "directors or those in control of the corporation" engaged in "illegal, oppressive, or fraudulent"

actions. This requirement provides two more essential pieces of guidance. First, receivership under this provision must be based on the actions of the corporation's "directors or those in control of the corporation." *See* former art. 7.05(A)(1)(c); *see also* TEX. BUS. ORGS. CODE § 11.404(a)(1)(C) ("governing persons").[12] Directors, or those acting as directors, owe a fiduciary duty to the corporation in their directorial actions, and this duty "includes the dedication of [their] uncorrupted business judgment for the sole benefit of the corporation." *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963); *see also Gearhart Indus., Inc. v. Smith Intern., Inc.*, 741 F.2d 707, 723–24 (5th Cir. 1984) (describing corporate director's fiduciary duties of obedience, loyalty, and due care). Since the statute permits a receivership only for the "oppressive" actions of those who are duty-bound to act according to their "uncorrupted business judgment for the sole benefit of the corporation," the meaning of "oppressive" must accommodate the exercise of that business judgment. In other words, because a director is duty-bound to exercise business judgment for the sole benefit of the corporation, and not for the benefit of individual shareholders, we cannot construe the term "oppressive" in a manner that ignores that duty. *See, e.g.*, *Holloway*, 368 S.W.2d at 577–78 (describing corporate officers' and directors' duty to maximize corporate returns and value of

[12] Ordinarily, a corporation must be managed by a board of directors. TEX. BUS. ORGS. CODE § 21.401(a). The Business Organizations Code allows certain exceptions, including when the shareholders' agreement or the governing documents of a "close corporation" provide for the elimination of the board of directors in favor or one or more corporate managers. *Id.* §§ 21.101(a)(2), 21.713(2). Under these circumstances, corporations may be managed directly by shareholders. *See id.* §§ 21.101(a)(2), 21.714(b)(1), (2). Thus, former article 7.05 and current section 11.404 authorize receivership based on the conduct of a corporation's directors (when the corporation is managed by a board of directors) or of its shareholders (when the corporation is managed by its shareholders). *See* former art. 7.05(A)(1)(c); TEX. BUS. ORGS. CODE § 11.404(a)(1)(C). In either instance, however, the persons or entities managing the corporation act in the capacity of directors and are treated as directors under the Code. TEX. BUS. ORGS. CODE §§ 21.106(a)–(b), 21.725–.726(a); *see also id.* § 21.727 (managing shareholders subject to liability imposed on directors for management-related conduct required by law).

corporation's shares); *Hughes v. Hous. NW. Med. Ctr., Inc.*, 680 S.W.2d 838, 843 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (observing that corporate officers and directors owe corporation and its collective shareholders "a duty to act only in their best interest"). We therefore reject the court of appeals' conclusion that the business judgment rule "has no application in this case." 339 S.W.3d at 296. Instead, we agree with the *Texarkana College Bowl* court's conclusion that conduct is oppressive only if it is "inconsistent with the honest exercise of business judgment and discretion by the board of directors."[13] *Texarkana Coll. Bowl*, 408 S.W.2d at 539; *see also Willis*, 997 S.W.2d at 802–03.

Second, the Legislature grouped together three categories of conduct in this provision of the statute—actions that are "illegal," actions that are "fraudulent," and actions that are "oppressive." *See* former art. 7.05(A)(1)(c); *see also* TEX. BUS. ORGS. CODE § 11.404(a)(1)(C). It is a "familiar principle of statutory construction that words grouped in a list should be given related meaning," *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 n.2 (Tex. 1980), and similarly that "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 v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). Thus, the meaning that the Legislature contemplated for the term "oppressive" must be consistent with,

[13] The dissent states that "the business judgment rule is fundamentally at odds with shareholder oppression remedies." *Post* at __. But our task is not to construe the receivership statute in a manner that is consistent with "shareholder oppression remedies," a phrase that cannot be found in any prior Texas opinion. Our task is to construe the statute in a manner that is consistent with statutory language enacted by the Legislature. The business judgment rule is entirely consistent with the language of the statute, which authorizes relief only if necessary "to conserve the property and business of the domestic entity and avoid damage to interested parties," and it is entirely consistent with the surrounding grounds for relief under the statute, which focus on insolvency, deadlock in the management of the business, and misuse of business property—i.e., conduct that threatens the interests of the business. *See* former art. 7.05(A)(1)(a), (b), (d), (e); TEX. BUS. ORGS. CODE § 11.404(a)(1)(A), (B), (D), (E).

though not identical to, the meanings intended for the accompanying terms "illegal" and "fraudulent."

Illegal and fraudulent actions in corporate management share considerable similarities and in some circumstances overlap—fraud generally is itself "illegal," and may subject the actor to criminal liability. *See, e.g.*, TEX. PENAL CODE, ch. 32 (fraud), ch. 35 (insurance fraud), ch. 37 (perjury and other falsification). Fraudulent and illegal actions in this context pose a danger to the corporation itself. Fraudulent or illegal actions by a corporation's directors may result in disregard of the corporate form, *see, e.g.*, TEX. BUS. ORGS. CODE § 21.223(b); may vitiate the corporation's contractual interests, *see Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997); and may even result in an involuntary judicial termination of the corporation, *see* TEX. BUS. ORGS. CODE § 11.301(a)(2), (5). We must construe the third of these terms – "oppressive"—in a manner consistent with the severity of these concepts.

4. The Meaning of "Oppressive"

Considering the language and context of the statute, we have identified at least three characteristics of "actions" that the statute refers to as "oppressive": (1) the actions justify the harsh, temporary remedy of a rehabilitative receivership; (2) the actions are severe and create exigent circumstances; and (3) the actions are inconsistent with the directors' duty to exercise their honest business judgment for the benefit of the corporation. The term's common meaning and its usage in other statutes add a fourth characteristic: the actions involve an unjust exercise or abuse of power that harms the rights or interests of persons subject to the actor's authority and disserves the purpose

for which the power is authorized.[14] Actions that uniformly affect all shareholders typically will not satisfy this aspect of the term's meaning because, collectively, the shareholders of a business are not at the mercy of the business's directors.[15]

In light of these considerations, we conclude that neither the "fair dealing" test nor the "reasonable expectations" test sufficiently captures the Legislature's intended meaning of "oppressive" actions in former article 7.05.[16] As to the "fair dealing" test, we agree that a "lack of probity and fair dealing" and "a visible departure from the standards of fair dealing and [a] violation of fair play" may be aspects of actions that are "oppressive," and we agree that the actions must be "burdensome, harsh and wrongful." And as to the "reasonable expectations" test, we agree that oppressive actions will defeat the reasonable expectations that were central to the shareholder's decision to join the venture. But in light of the language and context of the statute and the term's

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[14] *See* authorities cited *supra* note 10; *see also* TEX. CONST. art. XV, § 8 (providing for removal of judges for oppression in office); TEX. PENAL CODE § 39.03 (oppression by a public official); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 103 (Tex. 2011) (Jefferson, C.J., joined by JJ. Wainwright and Lehrmann, concurring) (observing duty of courts and legislature to protect litigants from "crippling burdens oppressive discovery imposes"); *State v. Coca Cola Bottling Co. of Sw.*, 697 S.W.2d 677, 679 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (observing that state antitrust statutes are designed to "suppress trusts, secure the benefits arising from competition in trade, prevent monopolies, and protect the people from the possible tyranny and oppression of combined wealth") (citing *Monopolies, Etc.* 54 Am. Jur. 2d § 452 (1971)).

[15] Thus, actions that are "oppressive" under the statute ordinarily will not give rise to derivative suits. In other words, shareholders may not use a claim under the oppression provision of the receivership statute as an end-run around the Legislature's detailed rules and procedures for derivative actions.

[16] The dissent contends that the "Legislature has acquiesced" in "the long-standing definition of oppression that has existed at the common-law in Texas and a host of other jurisdictions," *post* at __, the development of which it attributes primarily to New York courts, *post* at __. With respect to the first contention, we note that this Court has consistently refused to rely on "legislative acquiescence" as a doctrine of statutory construction when it runs contrary to the plain language of the statute. *See, e.g.*, *Pretzer v. Motor Vehicle Bd.*, 138 S.W.3d 908, 914–15 (Tex. 2004) (rejecting argument based on legislative acquiescence because "neither legislative ratification nor judicial deference to an administrative interpretation can work a contradiction of plain statutory language."). With respect to the second, we have discussed above the meaningful differences between New York's statute relating to oppressive conduct, which applies only to closely held corporations, and Texas's statute, which applies to all domestic business entities.

common meaning and other uses, we cannot accept a definition that would find oppression on either of these bases alone, and we disapprove of the court of appeals decisions that have.[17]

Considering all of the indicators of the Legislature's intent, we conclude that a corporation's directors or managers engage in "oppressive" actions under former article 7.05 and section 11.404 when they abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation.

5. Application to Rupe

Applying the Legislature's intended meaning, we conclude that the refusal by Dennard, Ritchie, and Lutes to meet with Rupe's potential buyers does not constitute an "oppressive" action for which Rupe may obtain relief under former article 7.05. Dennard, Ritchie, and Lutes had no contractual, statutory, or other duty to meet with prospective buyers. Rupe does not dispute that they sought and received the advice of an outside attorney who had expertise in securities law before making that decision, and they declined to participate in the meetings because doing so would increase the risk of suit against RIC and its directors in the event of a dissatisfied purchaser.[18] Moreover, the evidence does not support a finding that they abused their authority with the intent

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[17] *See, e.g.*, *Kohannim v. Katoli*, 2013 WL 3943078 at *9–11, — S.W.3d at —; *Boehringer*, 404 S.W.3d at 24; *Redmon*, 202 S.W.3d at 234; *Cotton*, 187 S.W.3d at 699–701; *Pinnacle Data*, 104 S.W.3d at 196; *Willis*, 997 S.W.2d at 801; *Davis*, 754 S.W.2d at 382.

[18] As several amici noted in their briefs to this Court, by providing information to Rupe's prospective purchasers the directors would have placed RIC and themselves at risk of liability for making misleading "statements" under state and federal securities laws. *See* TEX. REV. CIV. STAT. art. 581-33(A) (imposing liability for misrepresentation or omissions of material facts by one who offers or sells a security); 17 C.F.R. § 240.10b-5 (imposing similar liability under federal law).

to harm Rupe's interests in RIC, or that their decision created a serious risk of harm to RIC. In the absence of such evidence, we conclude that their refusal to meet with prospective buyers was not "oppressive" as that term is used in the receivership statute.

Undoubtedly, the directors' refusal to meet with prospective purchasers placed Rupe in a difficult situation that prevented her from selling her shares as quickly as she wanted and for their full value. But difficulty in—and sometimes even the impossibility of—selling one's shares is a characteristic intrinsic to ownership of a closely held corporation, the shares of which are not publicly traded. Shareholders of closely held corporations may address and resolve such difficulties by entering into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements. In the absence of such agreements, however, former article 7.05 authorizes the appointment of a receiver only for specific conduct—in this case, allegedly oppressive actions—and the conduct relied on by the court of appeals here does not meet that standard.[19]

C. Statutory Remedy

Although the court of appeals relied exclusively on the directors' decision not to meet with potential buyers of Rupe's shares, Rupe asserted that other actions by Dennard, Ritchie, and Lutes also constituted "oppressive" conduct under former article 7.05. We need not consider whether any or all of these other actions were oppressive, however, because we hold that, even if they were, the

[19] Because this is the first time this Court has addressed the meaning of the term "oppressive" in the receivership statute, we would ordinarily consider remanding the case for a new trial under the new legal standard that we have announced. *See, e.g.*, *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 162 (Tex. 2013) (remanding case in the interest of justice for new trial under newly announced legal standard). In light of our next holding that the statute does not authorize courts to grant the relief that Rupe obtained, however, we need not consider that option here.

statute does not authorize the buy-out remedy that Rupe sought and obtained, and Rupe did not request the rehabilitative-receivership remedy that the statute does authorize.[20]

Former article 7.05 creates a single cause of action with a single remedy: an action for appointment of a rehabilitative receiver. *See* former art. 7.05; *see also* TEX. BUS. ORGS. CODE § 11.404. It identifies:

- to whom the cause of action is available: shareholders and creditors;[21]
- the remedy available: "[a] receiver may be appointed for the assets and business of a corporation."[22]
- the grounds on which each type of claimant may seek the remedy;[23] and
- the requirements a claimant must satisfy to obtain the remedy:
    - the appointment of a receiver must be necessary "to conserve the assets and business of the corporation and to avoid damage to parties at interest,"
    - "all other requirements of law are complied with," and
    - "all other remedies available either at law or in equity . . . are determined by the court to be inadequate."[24]

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[20] Rupe requested appointment of a receiver as an alternative remedy in the trial court. But she only sought a liquidating receiver, not a rehabilitative receiver. A liquidating receiver is available under former article 7.06, but not 7.05. *See Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855, 860–61 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (distinguishing rehabilitative receivership of article 7.05 from liquidating receivership of article 7.06). Oppressive actions are not a ground for appointment of a liquidating receiver under 7.06, and Rupe did not submit the elements necessary for a liquidating receiver to the jury.

[21] Former art. 7.05(A)(1), (2) (shareholder or creditor); *see* TEX. BUS. ORGS. CODE § 11.404(a)(1), (2).

[22] Former art. 7.05(A); *see* TEX. BUS. ORGS. CODE § 11.404(b)(1)–(3).

[23] Former art. 7.05(A)(1)(a)–(e) (grounds for shareholder), (A)(2)(a)–(b) (grounds for creditor); *see* TEX. BUS. ORGS. CODE § 11.404(a)(1)(A)–(E), (2)(A)–(B).

[24] Former art. 7.05(A); *see* TEX. BUS. ORGS. CODE § 11.404(b)(1)–(3).

The court of appeals relied on the statute's third requirement—a finding that all other remedies available at law or in equity are inadequate—to hold that the statute authorizes not only the appointment of a receiver but also any other appropriate equitable relief. 339 S.W.3d at 286. We disagree. Subsection (A) of former article 7.05, like subsection (b) of current section 11.404, identifies the inadequacy of other legal and equitable remedies as a prerequisite to the appointment of a receiver. *See* former art. 7.05(A); TEX. BUS. ORGS. CODE § 11.404(b). This provision is a restriction on the availability of receivership, not an expansion of the remedies that the statute authorizes.[25] It is consistent with the extraordinary nature of receivership and is a common

[25] The dissent reaches a contrary conclusion based, in part, on broad assertions about the holdings of courts in other jurisdictions, and suggests that our holdings in this case contradict the holdings of most other states. *See, e.g.*, *post* at __. But we must construe the Texas statute, and it differs from the statutes in those other states. In particular, the dissent points to the Model Business Corporation Act, which it asserts served as the basis of the Texas receivership statute, and the Illinois statute, which it asserts served as the basis of the model act. But a comparison of the language of the Texas statute to the language of the model act and the Illinois statute only confirms our construction of the Texas statute, rather than the dissent's.

The model act, for example, does not allow for appointment of a rehabilitative receiver based on oppressive actions. *See* Model Business Corporation Act § 7.48. In fact, it does not provide for *any* consideration of an individual shareholder's interests in determining whether to appoint a receiver. *Id.* § 7.48(a) (authorizing appointment of a custodian or receiver only when a shareholder establishes that the corporation's "directors are deadlocked" and "irreparable injury to the corporation is threatened or being suffered" or that "the directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered"). Instead, under the model act, oppressive actions will only support a claim for dissolution of the corporation, and only if it is a closely held corporation. *See id.* § 14.30(a)(2)(ii), (b). *Compare* TEX. BUS. & COM. CODE § 11.404, *with* Model Business Corporation Act § 14.30(a)(2)(ii), (b); *post* at __ (stating that "36 states in all appear to allow liquidation for oppressive or similar conduct"). We thus construe the Texas statute in a manner that is consistent with the less severe but more generally available remedy it authorizes for oppressive actions.

More importantly, the model act, unlike the Texas statute, *expressly authorizes* a buy-out option as an alternative to dissolution based on oppressive actions, but only if the corporation or one or more of its shareholders elects that option. Model Business Corporation Act § 14.34(a). Because the model act expressly authorizes a buyout, we cannot rely on it to find such a remedy in the Texas statute, which does not. And even if we could, it would provide no basis to hold that courts may order a buyout against the wishes of the corporation and its remaining shareholders.

Like the model act, but unlike the Texas statute, the Illinois statute creating a remedy for oppressive actions is limited to shareholders in corporations that are not publicly traded. *Compare* 805 ILL. COMP. STAT. 5/12.55 (shareholder remedies in public corporations), *with* 805 ILL. COMP. STAT. 5/12.56 (shareholder remedies in non-public corporations). And unlike the Texas statute, the Illinois statute *expressly authorizes* a broad array of remedies, including the removal of an officer or director, the appointment of a custodian, the payment of dividends, the award of damages, and "[t]he purchase by the corporation or one or more other shareholders of all, but not less than all, of the shares of the petitioning shareholder." *Id.* § 5/12.56(b). Thus, the Illinois legislature did exactly what the Texas legislature chose not to do: it

prerequisite for other extraordinary forms of relief. *See, e.g.*, *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (mandamus is extraordinary writ available only when remedy by appeal is inadequate); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002) (to obtain injunction under court's equitable powers, party must prove inadequacy of all remedies available at law).

Unlike the statute, which authorizes only a receivership, common-law causes of action, particularly those that invoke a court's equitable powers, often support a variety of remedies, and the same may be true of other statutes that authorize receivership. *See, e.g.*, TEX. BUS. & COM. CODE § 24.008(a)(3) (authorizing appointment of a receiver among types of equitable relief available for fraudulent transfer). Additionally, as discussed later in this opinion, the kinds of actions that support a shareholder action for receivership under the "oppressive" prong of the statute are the kinds of conduct that also may support other causes of action, such as fraud or breach-of-fiduciary-duties to the corporation. *See* former art. 7.05(A); TEX. BUS. ORGS. CODE § 11.404(a). Finally, the statute itself contemplates other, less harsh, relief that may be available under other provisions of the statute, such as the appointment of a receiver only over specific corporate assets rather than a receivership over the whole corporation. *See* former art. 7.05(A); TEX. BUS. ORGS. CODE § 11.404(b)(3).

The statute thus recognizes that in many circumstances relief other than appointment of a receiver may be available, and it requires courts to consider such relief before appointing a

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expressly authorized, by statute, additional remedies beyond appointment of a receiver, including judicially mandated buyouts. *See* 805 ILL. COMP. STAT. 5/12.55(b)(11). We cannot rely on another state's statute, which expressly authorizes certain remedies, as a basis for construing our statute, which does not expressly authorize those remedies, as if it does. To the contrary, the Illinois statute demonstrates how the Texas legislature could have statutorily authorized alternative remedies, but it did not.

rehabilitative receiver. *See* former art. 7.05(A); TEX. BUS. ORGS. CODE § 11.404(b)(3). If lesser remedies[26] are available under either the common law or other statutory provisions, and those remedies are adequate, the Court cannot appoint a rehabilitative receiver. *See id.* Here, for example, the jury found in Rupe's favor on her breach-of-fiduciary-duty claim.[27] Before granting a

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[26] The dissent's focus on the availability of "lesser remedies" assumes, without analysis, that the trial court's buy-out order is a "lesser remedy" than appointment of a rehabilitative receiver. But that contention is disputed in this case. Dennard, Rupe, and Lutes have argued that the trial court's buy-out order was an "unduly harsh 'remedy" that will force RIC to sell and/or leverage corporate assets to scrape together over $7.3 million for [Ritchie's] stock," which would bring RIC "to its knees" and place it "at risk of bankruptcy." 339 S.W.3d at 298 (not analyzing this argument under the "lesser remedies" language in the statute).

Commentators also have recognized that court-ordered buyouts can threaten the financial security of closely held entities, even pushing them into bankruptcy or dissolution. *See, e.g.*, Lydia Rogers, *The Bankruptcy Implications of A Court-Ordered Buyout for Shareholder Oppression: Is It A Remedy at All?*, 64 BAYLOR L. REV. 594, 604 (2012) ("The reality is that a court-ordered buyout judgment could force closely held corporations to declare bankruptcy. Buyout judgments, even after discounts, can easily exceed one million dollars. Such an amount is not likely to be readily available to a closely held corporation, and after a judgment, it would be unlikely that the corporation would be able to obtain outside financing to pay the debt."); Edward B. Rock & Michael L. Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations*, 24 J. CORP. L. 913, 920 (1999) (noting that, particularly in the context of close corporations, readily available "dissolution or buyout increase the risk of bankruptcy, thereby reducing the creditworthiness of the company"); 1 F. Hodge O'Neal & Robert B. Thompson, O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS & LLC MEMBERS §1:4, at 1-7 n.2 (rev. 2d ed. 2005) ("In discussing a minority shareholder suit which eventually led to the bankruptcy of the corporation, a Pennsylvania attorney noted: 'No responsible bank would extend credit to a close[] corporation embroiled in a shareholder controversy. Without credit, most such corporations simply die."' (quoting Letter to author, June 15, 1981)).

[27] The dissent states, "The Court's logic in applying the business judgment rule in this context would presumably also apply to minority shareholder claims for breach of fiduciary duty." *Post* at __. We see no basis for such an assumption and note that Texas law recognizes different kinds of fiduciary duties owed under different circumstances. *See, e.g.*, *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (discussing formal and informal fiduciary duties). The fiduciary duty alleged in this case is an informal fiduciary duty between Rupe and Dennard, Ritche, and Lutes. Informal fiduciary duties "arise from 'a moral, social, domestic, or purely personal relationship of trust and confidence.'" *Id.* at 331 (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)). Informal fiduciary duties are not owed in business transactions unless the special relationship of trust and confidence existed prior to, and apart from, the transaction(s) at issue in the case. *Id.* (quoting *Associated Indem.*, 964 S.W.2d at 288). This Court has never applied the business judgment rule to informal fiduciary duties before; no party argues that we should do so in this case; and because such duties arise separate and apart from business relationships, we see no reason to assume that the rule would apply.

With regard to formal fiduciary duties, this Court has never recognized a formal fiduciary duty between majority and minority shareholders in a closely-held corporation, *see Willis v. Donnelly*, 199 S.W.3d 262, 276–77 (Tex. 2006), and no party has asked us to do so here. This Court has recognized a fiduciary duty owed by corporate officers and directors to the corporation, which prohibits officer and directors from usurping corporate opportunities for personal gain and requires them to exercise their "uncorrupted business judgment for the sole benefit of the corporation." *Int'l Bankers Life Ins. v. Holloway*, 368 S.W.2d 567, 576–77 (Tex. 1963); *see also Redmon*, 202 S.W.3d at 233 (noting that officers'

receivership under the statute, the trial court was required to determine whether Rupe was entitled to remedies for breach of fiduciary duty based on the jury verdict and if so, whether those remedies were adequate; it did neither.[28] But the statute does not create a cause of action for unspecified lesser remedies that are not otherwise available under the law; the only cause of action the statute creates is for receivership. We cannot turn the statute's "all other . . . remedies" language on its head—treating it as expanding rather than restricting the relief the statute provides—and we need not do so to give the language meaning. Instead, the statute provides only the remedy it identifies—rehabilitative receivership—and it restricts the availability of that relief to circumstances where the trial court has determined that "all other available legal and equitable remedies . . . are inadequate."[29] Former art. 7.05(A); *see also* TEX. BUS. ORGS. CODE § 11.404(b).

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and directors' formal fiduciary duty is owed to the corporation and its shareholders collectively, not to individual shareholder interests); *Somers ex rel. EGL, Inc. v. Crane*, 295 S.W.3d 5, 11 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (same); *Lindley v. McKnight*, 349 S.W.3d 113, 124 (Tex. App.—Fort Worth 2011, no pet.) (same); *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (same). No party in this case has asked us to alter the nature of that duty.

[28] The dissent contends that in this opinion we "abolish," "foreclose," and "extinguish" the lesser remedies preferred by the statute. *Post* at __, __, __. But we have not abolished or even limited the remedies available under the common law or other statutes for the kinds of conduct that give rise to rehabilitative receivership actions, whether under the oppressive-actions prong or other prongs. As we discuss in some detail in Part III of this opinion, the actions that give rise to oppressive-action receivership claims typically also give rise to common-law claims as well, opening the door to a wide array of legal and equitable remedies not available under the receivership statute alone. Those remedies, whether lesser or greater, are not displaced by the rehabilitative receivership statute, which merely adds another potential remedy available in extraordinary circumstances when lesser remedies are inadequate. This very case underscores this point, demonstrating that lesser remedies may remain available as an alternative to receivership in Texas law. We have remanded this case to the court of appeals to consider whether Rupe is entitled to the buyout ordered by the trial court based on her successful breach-of-fiduciary-duty claim. If Rupe prevails on remand, she may obtain the very remedy the dissent says we have abolished.

[29] The dissent contends that we have "effectively rewritt[en] the statute" and rendered the limiting language in subsection (b) of the statute "meaningless" by failing to construe it as impliedly creating new, independent statutory authority to award a broad array of equitable remedies, including a court-ordered stock buyout, and that this "defeats the very purpose of the Legislature's carefully chosen words." *Ante* at __. But the "carefully chosen words" of subsection (b) are limiting, rather than expansive, in nature: a "court may appoint a receiver under Subsection (a) *only if*: . . . the court determines that all other available legal remedies and equitable remedies, including the appointment of a receiver

In affirming the trial court's buy-out order, the court of appeals relied on this Court's decision in *Patton v. Nicholas*, 279 S.W.2d 848 (Tex. 1955). But *Patton* involved neither a claim for oppression nor a court-ordered buyout of stock. *Id.* at 849–59. Rather, this Court held in *Patton* that the receivership statute in effect at the time, former article 2293,[30] did not displace Texas courts' power to appoint a receiver as an equitable remedy for existing causes of action (there, a breach of the corporate trust) in "extreme" circumstances. *Id.* at 856–57.[31] Former article 2293, like former article 7.05 and current section 11.404, expressly preserved the availability of receivership as an equitable remedy for a cause of action that invokes the courts' equitable powers. *See* former art. 2293, para. 4; former art. 7.05(A)(3); TEX. BUS. ORGS. CODE § 11.404(a)(3). Our recognition in *Patton* that the statutory action for receivership did not displace Texas courts' historical power to

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for specific property of the domestic entity under Section 11.404(a), are inadequate." TEX. BUS. & COM. CODE § 11.404(b)(3) (emphasis added). We give those words their plain meaning—limiting the authority of a trial court to grant a rehabilitative receiver under subsection (a) *only if* certain requirements are met. *See id.* This serves the legislative purpose expressed in the statute, which is to preclude the appointment of a receiver if other lesser remedies available under the common law or other statutes (expressly including section 11.404) are adequate.

Importantly, the dissent's attacks underscore the flaws in its own proposed construction of the statute. It asks this Court to ignore the words of the statute, which authorize courts to "appoint a receiver . . . only if . . . all other *available* legal and equitable remedies . . . are inadequate," *id.* § 11.404(b)(3), and instead rewrite the statute to authorize courts to "appoint a receiver or grant any other legal or equitable remedy of any kind, whether otherwise available or not."

[30] *See* Act of April 2, 1887, 20th Leg., R.S., ch. 131, § 1, 1887 Tex. Gen. Laws 119, 119–22, *amended by* Act of March 19, 1889, 21st Leg., R.S., ch. 59, § 1, 1889 Tex. Gen. Laws 55, 55–58 (former TEX. REV. CIV. STAT. art. 2293), *repealed by* Act of May 17, 1985, 69th Leg., R.S. ch. 959, § 9(1), 1985 Tex. Gen. Laws [herein, "former article 2293"].

[31] The cases upon which the Court relied in *Patton* to recognize that the "malicious suppression of dividends" was a wrong in the nature of a breach of fiduciary duty indicate that the Court viewed the wrong as a breach of the formal fiduciary duty owed by corporate officers and directors to the corporation. *See Patton*, 279 S.W. at 394 (citing *Becker v. Dirs. of Gulf City St. Ry. & Real-Estate Co.*, 15 S.W. 1094 (Tex. 1891) and *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846 (1889)); *see also Becker*, 15 S.W. at 1095–97 (reversing dismissal of suit for receivership brought by shareholders on behalf of company, alleging company's controllers formed competitor business, fraudulently transferred company's assets to competitor owned by controllers, then consolidated company into competitor); *Cates*, 11 S.W. at 848–50 (affirming dismissal of shareholder's claim against company's controller for devaluation of shares brought by shareholder individually because right of action belonged to corporation).

grant receivership as an equitable remedy under a common-law cause of action does not support the court's construction of former article 7.05 to provide a different statutory remedy, a buyout, without regard to any common-law cause of action.

The court of appeals also relied on *Davis* to support the availability of a buy-out order under the statute. 339 S.W.3d at 286–87 (citing *Davis*, 754 S.W.2d at 378–80). *Davis* likewise relied on *Patton*. Both courts' reliance on *Patton* is misplaced, and we reject the holding in *Davis* that former article 7.05 authorizes Texas courts to invoke their "general equity power" to award a buyout of stock as a remedy for oppressive actions under the statute (rather than under a common-law cause of action for which equitable remedies are otherwise available). *Cf. Davis*, 754 S.W.2d at 379; *see also ARGO Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249, 265 (Tex. App.—Dallas 2012, pet. filed) ("The statute authorizes the court to fashion an equitable remedy if the actions of those in control of a corporation are illegal, oppressive, or fraudulent."). Although the Legislature has made a broad range of equitable remedies available for violations of other statutory causes of action, *see, e.g.*, TEX. BUS. & COM. CODE § 24.008(a)(3), it has not done so here. The Legislature provided a single remedy for oppressive actions under former article 7.05: appointment of a rehabilitative receiver.[32]

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[32] We need not decide in this case whether a trial court could properly appoint a rehabilitative receiver and authorize or order the receiver to implement a buyout of a shareholder's interests. Under section 11.406, a receiver has "the powers and duties that are stated in the order appointing the receiver" (as that order may be amended over time), and "the powers and duties provided by other laws applicable to receivers." TEX. BUS. ORGS. CODE § 11.406(a)(4), (5). The primary "other laws" applicable to receivers subject their power "to the control of the court" and to actions "authorized by the court," TEX. BUS. & COM. CODE § 64.031, and provides that "the rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver and to the powers of a court regarding a receiver." *Id*. § 64.004. Thus, "[a] receiver has only that authority conferred by the Court's order appointing him," but, "[t]he order itself must comply with the statute authorizing such appointment." *Ex parte Hodges*, 624 S.W.2d 304, 306 (Tex. 1981) (because statute did not authorize court to empower receiver to supplement or issue court orders, party's failure to

D. Conclusion on Statutory Oppressive Actions

We hold that the decision by Ritchie, Dennard, and Lutes not to meet with Rupe's prospective buyers does not constitute "oppressive" action under former article 7.05, and the court of appeals erred in concluding otherwise. We also hold that appointment of a rehabilitative receiver is the only remedy that former article 7.05 authorizes for oppressive actions. Because the trial court's judgment does not appoint a receiver, we need not consider the other conduct that Rupe alleged was "oppressive."

III.
A Common-law Cause of Action for Shareholder Oppression?

This Court has never recognized a common-law cause of action for "minority shareholder oppression." Although the courts of appeals' opinions in this case and in *Davis* both addressed only actions for oppressive actions under the receivership statute, other parties and Texas courts have relied on these opinions to recognize a common-law claim for "shareholder oppression" not based on any statutory authority.[33] When asked in oral argument to identify the source of the directors' alleged duty in this case, Rupe's attorney asserted only that the duty "flows from the statute" and

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comply with receiver's order could not be basis for contempt). Section 11.404 authorizes the courts to appoint a rehabilitative receiver "to conserve the property and business of the domestic entity and avoid damage to interested parties." TEX. BUS. ORGS. CODE § 11.404(b)(1). An order authorizing or requiring a receiver to buy out a shareholder's interests would be authorized and proper under the statute only if the buyout would both "avoid damage to [an] interested part[y]" and "conserve the property and business of the domestic entity." If the buyout would help the shareholder but hurt the corporation, an order authorizing the receiver to effectuate the buyout would likely not comply with the statute authorizing the appointment. We need not resolve this question here, however, because Rupe did not seek or obtain an order authorizing a rehabilitative receiver to cause RIC to purchase her shares. In fact, Rupe did not seek a rehabilitative receiver at all.

[33] *See, e.g.*, *Cardiac Perfusion Servs., Inc. v. Hughes*, 380 S.W.3d 198, 202 (Tex. App.—Dallas 2012, pet. filed); *Boehringer*, 404 S.W.3d at 32–33; *Redmon*, 202 S.W.3d at 225, 233; *Cotton*, 187 S.W.3d at 699–701; *Gonzalez*, 181 S.W.3d at 392 n.5; *Pinnacle Data Servs.*, 104 S.W.3d at 192; *Willis*, 997 S.W.2d at 803.

"derives from the word oppression in the statute." But because Rupe's pleadings and briefs also assert a common-law claim for shareholder oppression, we must decide whether to recognize such a common-law cause of action under Texas law.

When deciding whether to recognize "a new cause of action and the accompanying expansion of duty," this Court "perform[s] something akin to a cost-benefit analysis to assure that this expansion of liability is justified." *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003). The analysis is complex, requiring consideration of a number of non-dispositive factors including, but not limited to:

- the foreseeability, likelihood, and magnitude of the risk of injury,
- the existence and adequacy of other protections against the risk,
- the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the persons in question, and
- the consequences of imposing the new duty, including
    - whether Texas's public policies are served or disserved
    - whether the new duty may upset legislative balancing-of-interests, and
    - the extent to which the new duty provides clear standards of conduct so as to deter undesirable conduct without impeding desirable conduct or unduly restricting freedoms.

See Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401, 410 (Tex. 2009); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 193 (Tex. 2004); *Thapar v. Zezulka*, 994 S.W.2d 635, 639–40 (Tex. 1999); *Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994); *Gaff v. Beard*, 858 S.W.2d 918, 920–21 (Tex. 1993). Carefully considering these factors within the context of this case, we

decline to recognize a new common-law cause of action for "minority shareholder oppression" in closely held corporations.

A. Foreseeability, Likelihood, and Magnitude of Potential Injury

By definition, a "closely held" corporation[34] is owned by a small number of shareholders whose shares are not publicly traded.[35] Often, these shareholders enjoy personal relationships as friends or family members in addition to their business relationship.[36] Sometimes, they enter into shareholder agreements to define things like their respective management and voting powers, the apportionment of losses and profits, the payment of dividends, and their rights to buy or sell their shares from or to each other, the corporation, or an outside party. Occasionally, things don't work out as planned: shareholders die, businesses struggle, relationships change, and disputes arise. When, as in this case, there is no shareholders' agreement, minority shareholders who lack both contractual rights and voting power may have no control over how those disputes are resolved. As a group of law school professors appearing as amicus curiae[37] in this case observed, minority shareholders in

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[34] The Texas Business Organizations Code distinguishes between "closely held corporations" and "close corporations." The Code defines a "closely held corporation" as a corporation that is privately owned (i.e., not publicly traded) by fewer than 35 shareholders. *See* TEX. BUS. ORGS. CODE § 21.563(a); *see also id.* § 101.463 (closely held LLCs). By contrast, the Code allows all corporations to elect to operate as a "close corporation" by so providing in the appropriate corporate documents. *See id.* §§ 21.563(a), 21.701, 21.705–.707.

[35] *See, e.g.*, Douglas K. Moll, *Majority Rule Isn't What It Used to Be: Shareholder Oppression in Texas Close Corporations*, 63 TEX. B.J. 434, 436 (2000) [hereafter, "Moll, *Majority Rule*"] ("A close corporation is a business organization typified by a small number of stockholders, the absence of a market for the corporation's stock, and substantial shareholder participation in the management of the corporation.").

[36] *See id.* ("[C]lose corporation investors are often linked by family or other personal relationships that result in a familiarity between the participants.").

[37] Robert A. Ragazzo, Marc I. Steinberg, Alan R. Bromberg, Joseph K. Leahy, Bruce A. McGovern, Gary S. Rosin, and David Simon Sokolow.

closely held corporations have "no statutory right to exit the venture and receive a return of capital" like partners in a partnership do, and "usually have no ability to sell their shares" like shareholders in a publicly held corporation do; thus, if they fail to contract for shareholder rights, they will be "uniquely subject to potential abuse by a majority or controlling shareholder or group." Unhappy with the situation and unable to change it, they are often unable to extract themselves from the business relationship, at least without financial loss.

Those in control of a closely held corporation may use various "squeeze-out" or "freeze-out" tactics to deprive minority shareholders of benefits, to misappropriate those benefits for themselves, or to induce minority shareholders to relinquish their ownership for less than it is otherwise worth. The types of conduct most commonly associated with such tactics include (1) denial of access to corporate books and records, (2) withholding payment of, or declining to declare, dividends, (3) termination of a minority shareholder's employment, (4) misapplication of corporate funds and diversion of corporate opportunities for personal purposes, and (5) manipulation of stock values.[38]

Our review of the case law and other authorities also convinces us that it is both foreseeable and likely that some directors and majority shareholders of closely held corporations will engage in such actions with a meaningful degree of frequency and that minority shareholders typically will suffer some injury as a result. Although the injury is usually merely economic in nature, it can be quite substantial from the minority shareholder's perspective, as it often completely undermines their

[38] *See, e.g.,* Moll, *Majority Rule*, at 436 (listing common "freeze-out" or "squeeze-out" tactics); Rogers, *supra* note 27, at 599–600 (listing conduct typical in oppression cases).

sole or primary motivation for engaging with the business.[39] We thus conclude that the foreseeability, likelihood, and magnitude of harm sustained by minority shareholders due to the abuse of power by those in control of a closely held corporation is significant, and Texas law should ensure that remedies exist to appropriately address such harm when the underlying actions are wrongful.

B. Existence and Adequacy of Other Protections

Our conclusion that the risks require a remedy does not end our analysis. *See, e.g.*, *Nabors Drilling*, 288 S.W.3d at 411 (observing that the mere foreseeability of an injury is not sufficient to justify the creation of a new duty). We must next consider the adequacy of remedies that already exist. This is particularly true when we are addressing corporations and the relationships among those who participate in them, which we have consistently recognized are largely matters governed by statute and contract. *See Empire Mills v. Alston Grocery Co.*, 15 S.W. 505 (Tex. App. 1891, no writ) ("A corporation is the creature of a statute immediately creating it, or authorizing proceedings for its organization."); *Calvert v. Capital Sw. Corp.*, 441 S.W.2d 247, 255 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) ("[T]he charter of a corporation creates contractual relations between the corporation and its shareholders, not between the shareholders themselves."). In addition to statutory and contractual protections, we will also consider other common-law remedies that currently exist to protect against the kinds of conduct that might otherwise justify a new common-law remedy.

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[39] *See, e.g.*, Douglas K. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. REV. 989, 1067 (2001) (observing that when dividends are not paid, "a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his or her investment").

As we consider existing statutory remedies, we are mindful of the principle that, when the Legislature has enacted a comprehensive statutory scheme, we will refrain from imposing additional claims or procedures that may upset the Legislature's careful balance of policies and interests. *See, e.g.*, *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 493 (Tex. 2013) (noting that the Texas Workers' Compensation Act "is a comprehensive statutory scheme, and therefore precludes the application of claims and procedures not contained within the Act.").[40] We thus begin in this case by noting that the Business Organizations Code permits corporations to declare themselves to be "close corporations," which allows them to take advantage of two subchapters of the Code dedicated to the special needs of such corporations and exempts them from many of the rules that govern other types of corporations. *See* TEX. BUS. ORGS. CODE §§ 21.701–.732 (subchapter O, Close Corporations), 21.751–.763 (subchapter P, Judicial Proceedings Relating to Close Corporations). In addition to the judicial proceedings that other corporate shareholders can bring, shareholders in close corporations are authorized to institute proceedings to enforce a close corporation provision, appoint a provisional director, or appoint a custodian. *Id.* § 21.752. In such proceedings, courts must enforce close corporation provisions regardless of whether there is an adequate remedy at law and may enforce them by injunction, specific performance, damages, appointment of provisional director or custodian, appointment of a receiver for specific corporate assets, appointment of a rehabilitative receiver, or appointment of a liquidating receiver, among other things. *Id.* § 21.756. And the

[40] *See also Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 193–94 (Tex. 2004) ("The existence of a comprehensive regulatory scheme to protect against harm weighs against imposing a common law duty to accomplish the same result if the scheme affords significant protections."); *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 715–16 (Tex. 2003) (declining to impose a new common-law duty on employers who conduct in-house drug testing because "the DOT's comprehensive statutory and regulatory scheme, coupled with the authority granted to the [Medical Review Officer], affords significant protection to employees who are the subject of random drug tests.").

Legislature has afforded businesses that elect to operate as close corporations even greater contractual liberty. *See generally* TEX. BUS. ORGS. CODE §§ 1.001 *et seq.*; *id.* § 21.701–.732. Although RIC's founders and shareholders did not declare RIC a close corporation and take advantage of this unique statutory scheme, we must note that they could have done so, and by doing so could have provided themselves with remedies to resolve the current dispute.

Even when a closely held corporation does not elect to operate as a "close corporation," the Legislature has enacted special rules to allow its shareholders to more easily bring a derivative suit on behalf of the corporation.[41] TEX. BUS. ORGS. CODE § 21.563. Shareholders in a closely held corporation, for example, can bring a derivative action without having to prove that they "fairly and adequately represents the interests of" the corporation, *id.* § 21.552(2), without having to make a "demand" upon the corporation, as in other derivative actions, and without fear of a stay or dismissal based on actions of other corporate actors in response to a demand. *See id.* §§ 21.563(b), 21.553–55, 21.558–59. And when justice requires, the court may treat a derivative action on behalf of a closely held corporation "as a direct action brought by the shareholder for the shareholder's own benefit," and award any recovery directly to that shareholder.[42] *See id.* § 21.563(c).

Of course, shareholders may also prevent and resolve common disputes by entering into a shareholders' agreement to govern their respective rights and obligations. Importantly, the Legislature has granted corporate founders and owners broad freedom to dictate for themselves the

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[41] *See supra* note 34.

[42] The court may also award the recovery "to the corporation if necessary to protect the interests of creditors or other shareholders of the corporation." TEX. BUS. ORGS. CODE § 21.563(c).

rights, duties, and procedures that govern their relationship with each other and with the corporation. *See, e.g.*, *id.* §§ 21.052–.059, 21.101–.110, 21.210, 21.401–.408. Again, we note that although RIC's owners did not enter into a shareholders' agreement, they certainly could have done so, and by doing so could have avoided the current dispute.[43]

And as a final preliminary matter, we note that various common-law causes of action already exist to address misconduct by corporate directors and officers. Relying on the same actions that support their oppression claims, Texas minority shareholders have also asserted causes of action for: (1) an accounting, (2) breach of fiduciary duty, (3) breach of contract, (4) fraud and constructive fraud, (5) conversion, (6) fraudulent transfer, (7) conspiracy, (8) unjust enrichment, and (9) quantum

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[43] The dissent concedes that shareholder and buy-sell agreements are a more "ideal[]" means for deciding shareholder disputes. *Post* at __. But it contends that people enter closely held businesses "ill-prepared" and implies that the law should step in to pick up the slack. We cannot accept this premise. Courts generally endeavor to afford citizens broad freedoms in their choices about how to manage their own business endeavors. There are numerous well-established justifications for this approach, not the least of which is that courts are simply ill-suited to the task of second-guessing business decisions made by business people who typically have a more long-term perspective, access to more extensive information, greater experience in the industry, if not in business practices generally, and more interest in the outcome. *See, e.g.*, Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749, 758 (2000) ("[C]ourts have trouble understanding the simplest of business relationships. This is not surprising. Judges must be generalists, but they usually have narrow backgrounds in a particular field of the law.").

Nor can we assume that the absence of applicable contractual provisions indicates ill-preparedness on the part of business owners. Owners may reasonably choose flexibility over predictability. Minority shareholders may reasonably choose to create mechanisms that would allow them to impede the will of the majority or demand a buyout because they do not want other minority owners to have the same ability to interfere with the operation of the business or to threaten the financial health of the business with an ill-timed demand for buyout.

Finally, even if we accepted the dissent's premise, the buy-out remedy the dissent favors (whether granted under an expansive reading of the receivership statute or the creation of a new common-law cause of action) has not been limited to circumstances where there is no shareholder or buy-sell agreement. In *Cardiac Perfusion Services*, for example, the court of appeals affirmed a buyout of minority shares in direct contravention of the terms of the parties' buy-out agreement. 380 S.W.3d at 204–05. In Illinois, where the statute on which the dissent relies expressly authorizes a buyout in non-public corporations based on oppressive actions, the courts likewise have applied the statute to force buyouts at prices calculated under the statute rather than the parties express agreement and to force buyouts with terms that are contrary to the parties' express terms for exiting the business. *See, e.g.*, *Gingrich v. Midkiff*, 2014 IL App (5th) 120332-U (affirming judgment in case where court calculated buyout price under statute rather than valuation formula in shareholder agreement and where court declined to impose shareholder agreement's non-compete limitation on withdrawing or expelled shareholders).

meruit. *See, e.g.*, *Boehringer*, 404 S.W.3d at 24; *Shagrithaya*, 380 S.W.3d at 262; *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 365 (Tex. App.—Houston [1st Dist.] 2012, judgm't set aside by agr.); *Strebel v. Wimberly*, 371 S.W.3d 267, 274 (Tex. App.—Houston [1st Dist.] 2012, pet. filed); *Adams v. StaxxRing, Inc.*, 344 S.W.3d 641, 643 (Tex. App.—Dallas 2011, pet. denied); *Redmon*, 202 S.W.3d at 231; *DeWoody v. Rippley*, 951 S.W.2d 935, 944 (Tex. App.—Fort Worth 1997, no writ); *Davis*, 754 S.W.2d at 377.

Having noted the extensive statutory, contractual, and common-law protections that already exist under Texas law, we now consider the adequacy of those protections to address the kinds of conduct commonly cited as justifying the creation of liability for "shareholder oppression."

1. Denial of Access to Corporate Books and Records

A common complaint of those alleging shareholder oppression is the denial of access to the corporation's books and records. Our Legislature has expressly protected a corporate shareholder's right to examine corporate records, provided penalties for a violation of those rights, and identified applicable defenses in an action to enforce those rights. *See* TEX. BUS. ORGS. CODE §§ 21.218 (examination of records), 21.219 (annual and interim statements of corporation), 21.220 (penalty for failure to prepare voting list), 21.222 (penalty for refusal to permit examination), 21.354 (inspection of voting list), 21.372 (shareholder meeting list). These statutory rights and remedies adequately protect a minority shareholder's access to corporate records, and we need not create a new common-law cause of action to supplement that protection.[44]

[44] The dissent accuses Ritchie, Dennard, and Lutes of withholding corporate records from Rupe, but the court of appeals held that there was no evidence of such actions and Rupe did not appeal that holding.

2. Withholding or Refusing to Declare Dividends

A second common complaint by those alleging shareholder oppression relates to the corporation's declaration of dividends, including the failure to declare dividends, the failure to declare higher dividends, and the withholding of dividend payments after a dividend has been declared.[45] With regard to the latter situation, we note that shareholders already have a right to receive payment of a declared dividend in accordance with the terms of the shares and the corporation's certificate of formation, and they can enforce that right as a debt against the corporation. *See, e.g.*, *Cavitt v. Amsler*, 242 S.W. 246, 247 (Tex. Civ. App.—Austin 1922, writ dism'd) ("[W]hen a dividend is declared, it becomes a debt owing by the corporation to the stockholders."). Our review of the cases gives us no reason to doubt the adequacy of this remedy to address that particular situation.

With regard to the failure to declare dividends and the failure to declare higher dividends, Texas statutes generally do not dictate when directors must declare dividends or how much the dividends must be.[46] Instead, those decisions fall within the discretion of a corporation's directors (or those acting as directors). *See* TEX. BUS. ORGS. CODE §§ 21.302–.303, 21.310–.313; *see also id.* §§ 21.714, 21.726–.727. The directors must make those decisions in compliance with the formal fiduciary duties that they, as officers or directors, owe to the corporation, and thus to the shareholders

[45] The declaration of dividends for some but not all classes of stock could also form the basis for such a complaint, but we have not seen this kind of claim in Texas cases. When a Texas corporation has more than one class of shares, the corporation's certificate of formation must specify the preferences, limitations, and relative rights of the shares. TEX. BUS. ORGS. CODE § 3.007(b)(4).

[46] The Legislature has, however, placed limits on corporate dividends, distributions, and redemptions, primarily to protect the corporation's creditors. TEX. BUS. ORGS. CODE §§ 21.301–.318 (Subchapter G).

collectively. *See, e.g.*, *Holloway*, 368 S.W.2d at 576–77 (as fiduciaries, corporate directors are "under obligation not to usurp corporate opportunities for personal gain," and must dedicate "uncorrupted business judgment for the sole benefit of the corporation"). When directors breach their fiduciary duties by improperly withholding or failing to declare dividends, one or more shareholders can sue the directors for breach of those duties on behalf of the corporation through a derivative action. *See* TEX. BUS. ORGS. CODE §§ 21.551–.563.[47]

This Court first addressed this kind of a claim in the context of a closely held corporation nearly sixty years ago in *Patton*. 279 S.W.2d at 849–53. Although there seems to be some confusion in the courts of appeals, *Patton* was not a "shareholder oppression" case.[48] It was a suit in which a corporation's two minority shareholders alleged that Patton—the corporation's majority shareholder, president, and controlling board member—committed fraud and breached his duties to the corporation.[49] *See id.* at 849. The jury found that Patton had mismanaged the corporation and withheld dividends for the improper purposes of preventing the minority shareholders from sharing

[47] A corporation may not limit its directors' liability for bad faith breaches of their duties to the corporation, breaches of their duty of loyalty, or transactions from which the directors receive an improper benefit. TEX. BUS. ORGS. CODE § 7.001(b), (c).

[48] The *Patton* opinion uses the word "oppression" only once, when describing the kind of future conduct that a rehabilitative receivership may be designed to prevent, in the context of a New Jersey case involving fraud claims by one corporate director against two other corporate directors. *Patton*, 279 S.W.2d at 857 (citing *Laurel Springs Land Co. v. Faugeray*, 26 A. 886, 887 (N.J. 1893)).

[49] In *Patton*, we used the phrase "breach of trust," 279 S.W.2d at 854, rather than "breach of fiduciary duty," which has since become the more common phrase outside of trustee actions. The courts have used the two phrases interchangeably. *See, e.g.*, *Phillips v. Phillips*, 820 S.W.2d 785, 792 (Tex. 1991) (Gonzalez, J., dissenting) ("Courts impose damages on parties who violate a fiduciary duty in order to punish the party's breach of trust."); *Paddock v. Siemoneit*, 218 S.W.2d 428, 432 (Tex. 1949) ("Acts which might well be considered breaches of trust as to other fiduciaries have not always been so regarded in cases of corporate officers or directors."); *Kaufman & Runge v. B. Alexander & Bro.*, 53 Tex. 562, 568 (1880) (finding no claim "involving any bad faith or breach of trust on the part of the agents in appropriating as their own that which, by reason of their fiduciary relation, they were bound to hold in trust for their principals.").

in the corporation's profits and depreciating the value of the corporation's stock. *Id.* The trial court appointed a receiver to liquidate the corporation. *Id.*

We rejected the minority shareholders' mismanagement claims, but we recognized that the finding that Patton had used "his control of the board for the malicious purpose of . . . preventing dividends and otherwise lowering the value . . . of the stock of the [minority shareholders], is something else." *Id.* at 853. We equated this finding with a "breach of trust for which the courts will afford a remedy," *id.* at 854, and the cases on which we relied indicate that we treated that claim as being brought by the shareholders on behalf of the corporation. *See id.* (citing *Becker v. Dirs. of Gulf City St. Ry. & Real-Estate Co.*, 15 S.W. 1094 (Tex. 1891); *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846 (1889)). We determined that the appropriate remedy in that circumstance was an injunction order compelling payment of the dividends. *Id.* at 859.[50]

Patton demonstrates that when a corporate director violates the duty to act solely for the benefit of the corporation and refuses to declare dividends for some other, improper purpose, the director breaches fiduciary duties to the corporation, and the minority shareholders are entitled to

[50] The trial court had awarded a liquidating receivership, and we rejected that remedy as too severe. *Id.* at 859. We noted that although the statutes in effect at the time provided only for dissolution and liquidation, the Legislature had recently passed the not-yet-effective Business Corporation Act, which favored rehabilitative receivership over liquidation when the business was solvent. *Id.* at 854. Citing precedents in which we "seem[ed] to recognize a minority right to receivership in cases of *gross or fraudulent mismanagement*, although without particular reference to whether liquidation or something else is to follow," we concluded that, in the "more extreme" cases, Texas courts could, under their general equity power, appoint a receiver "for the less drastic purpose of 'rehabilitation'" as remedy for the majority shareholder's breach of fiduciary duty, rather than appointing a liquidating receiver under the statute. *Id*. at 857 (emphasis added). As discussed above, this holding related to Texas courts' power to grant different types of receiverships as equitable remedies for existing causes of action—in *Patton*, breach of fiduciary duty—and not whether the receivership statutes created new statutory remedies other than receivership. *See id.*

relief, either directly to the corporation or through a derivative action.[51] *See Landon v. S & H Mktg. Group, Inc.*, 82 S.W.3d 666, 677 (Tex. App.—Eastland 2002, no pet.) (upholding breach-of-fiduciary-duty claim against officer-director who improperly authorized $40,000 bonus payment to himself). If, on the other hand, the director's decision not to declare dividends is made for the benefit of the corporation, in compliance with the duties of care and loyalty, no relief is warranted. In that instance, a director generally will have fulfilled the duties by acting in the best interest of the corporation, even if there was an incidental injury to one or more individual shareholders. *See, e.g.*, *Rowe v. Rowe*, 887 S.W.2d 191, 198 (Tex. App.—Fort Worth 1994, writ denied) (holding that shareholder could not prevail on breach-of-fiduciary-duty claim against other shareholder because alleged mishandling of funds did not result in any injury to the corporation).

In sum, a remedy exists for dividend decisions made in violation of a director's duties to the corporation and its shareholders collectively, but no remedy exists for decisions that comply with those duties, even if they result in incidental harm to a minority shareholder's individual interests. But even when a corporate controller's dividend decision itself does not give rise to a remedy, that is not typically the end of the inquiry. Allegations that directors or controlling shareholders are manipulating dividends to "oppress" minority shareholders typically arise when the accused not only withhold dividends but also use some method to distribute the corporation's profits exclusively to themselves—frequently, by inflating their own salaries. *See, e.g.*, *Boehringer*, 404 S.W.3d at 31–32 (addressing failure to pay dividends coupled with increase in controlling shareholder-director's

[51] *Patton* is thus contrary to the dissent's assertion that majority shareholders can simply refuse to declare dividends for their own personal benefit rather than in the best interest of the corporation. *See post* at __.

salary).[52] As discussed below, when corporate controllers misappropriate corporate funds for their own use or pay themselves excessive salaries out of corporate coffers, they do so in violation of their fiduciary duty to the corporation, and the law affords a remedy for that misconduct.

We therefore conclude that the existing duties and remedies applicable to corporate dividend declarations and payments offer adequate protections for minority shareholders under most circumstances.[53] This case does not present any extreme or unusual circumstances that would justify the imposition of additional duties and remedies.

3. Termination of Employment

A third common complaint of those alleging minority shareholder oppression relates to the termination of the minority shareholder's employment with the corporation. A minority shareholder's loss of employment with a closely held corporation can be particularly harmful because

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[52] Shareholders can utilize a shareholders' agreement to set the terms of an officer's or director's salary and employment, thus preventing the officers and directors from making those decisions for themselves. *See* TEX. BUS. ORGS. CODE §§ 21.101(a)(4), 21.714(b)(9).

[53] The dissent contends that "typical acts of minority oppression (refusing to pay dividends, paying majority shareholders outside the dividend process, and making fire-sale buyout offers) usually operate to benefit the corporation and hardly ever harm it." *Post* at __. But the dissent offers no support for this broad proposition, and we do not agree that this is a valid assumption. The dissent confuses the corporation's interests with the individual interests of its majority shareholders. But a corporate officer or director's duty is to the corporation and its shareholders collectively, not any individual shareholder or subgroup of shareholders, even if that subgroup represents a majority of the ownership. *See, e.g.*, *Redmon*, 202 S.W.3d at 233; *Somers*, 295 S.W.3d at 11; *Lindley*, 349 S.W.3d at 124; *Hoggett*, 971 S.W.2d at 488. We do not determine the best interest of the corporation by examining only the interest of its majority shareholder(s). *See Holloway*, 898 S.W.2d 797 (holding that corporate officer and majority shareholder could be held liable for acting "in a manner that served his interests at the expense of the other shareholders" because his interests and the corporation's were not necessarily aligned). Refusal to pay dividends, paying majority shareholders outside the dividend process, and making fire-sale buyout offers certainly can harm the corporation, for instance, by lowering the value of its stock. As *Patton* itself demonstrates, the very conduct the dissent claims does not harm the corporation in fact can give rise (and has given rise in the past) to a breach-of-fiduciary-duty claim against the corporate controller who engaged in such conduct to benefit himself at the expense of the corporation. 279 S.W.2d at 853 (holding majority shareholder liable when he used "his control of the board for the malicious purpose of . . . preventing dividends and otherwise lowering the value . . . of the stock of the [minority shareholders]").

a job and its salary are often the sole means by which shareholders receive a return on their investment in the corporation. We must be particularly careful in considering this complaint, however, because Texas is steadfastly an at-will employment state. "For well over a century, the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). We need not address the policy reasons for our commitment to at-will employment in detail here, but we note that we have consistently recognized that it benefits both employees, by allowing them to change employers freely as they deem best, and employers, by allowing them to make employment decision as they deem best, without second-guessing by courts and juries. *See, e.g.*, *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 776 (Tex. 2011) ("A person's right to use his own labor in any lawful employment is . . . one of the first and highest of civil rights.") (quoting *Int'l Printing Pressmen & Assistants' Union of N. Am. v. Smith*, 145 Tex. 399, 198 S.W.2d 729, 740 (1947)); *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 318 (Tex. 1987) ("Employers should have the right and the freedom to make their employment decisions without interference unless they discriminate against some protected group which might otherwise be unfairly denied employment.").

Although at-will employment is the default, employers and employees have the freedom to contract for a different employment relationship. *See* TEX. BUS. ORGS. CODE § 2.101(5). In fact, the Business Organizations Code expressly permits corporate shareholders to memorialize the terms of employment for a director, officer, or other employee in a shareholders' agreement. *Id.* §§ 21.101(a)(4), 21.714(b)(9). In the absence of such a contract, however, we may not presume that the

company and its shareholders elected to forgo their at-will employment rights, for to do so would violate this State's strong policy in favor of at-will employment. *Cf. Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 608 (Tex. 2002) ("At-will employment is an important and long-standing doctrine in Texas, and we have been reluctant to impose new common-law duties that would alter or conflict with the at-will relationship." (citations omitted)).

There may be situations in which, despite the absence of an employment agreement, termination of a key employee is improper, for no legitimate business purpose, intended to benefit the directors or individual shareholders at the expense of the minority shareholder, and harmful to the corporation. Though the ultimate determination will depend on the facts of a given case, such a decision could violate the directors' fiduciary duties to exercise their "uncorrupted business judgment for the sole benefit of the corporation" and to refrain from "usurp[ing] corporate opportunities for personal gain." *Holloway*, 368 S.W.2d at 577; *see also Gearhart Indus.*, 741 F.2d at 723–24. As we have already discussed, a shareholder may enforce these duties through a derivative action, *see* TEX. BUS. ORGS. CODE §§ 21.551–.563, and the Legislature's special rules would apply if the matter involved a closely held corporation. *Id.* §§ 21.563(b), 21.751–.763. We also note that such actions could potentially be "oppressive" under section 11.404, and thus justify the appointment of a rehabilitative receiver. *See* TEX. BUS. ORGS. CODE § 11.404(a)(1)(C); *see also* former art. 7.05(A)(1)(c). For employment terminations that fall short of these extreme circumstances, however, our commitment to the principles of at-will employment compels us to conclude that the opportunity to contract for any desired employment assurances is sufficient.

4. Misapplication of Corporate Funds and Diversion of Corporate Opportunities

A fourth common complaint of minority shareholders involves the misapplication of corporate funds and diversion of corporate opportunities. As to this complaint, we need only note that the duty of loyalty that officers and directors owe to the corporation specifically prohibits them from misapplying corporate assets for their personal gain or wrongfully diverting corporate opportunities to themselves. *See, e.g.*, *Holloway*, 368 S.W.2d at 576 ("A corporate fiduciary is under obligation not to usurp corporate opportunities for personal gain, and equity will hold him accountable to the corporation for his profits if he does so."); *Dunagan v. Bushey*, 152 Tex. 630, 636, 263 S.W.2d 148, 152 (1953) ("The directors of a corporation stand in a fiduciary relationship to the corporation and its stockholders, and they are without authority to act as such in a matter in which a director's interest is adverse to that of the corporation. The directors are not permitted to appropriate the property of the corporation to their benefit, nor should they permit others to do so."); *see also* TEX. BUS. ORGS. CODE § 7.001(c)(1), (3). Like most of the actions we have already discussed, these types of actions may be redressed through a derivative action, or through a direct action brought by the corporation, for breach of fiduciary duty.[54] *See, e.g.*, *Holloway*, 368 S.W.2d at 576; *Becker*, 15 S.W. at 1095–97 (permitting shareholders to bring suit on behalf of company for corporate directors' alleged misapplication of corporate funds); *see also Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1999) (holding that sole shareholder could recover on behalf of company,

[54] The dissent's contention that this Court should recognize a common-law duty between majority and minority shareholders, rather than between corporate controllers and the corporation, for this kind of conduct is contrary to well-established Texas law. *See, e.g.*, *Murphy v. Campbell*, 964 S.W.2d 265, 268 (Tex. 1997) (citing *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990) for the proposition that "one corporate stockholder cannot recover damages from another for misappropriation of corporate assets").

but not in individual capacity, for former shareholder and officer's misappropriation of corporate assets). And in limited circumstances, as we have discussed, the shareholder may sue directly for a rehabilitative receivership. *See* former art. 7.05(A)(1); TEX. BUS. ORGS. CODE § 11.404(a)(1).

Because the potential harm here is to the corporation and the shareholders collectively, this misconduct does not weigh in favor of recognizing an additional common-law remedy for individual shareholders.

5. Manipulation of Stock Values

The final common minority shareholder complaint that we will address involves the directors' manipulation of the value of the corporation's stock. Although not alleged here, there may be circumstances in which the controlling shareholders or directors of a closely held corporation seek to artificially deflate the shares' value, perhaps to allow the company or its shareholders to purchase a minority shareholder's shares for less than their true market value, or to hinder a minority shareholder's sale of shares to third parties. *See, e.g.*, *Patton*, 279 S.W.2d at 849–53. As a rule, however, claims based on such conduct belong to the corporation, rather than the individual shareholder. *See Mass. v. Davis*, 140 Tex. 398, 407, 168 S.W.2d 216, 221 (1942). As we explained over 70 years ago:

> Generally, the individual stockholders have no separate and independent right of action for injuries suffered by the corporation which merely result in the depreciation of the value of their stock. This rule is based on the principle that where such an injury occurs each shareholder suffers relatively in proportion to the number of shares he owns, and each will be made whole if the corporation obtains restitution or compensation from the wrongdoer. Such action must be brought by the corporation, not alone to avoid a multiplicity of suits by the various stockholders and to bar a subsequent suit by the corporation, but in order that the damages so recovered may be available for the payment of the corporation's creditors, and for proportional

> distribution to the stockholders as dividends, or for such other purposes as the directors may lawfully determine.

Id.[55]

As with the other conduct we have addressed, the directors' fiduciary duties to the corporation provide protection for minority shareholders affected by such conduct when the conduct harms them in their capacity as shareholders. Though we recognize that the directors may endeavor in such conduct to harm the interests of one or more individual minority shareholders without harming the corporation (i.e., without giving rise to damages recoverable in a derivative suit), for the reasons discussed below, we cannot adopt a common-law rule that requires directors to act in the best interests of each individual shareholder at the expense of the corporation.[56]

6. Summary of Existence and Adequacy of Other Protections

The Legislature has already dictated what rights of access a shareholder has to corporate books and records, and no party alleges that the Legislature's statutory scheme is inadequate to protect shareholders in closely held corporations from improper denial of access to corporate records. *See, e.g.*, *D'Unger*, 207 S.W.3d at 331; *O'Bryant*, 18 S.W.3d at 216; *Austin*, 967 S.W.2d at 401. The four remaining categories of conduct identified as frequent causes of shareholder

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[55] An exception to this rule may apply when the conduct in question breaches a specific duty owed by the actor to the individual shareholder, such as when the conduct gives rise to a breach of contract claim. *See Davis*, 168 S.W.2d at 221; *Wingate v. Hajdik*, 795 S.W.2d at 719; *see also Miga v. Jensen*, 96 S.W.3d 207 (Tex. 2002) (action by one shareholder against another for breach of contract for option to purchase stock).

[56] Of course, if the controlling directors or shareholders act fraudulently to manipulate the shares' value, additional common-law and statutory remedies may apply. *See, e.g.*, TEX. REV. CIV. STAT. art. 581 (Texas Securities Act); TEX. BUS. & COM. CODE § 27.01 (fraud in real estate and stock transactions); *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 369 (Tex. App.—Houston [1st Dist.] 2012, judgm't set aside by agr.) (addressing fraud claims relating to closely held company's purchase of minority shareholders' shares).

oppression—withholding or refusing to declare dividends, termination of employment, misapplication of corporate funds or misappropriation of corporate opportunities, and manipulation of corporate share values—all relate to business decisions that fall under the authority of a corporation's offices and directors. As such, they are subject to an officer or director's fiduciary duties to the corporation. We conclude that these legal duties are sufficient to protect the legitimate interests of a minority shareholder by protecting the well-being of the corporation.[57] Absent a contractual or other legal obligation,[58] the officer or director has no duty to conduct the corporation's business in a manner that suits an individual shareholder's interests when those interests are not aligned with the interests of the corporation and the corporation's shareholders collectively.

We recognize that our conclusion leaves a "gap" in the protection that the law affords to individual minority shareholders, and we acknowledge that we could fill the gap by imposing a common-law duty on directors in closely held corporations not to take oppressive actions against an individual shareholder even if doing so is in the best interest of the corporation. To determine whether imposing such a duty is advisable, however, we must consider the public policies at play, the consequences of imposing the duty, the duty's social utility, and whether the duty would conflict

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[57] The dissent asserts that our "inclusion of [the business judgment rule] in the definition of oppression negates the very protection the oppression statute afforded until today." *Post* at __. We note that what the dissent calls "the oppression statute," the Legislature refers to as a rehabilitative receivership statute, only one prong of which includes oppression as one of three types of conduct addressed in that prong. *See* former art. 7.05; TEX. BUS. & COM. CODE § 11.404 (titled "appointment of receiver to rehabilitate domestic entity" and located in the "receivership" subchapter of the Code); *id.* § 11.404(a)(1)(C) (authorizing receivership for "illegal, oppressive, or fraudulent" actions by the governing persons of a domestic entity).

[58] We have recognized that in some circumstances a special relationship of trust may arise between parties prior to and independent from the parties' business relationship, which can give rise to informal fiduciary duties. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176–77 (Tex. 1997).

with existing law or upset the Legislature's careful balancing of competing interests in governing business relationships.

C. Consequences of Proposed Duty

"Tort law . . . cannot remedy every wrong." *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003). "The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims." *Id.* We do not believe that the creation of a common-law claim for minority shareholder oppression would fulfill these purposes, nor is the creation of such a claim necessary to do so.

We begin by considering the type of actions that would qualify as "oppressive" under a common-law cause of action. In deciding whether to recognize a new common-law cause of action, we must consider whether the new duty would provide clear standards that would deter the undesirable conduct without deterring desirable conduct or unduly restricting freedoms. *See Nabors Drilling*, 288 S.W.3d at 410; *Gomez*, 146 S.W.3d at 193. As our discussion of the Legislature's undefined usage of the term "oppressive" has revealed, the term falls far short of providing any clear standards. Adopting the Legislature's intended meaning of "oppressive" as the same meaning for a common-law claim would merely duplicate the statutory cause of action while permitting remedies that the Legislature has chosen not to permit. Yet adopting a meaning of "oppressive" that differs from the Legislature's would only create more confusion and foster both uncertainty and unnecessary

litigation. *See Roberts*, 111 S.W.3d at 118–19 (observing that proposed duty would "foster uncertainty" as well as disparity in recovery among similarly situated parties).[59]

Even the most developed common-law standards for "oppression"—the "reasonable expectations" and "fair dealing" tests—have been heavily criticized for their lack of clarity and predictability.[60] The "reasonable expectations" test may be less amorphous than a case-by-case analysis of whether actions are "fair," but application becomes increasingly difficult when the complaining shareholder obtained his or her shares by gift or inheritance, as was the case here and as is a common occurrence in closely held businesses.[61]

Ultimately, because the standard is so vague and subject to so many different meanings in different circumstances, we conclude that creating new and independent legal remedies for "oppressive" actions is simply bad jurisprudence. Although we do not foreclose the possibility that

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[59] *See also Graff*, 858 S.W.2d at 921 (addressing difficulties arising from imposing a duty without a clear standard of how the duty is satisfied); *Twyman v. Twyman*, 855 S.W.2d 619, 629 (Tex. 1993) (Hecht, J., concurring and dissenting) ("The wrongful conduct for which the common law offers redress by an award of damages should be defined by standards sufficiently objective and particular to allow a reasonable assessment of the likelihood that certain behavior may be found to be culpable, and to adjudicate liability with some consistency in the various cases that arise.").

[60] *See, e.g.*, Timothy J. Storm, *Remedies for Oppression of Non-Controlling Shareholders in Illinois Closely-Held Corporations: An Idea Whose Time Has Gone*, 33 LOY. U. CHI. L.J. 379, 383–84, 435 (2002) (observing that "[a]lthough entire treatises have been written on the subject of minority shareholder oppression, a precise definition remains elusive," that "much of the relevant case law defines oppression more by what it is not, than by what it is," and that "[e]ven proponents of a view of oppression that recognizes the non-controlling shareholder's reasonable expectations admit that these are often 'just vague and half-articulated understandings.'") (quoting F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 886 (1978)); Sandra K. Miller, *How Should U.K. and U.S. Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct Be Reformed?*, 36 AM. BUS. L.J. 579, 617 (1999) ("A vague reasonable expectations approach raises concerns for practitioners because in any particular case it is difficult to predict how a court will rule. It is difficult to counsel a minority owner who may be reluctant to proceed with litigation in the face of an uncertain result. It also is difficult to counsel the majority shareholder as to what conduct is acceptable, particularly after a shareholder dispute develops.").

[61] *See, e.g.*, Hunter J. Brownlee, *The Shareholders' Agreement: A Contractual Alternative to Oppression As A Ground for Dissolution*, 24 STETSON L. REV. 267, 286 (1994) (noting that "reasonable expectations" is a vague standard and subject to greater obscurity when some shareholders received their shares by inheritance or gift).

a proper case might justify our recognition of a new common-law cause of action to address a "gap" in protection for minority shareholders, any such theory of liability will need to be based on a standard that is far more concrete than the meaning of "oppressive."

In addition, even if we were to utilize the Legislature's intended meaning of the term "oppressive," our consideration of the competing interests and consequences convinces us to decline to expand a claim for shareholder oppression to provide relief beyond appointment of a rehabilitative receiver. In this context, we must consider not only the interests of the minority shareholder, but also the potential consequences to the corporation itself, the officers and directors on whom the duty is imposed, the other shareholders of the corporation, and business relationships in general. *See, e.g.*, *Strickland v. Medlen*, 397 S.W.3d 184, 185 (Tex. 2013) (listing a myriad of unintentional consequences that might attend liability for compensating emotional damages arising from the loss of a pet). Imposing on directors and officers a common-law duty not to act "oppressively" against individual shareholders is the equivalent of, or at least closely akin to, imposing on directors and officers a fiduciary duty to individual shareholders. We have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so.[62]

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[62] *See, e.g.*, Mark J. Loewenstein & William K.S. Wang, *The Corporation as Insider Trader*, 30 DEL. J. CORP. L. 45, 52 (2005) ("The very idea that a corporation has a fiduciary duty to individual shareholders is troubling. The corporation can act only through its board of directors, officers, employees, and other agents. These actors are obligated to act in the best interests of the corporation, which may not coincide with the best interests of an individual shareholder transacting business with the corporation. There is no reason to impose a fiduciary obligation on these actors to act in the best interests of an individual shareholder when that shareholder proposes a course of conduct not in the best interests of the corporation.").

Finally, we consider public policies regarding the role of the judiciary in government and in society. As we previously noted, we have consistently recognized that corporate relationships are largely matters governed by statute and contract. More than a century ago, this Court expressed our reluctance to allow courts to "control or interfere in the management of the corporate or internal affairs of an incorporated company." *Cates*, 11 S.W. at 848–49; *see also Kroese v. Gen. Steel Castings Corp.*, 179 F.2d 760, 763 (3d Cir. 1950) ("Courts are rightly reluctant to interfere with the management of a business concern by the individuals who have been selected by its owners to manage it."); *Salgo v. Matthews*, 497 S.W.2d 620, 625 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (discussing the dangers of court intervention in ongoing stockholder disputes). We are equally reluctant to permit courts to interfere with the freely negotiated terms of a private contract, or to insert into such a contract rights or obligations that the parties could have bargained for but did not. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996). The Legislature has by statute provided a remedy for "oppressive" actions that is limited yet sufficient, and shareholders in closely held corporations may further define their respective rights and obligations through shareholder agreements.

D. Conclusion on Common-law Action for Oppression

The Legislature has crafted a statutory scheme governing domestic corporations. The statutes are detailed and extensive, reflecting legislative policy judgments about when the government should step in to impose rights and obligations on the parties and when the parties should be free to dictate their own rights and obligations vis-à-vis each other and the business. This Court has the prerogative to superimpose a common-law cause of action upon this statutory framework—though not to alter

or contravene the statutory framework—but we exercise that power sparingly, careful not to upset the Legislative balance of policies, and only when warranted by a genuine need. *See, e.g.*, *D'Unger*, 207 S.W.3d at 331; *O'Bryant*, 18 S.W.3d at 216; *Austin*, 967 S.W.2d at 401; *see also Twyman*, 855 S.W.2d at 630 (Hecht, J., joined by Enoch, J., concurring in part and dissenting in part) ("This Court, as steward of the common law, possesses the power to recognize new causes of action, but the mere existence of that power cannot justify its exercise. There must be well-considered, even compelling grounds for changing the law so significantly. Where, as here, no such grounds are given, the decision is more an exercise of will than of reason."). We find no such necessity here, and therefore decline to recognize a common-law cause of action for "shareholder oppression."

IV.
Breach of Informal Fiduciary Duties

Finally, we address Rupe's contention that we may affirm the trial court's buy-out order based on the jury's finding in her favor on her breach-of-fiduciary-duty claim. Rupe's fiduciary duty claim is not based on the formal fiduciary duties that officers and directors owe to the corporation by virtue of their management position. Rather, Rupe alleged, and the jury found, that an informal fiduciary relationship existed between her and Dennard, Ritchie, and Lutes.[63] In the court of appeals, Dennard, Ritchie, and Lutes challenged whether such a relationship existed and whether Dennard, Ritchie, and Lutes breached any fiduciary duties if they did exist. They also argued that a court-ordered buyout is not available as a remedy for Rupe's breach-of-fiduciary-duty claim. Because the

[63] As noted above, an informal fiduciary duty may arise from "a moral, social, domestic or purely personal relationship of trust and confidence," and its existence is generally a question of fact for the jury. *See Cathey*, 167 S.W.3d at 330–31 (quoting *Associated Indem. Corp.*, 964 S.W.2d at 287).

court of appeals based its decision solely on the finding of oppressive conduct, we remand this case to the court of appeals so that it may resolve Dennard, Ritchie, and Lutes's challenges to Rupe's breach-of-fiduciary-duty claim. The court of appeals previously found that the evidence does not support the jury's valuation of Rupe's shares. Thus, if the court of appeals concludes that Rupe may recover on her breach-of-fiduciary-duty claim, and that the buyout order is available as a remedy, it will need to remand the case to the trial court for a redetermination of the value of Rupe's shares and whether the buyout is equitable in light of the newly determined value and the impact that a buyout at that price will have on RIC and its other shareholders.

V.
Conclusion

For the reasons expressed, we reverse the court of appeals' judgment and remand the case to that court for further proceedings consistent with this opinion.

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Jeffrey S. Boyd
Justice

Opinion delivered: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0447

LEE C. RITCHIE, ET AL., PETITIONERS,

v.

ANN CALDWELL RUPE, AS TRUSTEE FOR THE DALLAS GORDON RUPE, III 1995 FAMILY TRUST, RESPONDENT

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

JUSTICE GUZMAN, joined by joined by JUSTICE WILLETT and JUSTICE BROWN, dissenting.

Thirty-seven states, including Texas, have statutes allowing a court to appoint some form of receiver over a closely held corporation for shareholder oppression. Today, Texas becomes the first of these jurisdictions with a statute that unequivocally prefers lesser remedies to effectively preclude those remedies—despite overwhelming authority observing that, to the contrary, many if not all jurisdictions allow these lesser remedies.[1] But even jurisdictions with statutes that are silent on lesser remedies have interpreted their statutes to impliedly allow them. This departure from the plain language of the statute negates protections the law and Texas courts of appeals have long afforded to minority shareholders.[2]

[1] *See infra* Part II.A.

[2] *See infra* Part II.A.

Historically, legislatures have recognized that minority shareholders are particularly vulnerable to abuse by majority shareholders and are thus entitled to significant protections. Without protection, shareholder oppression can significantly devalue or destroy the minority shareholder's investment.[3] As one colloquial anecdote declares, "'[t]here are 51 shares . . . that are worth $250,000. There are 49 shares that are not worth a ___.'"[4] Over half a century ago, when Texas enacted its shareholder oppression statute, we warned that "[a] minority stock interest is far from 'change left on the counter.'"[5] Ignoring our prescient observation, the Court today largely relegates minority stock interests to the "change left on the counter" we feared they might become. This radical departure from settled precedents and expectations is primarily the result of the Court effectively rewriting the statute to abolish the lesser remedies the statute prefers as well as the Court's strict definition of oppression that will render any recovery highly unlikely. The Court today defines oppression as a decision that harms the corporation and was not determined in the honest exercise of business judgment. But typical acts of minority shareholder oppression (refusing to pay dividends, paying majority shareholders outside the dividend process, and making fire-sale buyout

[3] The investment of minority shareholders in closely held corporations is crucial because of the key role closely held corporations play in the American economy. According to Forbes, America's 224 largest privately held companies alone accounted for $1.61 trillion in revenue and over 4.5 million jobs in 2013. Andrea Murphy & Scott DeCarlo, *America's Largest Private Companies 2013*, FORBES (Dec. 18, 2013), http://www.forbes.com/sites/andreamurphy/2013/12/18/americas-largest-private-companies-2013/. Closely held corporations are a significant category of private companies, which include such organizations as partnerships and sole proprietorships.

[4] Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 425 (1990) (quoting *Humphrys v. Winous Co.*, 133 N.E.2d 780, 783 (Ohio 1956)).

[5] *Patton v. Nicholas*, 279 S.W.2d 848, 854 (Tex. 1955).

offers) usually operate to benefit the corporation and hardly ever harm it.[6] The ultimate effect of this holding is to negate the very foundations of protection the legislatures and U.S. courts have long afforded to minority shareholders in closely held corporations.

Here, the minority shareholder prevailed on her oppression and fiduciary duty claims at trial by presenting legally sufficient evidence that the majority shareholders and corporation made bargain offers to buyout her stock, warned her that it would be the only purchaser of her stock, withheld corporate information from her, refused to meet with prospective purchasers of her shares, and paid personal expenses of a majority shareholder with corporate funds. Indeed, the chairman of the corporation's board of directors admitted at trial that refusing to meet with prospective purchasers was oppressive. Because the Court extinguishes meaningful protections for minority shareholders and renders a take nothing judgment on a valid shareholder oppression claim, I respectfully dissent.

I. Background

The structure of closely held corporations situates minority shareholders in positions uniquely vulnerable to abuse. *Hollis v. Hill*, 232 F.3d 460, 467 (5th Cir. 2000). Typically, a board of directors elected by a majority of the voting interest of the shareholders oversees the corporation, which operates through officers that report to the board. TEX. BUS. ORGS. CODE §§ 3.103(b), 21.401(a). Generally, these minority shareholders have no right to participate in the management of the corporation, and the directors often elect themselves as officers of the corporation. As an

[6] *See, e.g.*, Amicus Letter of Robert A. Ragazzo, Marc. I. Steinberg, Alan R. Bromberg, Joseph K. Leahy, Bruce A. McGovern, Gary S. Rosin, & David Simon Sokolow at 4–5, *Ritchie v. Rupe*, No. 11-0447, Supreme Court of Texas, Jan. 15, 2013; *Patton*, 279 S.W.2d at 853 (finding no evidence of damage to a corporation when majority shareholder refused to pay dividends to minority shareholder).

amicus brief submitted by several professors and faculty of Texas law schools[7] demonstrates, the majority shareholders have the power to freeze out the minority shareholders by denying them employment and failing to pay dividends.[8] The majority shareholders can magnify the economic impact of the freeze out scheme by using corporate funds to personally benefit themselves and denying the minority shareholders access to corporate information—conduct commonly referred to as a "freeze out."[9] And the majority shareholders can ultimately offer to redeem the minority shareholder's stock at a bargain price[10]—often referred to as a "squeeze out."

Unlike minority shareholders in partnerships or public corporations, minority shareholders in closely held corporations are uniquely subject to this oppressive conduct because of their inability to freely exit the venture. In a partnership, a minority shareholder has a statutory right to withdraw from the partnership and receive either her share of the proceeds if the remaining partners terminate the partnership or a fair value buyout of her shares if the remaining partners continue the partnership. TEX. BUS. ORGS. CODE §§ 152.501(b)(1), 152.601(1). Likewise, dissatisfied minority shareholders in a publicly held corporation may sell their shares on the open market. But there is no statutory right for a minority shareholder to exit the corporation and receive a return of her investment. And frequently, the only buyers for minority shares of a closely held corporation are the remaining

[7] Ragazzo, *supra* note 6.

[8] *Id.* at 4–5.

[9] *Id*.

[10] *Id*. at 5.

shareholders—who might be engaging in the oppressive conduct from which they could ultimately profit.

Ideally, minority shareholders would reach buy-sell or shareholder agreements with the majority shareholders before purchasing minority shares. When disputes arise, shareholders could readily turn to their agreements as the basis for their rights without needing to resort to the law to determine the duties owed. But as one commentator has observed, "[f]rom a relational standpoint, people enter closely-held businesses in the same manner as they enter marriage: optimistically and ill-prepared."[11] This case exposes the heightened vulnerability to oppression minority shareholders face: the minority shareholder inherited her shares from her husband, who acquired his shares as a member of a family owned business that foresaw no need for shareholder agreements.

Giving due consideration to the plight of minority shareholders, thirty-one states have statutes that permit even the harsh remedy of allowing courts to appoint a receiver to liquidate a corporation based on shareholder oppression.[12] Another four states allow liquidation for "persistent unfairness"

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[11] Murdock, *supra* note 4, at 426; *see also* Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 912 (2005) ("Because close corporation owners are frequently linked by family or other personal relationships, there is often an initial atmosphere of mutual trust that diminishes the sense that contractual protection is needed. Commentators have also argued that close corporation owners are often unsophisticated in business and legal matters such that the need for contractual protection is rarely recognized." (internal citations omitted)).

[12] ALA. CODE § 10-2A-1430; ARK. CODE § 4-27-1430; COLO. REV. STAT. § 7-114-301; CONN. GEN. STAT. § 33-896; GA. CODE § 14-2-940; IDAHO CODE § 30-1-1430; 805 ILL. COMP. STAT. 5/12.55; IOWA CODE § 490.1430; MD. CODE, CORPS. & ASS'NS § 3-413; MICH. COMP. LAWS § 450.1489; MISS. CODE § 79-4-14.30; MO. ANN. STAT. § 351.494; MONT. CODE § 35-1-938; NEB. REV. STAT. § 21-2985; N.H. REV. STAT. § 293-A:14.30; N.J. STAT. § 14A:12-7; N.M. STAT. § 53-16-16; N.Y. BUS. CORP. LAW § 1104-a; OR. REV. STAT. § 60.661; 15 PA. STAT. § 1981; R.I. GEN. LAWS § 7-1.2-1314; S.C. CODE § 33-14-300; S.D. CODIFIED LAWS § 47-1A-1430; TENN. CODE § 48-24-301; UTAH CODE § 16-10a-1430; VT. STAT. tit. 11A, § 14.30; VA. CODE § 13.1-747; WASH. REV. CODE § 23B.14.300; W. VA. CODE § 31D-14-1430; WIS. STAT. § 180.1430; WYO. STAT. § 17-16-1430.

or "unfairly prejudicial" conduct.[13] One state has broader language for when dissolution is appropriate.[14] Thus, thirty-six states in all appear to allow liquidation for oppressive or similar conduct.[15] *See also* DOUGLAS K. MOLL & ROBERT A. RAGAZZO, THE LAW OF CLOSELY HELD CORPORATIONS Fig. 7.1 (2012); Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 709 n.70 (1993).

Here, Ann married into the Rupe family. Her husband's sister, Paula Dennard, informed Rupe that she would "never get any money in this family." Rupe and her husband, Buddy, wanted to add their son as a beneficiary to the family trust that owned 47% of Rupe Investment Corporation (RIC),[16] but Dennard and her children refused. When Buddy passed away, Rupe acquired (together with her son)[17] an 18% interest in RIC.[18] Rupe claims that Dennard and her colleagues Lee Ritchie

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[13] ALASKA STAT. § 10.06.628; CAL. CORP. CODE § 1800; MINN. STAT. § 302A.751; N.D. CENT. CODE § 10-19.1-115.

[14] *See* N.C. GEN. STAT. § 55-14-30(2)(ii) (authorizing liquidation if "reasonably necessary for the protection of the rights or interests of the complaining shareholder").

[15] Several states also impose special fiduciary duties on majority shareholders in closely held corporations. *See, e.g.*, *Barth v. Barth*, 659 N.E.2d 559, 561 n.6 (Ind. 1995); *Crosby v. Beam*, 548 N.E.2d 217, 221 (Ohio 1989); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976). Fiduciary duty protections are discussed in Part II.E, *infra*.

[16] The father of Buddy Rupe and Paula Dennard established the family trust to benefit his wife, his two children (Buddy and Dennard), and Dennard's three children. At the time, Buddy had one adopted child. The father did not wish to leave voting shares to an adopted child and believed Buddy to be incapable of having children. Accordingly, the family trust provided that Buddy's inheritance of RIC dividends would revert to Dennard and her three children on Buddy's death.

[17] Almost all of RIC's voting shares were owned by trusts, including the 18% of the voting shares attributable to Rupe and her son. For ease of reference, this opinion will refer to the beneficial interest owners of the trust when possible.

[18] In accordance with the terms of the family trust, *see supra* note 16, Buddy's RIC dividends of $50,000 per year from his shares in the family trust reverted to Dennard and her children.

(a descendant of one of RIC's early owners) and Dennis Lutes (an attorney for RIC and Dennard's family) feared she would sue to reform the trust and add her and Buddy's son as a beneficiary. Dennard serves as chair of RIC's board of directors, and with her children controls over 70% of RIC's voting stock. Ritchie serves as RIC's president, is on the board, and together with his family owns just under 10% of RIC's voting stock. And Lutes serves as vice-president and secretary of RIC and is on the board. Together, Dennard and her children, Ritchie and his family, and Lutes control approximately 79% of RIC's voting shares and three of the board's four positions. The trial court found that Dennard, Ritchie, and Lutes voted the same for every shareholder vote for the entire time relevant to this lawsuit. Before his death, Buddy was RIC's fourth director. RIC's sales were approximately $152 million by 2007.

After Buddy's death, Ritchie offered to appoint Rupe to RIC's board if she would agree to not sue another stockholder of RIC, which included the trust. Rupe accepted. Subsequently, when her home was facing foreclosure and she encountered a tax problem, Rupe asked if RIC would purchase her shares. Ritchie responded that RIC would prefer to delay any offer to purchase her shares because one of its subsidiaries was attempting to obtain new financing.

Lutes later offered to redeem Rupe's shares for $1 million. Rupe replied that the $1 million buyout offer was "absurd" and was designed to take advantage of her. Dennard, Ritchie, and Lutes then elected Dennard's daughter Gretchen to take Buddy's seat on the board.

Ritchie later offered for RIC to purchase Rupe's shares for approximately $1.7 million (or $5,987 per share) to be paid over a seven-year period. In making the offer, Ritchie warned that RIC would be the only purchaser of her stock. Ritchie admitted at trial this value was calculated using

the book value of RIC's shareholder equity, and Ritchie and Lutes both conceded that book value was not necessarily representative of market value.[19] RIC's calculation also deducted 50% of the book value of one of its major subsidiaries,[20] and further reduced the value of Rupe's stock by 46.3%.[21] Ritchie separately informed Dennard that based on the same date he valued Rupe's shares at $5,987 per share, Dennard's shares possessed a book value of $7,032 per share for gift tax purposes. And these offers to purchase Rupe's shares were markedly lower than the per-share prices RIC paid to previous minority shareholders.

Unsatisfied with the offer, Rupe retained investment banker George Stasen to market her stock to third parties. When they met, Dennard, several of her children, and Ritchie greeted Stasen in "a very hostile fashion," and Ritchie refused Stasen's request to meet with any potential third-party buyers. They required Rupe and any potential buyer to execute confidentiality agreements that were not subject to negotiation and that granted RIC sole discretion to approve or disapprove disclosure of requested information.

According to Stasen, potential buyers laughed at him because they could not be expected to "make a decision on an investment from this limited information without meeting the executives" of a closely held corporation like RIC. Stasen explained that "[t]here was no way I could ever sell anything . . . [b]ecause there wasn't enough information in the package and everybody wanted to be

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[19] For example, RIC listed an office building for sale for $1.8 million but established its book value at $124,000 due to depreciation.

[20] RIC subsidiary Hutton Communications was in a financial crisis, but Hutton's chief financial officer testified that its turnaround began before the date on which RIC assessed the book value of Rupe's shares.

[21] RIC used this particular discount when buying back certain stock in previous years.

able to meet Lee Ritchie and talk to the executives of the companies." Importantly Dennard admitted at trial that she disagreed with Ritchie's refusal to meet with potential third-party buyers, she would want to meet with the president of a closely held corporation before investing, Stasen's request of Ritchie was reasonable, and refusing such a request would be "oppressive to a minority shareholder."

Rupe sued Dennard, Ritchie, Lutes, and RIC, claiming shareholder oppression and breach of fiduciary duty. Rupe sought a court-ordered buyout of her shares or, alternatively, the appointment of a receiver to liquidate RIC. Among other things, the jury found after an eight-day trial that: (1) Dennard, Ritchie, Lutes, and RIC engaged in oppressive conduct; (2) RIC failed to allow Rupe to inspect and copy relevant books and records; (3) Dennard paid personal expenses from RIC's corporate funds; (4) Dennard, Ritchie, and Lutes offered Rupe a position on the board if she would agree to not sue a shareholder of RIC; (5) Dennard, Ritchie, and Lutes engaged in oppressive conduct in their redemption offers and treatment of Rupe with regard to inspection and copying of corporate records; (6) Dennard, Ritchie, and Lutes breached their fiduciary duties to Rupe; and (7) the fair value of Rupe's shares was $7.3 million.[22] The trial court entered judgment in favor of Rupe and ordered Dennard, Ritchie, and Lutes to cause RIC to redeem Rupe's shares for $7.3 million. The court of appeals agreed that the conduct amounted to shareholder oppression and a stock buyout was the most appropriate remedy but remanded for a redetermination of the stock's value in light of the lack of marketability and control. 339 S.W.3d 275, 299, 302.

[22] RIC's $1.7 million offer was calculated utilizing a valuation date of June 30, 2003. The jury assessed the value of Rupe's shares as of June 30, 2006. The court of appeals affirmed the jury's valuation date, which is not at issue in this appeal.

II. Discussion

The Court today holds that because the shareholder oppression statute only expressly addresses the remedy of receivership, no other remedy for oppression is available. And because the remedy of receivership is comparably harsh, the Court imposes a stringent definition of oppression by incorporating the business judgment rule. The Court's logic in applying the business judgment rule in this context would presumably also apply to minority shareholder claims for breach of fiduciary duty. But the Court's initial holding that receivership is the only remedy for oppression is flawed—which necessarily affects the soundness of the Court's remaining holdings.

The shareholder oppression statute *not only* addresses but also *prefers* lesser legal and equitable remedies than receivership—it does not extinguish them. Because courts may impose lesser remedies, the long-standing definition of oppression that has existed at common law in Texas and a host of other jurisdictions (to which the Legislature has acquiesced) should apply. Further, the business judgment rule is fundamentally incongruent with the concept of minority shareholder oppression because that oppression (such as buying minority shares for a bargain price) typically benefits the corporation. And the oppression statute contemplates use of lesser remedies in situations where oppression exists but does not harm the corporation—further indicating the business judgment rule should not apply. Neither does the business judgment rule have a place in minority shareholder claims for breach of fiduciary duty. I address each point in turn.

A. Remedy

At the heart of this case is the pre-codified version of the Texas oppression statute, former article 7.05. That provision requires a shareholder seeking a rehabilitative receivership to establish

that the directors' acts are "illegal, oppressive, or fraudulent." Act of Mar. 30, 1955, 54th Leg., R.S., ch. 64, art. 7.05(A)(1), 1955 Tex. Gen. Laws 239, 290-91, *amended by* Act of May 3, 1961, 57th Leg., R.S., ch. 169, 1, 1961 Tex. Gen. Laws 319, 319 (hereinafter "former art. 7.05"). Additionally, a court may only appoint a receiver: (1) when the court deems it necessary "to conserve the assets and business of the corporation and to avoid damage to parties at interest," and (2) if "all other requirements of law are complied with" and "all other remedies available either at law or in equity, including the appointment of a receiver for specific assets of the corporation, are determined by the court to be inadequate." Former art. 7.05. In short, a court may appoint a receiver when: (1) the directors engage in oppressive conduct; (2) such conduct harms the corporation; and (3) lesser legal and equitable remedies will not suffice.

But the plain language of the oppression statute *prefers* other remedies—it does not extinguish them. Former article 7.05 provides for receivership only if "all other remedies available either at law or in equity . . . are determined by the court to be inadequate." Former art. 7.05. If no other remedies are available under the statute or common law, as the Court holds, the oppression statute would have no need to express a preference for their use. Such a holding violates our fundamental canon of construction to not render any statutory language meaningless. *See 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."). And in doing so, the Court defeats the very purpose of the Legislature's carefully chosen words.

Other jurisdictions with similar oppression statutes have uniformly interpreted them as allowing other lesser remedies. The Texas oppression statute has its roots in the Illinois Business

Corporation Act of 1933,[23] which formed the basis for the Model Business Corporation Act.[24] Courts in states with oppression statutes similar to ours have discussed eight legal and equitable remedies less drastic than a rehabilitative receivership: (1) appointment of a fiscal agent to periodically report to the court; (2) retention of jurisdiction by the court; (3) an accounting of allegedly misappropriated funds; (4) an injunction for oppressive conduct (such as reducing excessive salaries or bonuses); (5) ordering a dividend; (6) ordering a buyout; (7) permitting minority shareholders to purchase additional stock; and (8) awarding damages caused by oppressive conduct. *See, e.g.*, *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 395–96 (Or. 1973); *Fix v. Fix Material Co., Inc.*, 538 S.W.2d 351, 357 n.3 (Mo. Ct. App. 1976). Ironically, the courts that have recognized these remedies attribute the creation of two of them (continuing the exercise of jurisdiction and ordering a dividend) to this very Court—even though the Court extinguishes them today. *See Baker*, 507 P.2d at 395–96 (citing *Patton v. Nicholas*, 279 S.W.2d 848 (Tex. 1955)); *Fix*, 538 S.W.2d at 357 n.3 (same).

Several courts with statutes similar to ours have specifically addressed the propriety of a buyout as a remedy for oppression.[25] Unsurprisingly, the seminal Texas case on the issue has likewise agreed with this authority in recognizing the availability of a buyout under our oppression

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[23] *Cent. Standard Life Ins. Co. v. Davis*, 141 N.E.2d 45, 49 (Ill. 1957) ("The concept of oppressive conduct as a ground for dissolution of a corporation in equity appears for the first time in the 1933 act.").

[24] Murdock, *supra* note 4, at 455.

[25] *See Balvik v. Sylvester*, 411 N.W.2d 383, 389 (N.D. 1987); *Delaney v. Georgia-Pacific Corp.*, 564 P.2d 277, 288 (Or. 1977) ("[T]his is an appropriate cause for relief in the form of a requirement that [the majority shareholder] purchase plaintiffs' stock at a fair price."). Oregon has since amended its statute to expressly allow buyouts and other remedies, noting that the listed remedies "shall not be exclusive of other legal and equitable remedies that the court may impose." OR. REV. STAT. § 60.952(2)–(3).

statute that expresses a preference for the use of lesser legal and equitable remedies. *Davis v. Sheerin*, 754 S.W.2d 375, 380 (Tex. App.—Houston [1st Dist.] 1988, writ denied) ("Texas courts, under their general equity power, may decree a [buyout] in an appropriate case . . . ."). Texas courts of appeals have agreed.[26] And several courts in other jurisdictions whose oppression statutes address no remedy other than dissolution have found buyouts to be appropriate remedies for oppression.[27]

Importantly, I am aware of no state that has interpreted their shareholder oppression statute as foreclosing all remedies except receivership, as the Court does today. Indeed, other state supreme courts have cited this Court's precedent for the proposition that "[m]ost states have adopted the view that a dissolution statute does not provide the exclusive remedy for injured shareholders and that the courts have equitable powers to fashion appropriate remedies where the majority shareholders have breached their fiduciary duty to the minority by engaging in oppressive conduct."[28]

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[26] *See, e.g.*, *Christians v. Stafford*, No. 14-99-00038-CV, 2000 WL 1591000, at *2 (Tex. App.—Houston [14th Dist.] Oct. 26, 2000, no pet.) (mem. op.) ("[A] court may order an equitable 'buy-out' of a party's minority shares for oppressive acts of the majority when the party sues both individually in his own right and as a shareholder on behalf of the corporation."); *Advance Marine, Inc. v. Kelley*, No. 01-90-00645-CV, 1991 WL 114463, at *2 (Tex. App.—Houston [1st Dist.] June 27, 1991, no writ) (mem. op.) ("Courts have power to order the equitable remedy of a buy-out by the majority shareholders according to the facts of the particular case."); *see also Balias v. Balias, Inc*, 748 S.W.2d 253, 256–57 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (affirming trial court's denial of appointment of a receiver where shareholder failed to demonstrate that other remedies would have been inadequate).

[27] *See Maddox v. Norman*, 669 P.2d 230, 237 (Mont. 1983) ("[A] court sitting in equity is empowered to determine the questions involved in a case and do complete justice. This includes the power to fashion an equitable result." (citations and quotation marks omitted)); *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 274–75 (Alaska 1980); *McCauley v. Tom McCauley & Son, Inc.*, 724 P.2d 232, 243 (N.M. Ct. App. 1986); *Sauer v. Moffitt*, 363 N.W.2d 269, 274–75 (Iowa Ct. App. 1984).

[28] *Masinter v. WEBCO Co.*, 262 S.E.2d 433, 439–40 (W. Va. 1980) (citing *Patton*, 279 S.W.2d at 853); *see also Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 656 (Iowa 1979) ("Wherever a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation, though no similar relief has been given before." (quotation marks omitted) (citing *Patton*, 279 S.W.2d at 857)).

Commentators are in accord with the host of jurisdictions that recognize courts retain the authority to implement lesser legal and equitable remedies for shareholder oppression. As one commentator has observed, because most oppression statutes are based on the Model Business Corporation Act, "alternative relief, particularly buy-outs of minority shareholders, is available in most, if not all, jurisdictions."[29] And leading scholars on shareholder oppression have observed that buyouts "are the most common remedy for dissension within a close corporation."[30] But ignoring the plain language of the statute and the great weight of authority against its holding, today Texas becomes the first jurisdiction to hold that an oppression statute abolishes the remedies it expressly prefers.

B. Definition of Oppression

The Court's first misinterpretation of the statute (that there is but one remedy) results in a second: that oppression must have an unduly restrictive definition. The Court observes that receivership is a harsh or drastic remedy, designed for situations that pose a serious threat to the corporation and its shareholders.[31] __ S.W.3d at __; *see also Balias v. Balias*, 748 S.W.2d 253, 257

[29] Murdock, *supra* note 4, at 464.

[30] Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 309 n.56 (2004) (quoting 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.16, at 1-97 (3d ed. 2002); *see also id.* at 308–09 ("The most common remedy for oppression . . . is a buyout of the oppressed investor's stockholdings. A buyout is advantageous because it provides a mechanism for an oppressed shareholder to extricate his investment from a venture without having to dissolve the corporation. The majority shareholder continues to operate the close corporation and to participate in the company's successes and failures, while the minority shareholder recovers the value of his invested capital and removes himself from the company's affairs."); Murdock, *supra* note 4, at 470 ("The most common form of alternative remedy is the buy-out of the minority shareholder.").

[31] The remedy of receivership is harsh or drastic when compared to other remedies such as compelling dividends or a buyout because it replaces the shareholders' chosen managers with court-chosen managers. __ S.W.3d at __; *Balias*, 748 S.W.2d at 257. But this does not mean that even a receivership for dissolution will cause the corporation to cease

(Tex. App.—Houston [14th Dist.] 1988, writ denied). The Court has taken a position commentators previously warned against: "the view of dissolution as a 'drastic' remedy generally works to the disadvantage of minority shareholders."[32] Because the Court concludes that receivership is the only remedy under the oppression statute and that it is drastic or harsh, it adopts a novel and strict definition of oppression:

> when [directors or managers] abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation.

__ S.W.3d at __. The business judgment rule shields directors and managers from liability for rational decisions made for the benefit of the corporation.[33] If there is no harm to the corporation, the director or manager has not violated the business judgment rule (and might not have violated the rule even if there is harm to the corporation if the decision was made in the honest exercise of business judgment). Thus, the Court's definition of oppression will only allow recovery if a director or manager fails to honestly exercise her business judgment and harms a minority shareholder as well as the corporation itself.

The Texas oppression statute and the court of appeals cases construing it did not develop in a vacuum. The developing body of law in Texas and beyond indicates why the Court's restrictive

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to be a going concern. The majority shareholders may well purchase the corporation from the receiver, essentially buying out the minority shareholder.

[32] Murdock, *supra* note 4, at 426.

[33] *See Texarkana Coll. Bowl, Inc. v. Phillips*, 408 S.W.2d 537, 539–40 (Tex. Civ. App.—Texarkana 1966, no writ) (holding that a shareholder was not entitled to a remedy for oppression because the directors' decisions were "not inconsistent with the honest exercise of business judgment and discretion").

definition of oppression is unwarranted. Like many other states, Texas's statute was similar to the Model Act.[34] As discussed above, the overwhelming majority of courts have construed their oppression statutes to allow for remedies other than receivership. *See supra* Part II.A. As commentators have observed, "less drastic remedies [than dissolution] may be justified by less oppressive conduct than that required to dissolve a corporation."[35] Accordingly, courts have "almost uniformly taken a broad approach to defining oppressive conduct, and where alternatives to dissolution do not exist by statute, have upheld the general equitable power of the courts to fashion such alternatives. The pattern appears firmly established"—except as of today in Texas.[36]

New York has primarily shaped the definitions of oppression in the United States.[37] The first New York court to squarely address the issue observed that "[w]hether the controlling shareholders discharged petitioner for cause or in their good business judgment is irrelevant;" rather, what was relevant was the minority shareholder's "reasonable expectations." *In re Topper*, 433 N.Y.S.2d 359, 362 (N.Y. Sup. Ct. 1980). The reasonable expectations test for oppression has been further refined

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[34] The Court believes the Model Act compels its conclusion here because the Act expressly provides a buyout as a remedy. __ S.W.3d at __ n.25. But the Model Act only changed in 1984 to expressly provide a buyout. *Compare* MODEL BUS. CORP. ACT § 14.34 (1984) (establishing procedure for buyout in lieu of dissolution) *with* MODEL BUS. CORP. ACT § 97 (1971) (allowing court to liquidate corporation due to oppressive conduct without specifying other remedies) *and* MODEL BUS. CORP. ACT § 90 (1960) (same). Presciently, the Texas Legislature added in 1955 the flexibility the Model Act did not have until recently by expressly allowing lesser legal and equitable remedies. Former art. 7.05. The Texas Act should not have to expressly enumerate lesser legal and equitable remedies to give the plain statutory language its intended effect.

[35] Murdock, *supra* note 4, at 459.

[36] *Id.* at 470 (citations omitted); *compare favorably McCauley*, 724 P.2d at 236 ("The absence of a rigidly defined standard for determining what constitutes oppressive behavior enables courts to determine, on a case-by-case basis, whether the acts complained of serve to frustrate the legitimate expectations of minority shareholders, or whether the acts are of such severity as to warrant the requested relief.").

[37] Murdock, *supra* note 4, at 465.

as "when the majority's conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture." *Davis*, 754 S.W.2d at 381 (citing *In re Wiedy's Furniture Clearance Ctr. Co.*, 487 N.Y.S.2d 901, 903 (N.Y. App. Div. 1985)). High courts in Alaska, Iowa, Maryland, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Rhode Island, and Washington have followed New York's lead in adopting the reasonable expectations test.[38] And this test is firmly established in Texas jurisprudence, with the Amarillo, Corpus Christi, Dallas, El Paso, Fort Worth, Houston (1st and 14th Districts), San Antonio, Texarkana, and Tyler courts of appeals having applied the test in shareholder oppression cases.[39]

But the reasonable expectations test can be a poor fit when the minority shareholder, such as the one here, inherited her shares (perhaps indicating she had no investment expectations at all).[40]

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[38] *See Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 674 (Iowa 2013); *Boland v. Boland*, 31 A.3d 529, 542 (Md. 2011); *Scott v. Trans–Sys., Inc.*, 64 P.3d 1, 6 (Wash. 2003); *Hendrick v. Hendrick*, 755 A.2d 784, 791 (R.I. 2000); *Brenner v. Berkowitz*, 634 A.2d 1019, 1028–29 (N.J. 1993); *Balvik*, 411 N.W.2d at 387 (N.D. 1987); *McCauley*, 724 P.2d at 237–38 (N.M. 1986); *Stefano v. Coppock*, 705 P.2d 443, 446 n.3 (Alaska 1985); *Meiselman v. Meiselman*, 307 S.E.2d 551, 563 (N.C. 1983); *Fox v. 7L Bar Ranch Co.*, 645 P.2d 929, 933 (Mont. 1982); *see also Adler v. Tauberg*, 881 A.2d 1267, 1269 (Pa. Super. Ct. 2005); *Ford v. Ford*, 878 A.2d 894, 904 (Pa. Super. Ct. 2005); *Morrow v. Prestonwold, Inc.*, No. CV000445844S, 2002 WL 652369, at *4 (Conn. Super. Ct. Mar. 22, 2002).

[39] *See, e.g.*, *Kohannim v. Katoli*, __ S.W.3d __, __, 2013 WL 3943078, at *9 (Tex. App.—El Paso July 24, 2013, pet. denied); *Boehringer v. Konkel*, 404 S.W.3d 18, 25 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Argo Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249, 265 (Tex. App.—Dallas 2012, pet. filed); *In re Trockman*, No. 07-11-0364-CV, 2012 WL 554999, at *2 (Tex. App.—Amarillo Feb. 1, 2012, no pet.) (mem. op.); *Guerra v. Guerra*, No. 04-10-00271-CV, 2011 WL 3715051, at *6 (Tex. App.—San Antonio Aug. 24, 2011, no pet.) (mem. op.); *Gibney v. Culver*, No. 13-06-112-CV, 2008 WL 1822767, at *16–17 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. denied) (mem. op.); *Redmon v. Griffith*, 202 S.W.3d 225, 234 (Tex. App.—Tyler 2006, pet. denied); *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 699–700 (Tex. App.—Fort Worth 2006, pet. denied); *Gonzalez v. Greyhound Lines Inc.*, 181 S.W.3d 386, 392 n.5 (Tex. App.—El Paso 2005, pet. denied); *Willis v. Donnelly*, 118 S.W.3d 10, 32 n.12 (Tex. App.—Houston [14th Dist.] 2003) *aff'd in part and rev'd in part on other grounds*, 199 S.W.3d 262 (Tex. 2006); *Pinnacle Data Servs., Inc. v. Gillen*, 104 S.W.3d 188, 196 (Tex. App.—Texarkana 2003, no pet.).

[40] *See* Ragazzo, *supra* note 6, at 10.

Due to such circumstances, New York courts developed a test for finding oppression if the conduct of the majority becomes "burdensome, harsh and wrongful." *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1020 (N.Y. Sup. Ct. 1984). High courts in Maine, Mississippi, Oregon, Rhode Island, and Washington have followed this test,[41] as have the courts of appeals in Texas.[42]

Because of the panoply of legal and equitable remedies Texas and other courts have recognized for oppression, these two definitions of oppression are firmly established in Texas and national jurisprudence and allow courts the flexibility to craft remedies for the varying types of oppression.[43] There is no valid basis to overturn this mountain of jurisprudence, leave Texas out of step with other jurisdictions whose statutes are similar to ours, and chill investment in closely held corporations.

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[41] *See Napp v. Parks Camp, Ltd.*, 932 A.2d 531, 538 (Me. 2007); *Scott*, 64 P.3d at 6 (Wash. 2003); *Hendrick*, 755 A.2d at 791 (R.I. 2000); *Kisner v. Coffey*, 418 So.2d 58, 61 (Miss. 1982); *Baker*, 507 P.2d at 393 (Or. 1973); *see also Edenbaum v. Schwarcz-Osztreicherne*, 885 A.2d 365, 378 (Md. Ct. Spec. App. 2005); *Colt v. Mt. Princeton Trout Club, Inc.*, 78 P.3d 1115, 1118 (Colo. App. 2003); *Morrow*, 2002 WL 652369, at *5; *Jorgensen v. Water Works, Inc.*, 582 N.W.2d 98, 107 (Wisc. Ct. App. 1998); *Whale Art Co. v. Docter*, 743 S.W.2d 511, 514 (Mo. Ct. App. 1987).

[42] *See, e.g.*, *Kohannim*, __ S.W.3d at __, 2013 WL 3943078, at *9; *Boehringer*, 404 S.W.3d at 25; *Shagrithaya*, 380 S.W.3d at 265; *Trockman*, 2012 WL 554999, at *2; *Guerra*, 2011 WL 3715051, at *6; *Gibney*, 2008 WL 1822767, at *16–17; *Gonzalez*, 181 S.W.3d at 392 n.5; *Willis*, 118 S.W.3d at 32 n.12; *Gillen*, 104 S.W.3d at 196; *Devji v. Keller*, No. 03-99-00436-CV, 2000 WL 1862819, at *7 (Tex. App.—Austin Dec. 21, 2000, no pet.) (mem. op.); *Davis*, 754 S.W.2d at 382.

[43] The Court holds that the Legislature cannot acquiesce to decisions that run contrary to a statute's plain language and that long-standing Texas court definitions of oppression are thus invalid. __ S.W.3d at __ n.16. The first proposition is unquestionably true, but the Court's application is incorrect. If, as the Court holds, the statutory definition of oppression should be more restrictive than the common-law definition because the statute applies to more than just closely held corporations, then the common-law claim for oppression should fill the "gap" in protection the Court admittedly leaves with its decision.

C. The Business Judgment Rule

In addition to crafting a restrictive definition of oppression, the Court embeds in its definition the business judgment rule, shielding majority shareholders and directors from liability for decisions that do not harm the corporation or that were made in the honest exercise of business judgment. But the business judgment rule is fundamentally at odds with the lesser shareholder oppression remedies the oppression statute expressly prefers. The Court's inclusion of the rule in the definition of oppression negates the very protection the oppression statute afforded until today.[44]

When crafting the reasonable expectations test for shareholder oppression, the New York court observed that "[w]hether the controlling shareholders discharged petitioner for cause or in their good business judgment is irrelevant." *Topper*, 433 N.Y.S.2d at 362. A number of other courts have likewise rejected the business judgment rule in minority shareholder oppression cases.[45]

Commentators have agreed that the business judgment rule should not apply in shareholder oppression cases. As one leading commentator has explained:

> [T]he shareholder oppression doctrine recognizes that decisions about such matters by a majority-controlled board can be part of a minority shareholder freeze-out. The oppression doctrine, therefore, is implicitly premised upon the notion that close corporation employment, management, and dividend decisions require more than a

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[44] The Court responds that the business judgment rule is congruent with the portion of the oppression statute, noting that it is "to conserve the property and business of the domestic entity and avoid damage to interested parties." __ S.W.3d at __ n.13. This assessment is misguided for three reasons. First, minority shareholders whose investments are being diminished would seem to qualify as "interested parties." Second, the Court is reading one provision of the statute ("conserve the property and business of the domestic entity") to render two others meaningless ("interested parties" and "all other legal and equitable remedies"). Third, this distortion of the statute leaves a gap in protection under the common law.

[45] *See, e.g.*, *Grato v. Grato*, 639 A.2d 390, 396 (N.J. Super. Ct. App. Div. 1994); *Fox*, 645 P.2d at 934–35 (Mont. 1982); *Smith v. Atl. Props., Inc.*, 422 N.E.2d 798, 801, 804 (Mass. App. Ct. 1981); *Exadaktilos v. Cinnaminson Realty Co.*, 400 A.2d 554, 561 (N.J. Super. Ct. Law Div. 1979).

> mere surface inquiry into the majority's conduct. Indeed, the fact that courts applying the oppression doctrine are subjecting the majority's actions to "reasonable expectations" or "burdensome, harsh, and wrongful conduct" standards suggests that courts are requiring majority shareholders to do more than merely articulate a rational business purpose for their decisions.

Douglas K. Moll, *Shareholder Oppression in Texas Close Corporations: Majority Rule Isn't What It Used To Be*, 1 HOUS. BUS. & TAX. L.J. 12, 20 (2001) (citations omitted); *see also* F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 884 (1978) (criticizing the business judgment rule as a conceptual barrier to judicial relief for aggrieved minority shareholders).

The typical example of minority shareholder oppression culminates when directors offer to buy a minority shareholder's shares at a fraction of their true value. Such an offer will seemingly always be in the corporation's best interest. For example, the directors here offered at most $1.7 million for shares the jury valued at trial at $7.3 million. If this value were the fair market value,[46] the shareholder oppression could benefit the corporation by $5.6 million if the minority shareholder accepted. Likewise, refusing to pay dividends to shareholders strengthens the corporation's cash reserves, paying a director's personal expenses from corporate funds keeps the director satisfied and in continued service of the corporation, and refusing to meet with prospective purchasers prevents statements that might possibly be the basis for a securities fraud suit. Each such act that potentially oppresses a minority shareholder can benefit the corporation and be justified under the business judgment rule. But after today, the business judgment rule will allow essentially all minority

[46] As explained below, I agree with the court of appeals that the jury's valuation of the minority shareholder's stock at $7.3 million failed to account for the stock's lack of marketability or control. Thus, the fair market value would be somewhat less than $7.3 million.

shareholder oppression that does not harm the corporation (and even some liability that does harm the corporation if the directors or majority shareholders made an honest business decision).

D. Common-Law Cause of Action

The Court also determines "the foreseeability, likelihood, and magnitude of harm sustained by minority shareholders due to the abuse of power by those in control of a closely held corporation is significant, and Texas law should ensure that remedies exist to appropriately address such harm when the underlying actions are wrongful." __ S.W.3d at __. But the Court concludes that the common-law standard for minority shareholder oppression is too vague[47] and existing remedies provide adequate protection, thereby obviating the need for a common-law cause of action.

Tellingly, the Court acknowledges that its interpretation of the oppression statute and failure to impose a common-law remedy for oppression "leaves a 'gap' in the protection that the law affords to individual minority shareholders" when the harm to the minority shareholders does not harm the corporation.[48] __ S.W.3d at __. Until today, that gap has not existed because Texas courts have

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[47] One basis for the Court's conclusion is its belief that the common-law reasonable expectations test is difficult to apply when a minority shareholder inherited her shares. __ S.W.3d at __. But this is precisely why courts in Texas and a host of other jurisdictions apply the test for burdensome, harsh, and wrongful conduct when addressing inherited shares. *See supra* Part II.B.

[48] The Court takes solace in the fact that majority shareholders that harm minority shareholders might also be harming the corporation, thus allowing a rehabilitative receiver under the oppression statute or a breach of fiduciary duty claim if the facts support it. __ S.W.3d at __ n.53. The Court specifically opines that "[r]efusal to pay dividends, paying majority shareholders outside the dividend process, and making fire-sale buyout offers certainly can harm the corporation, for instance, by lowering the value of its stock." *Id*. But such observation reflects a misunderstanding of closely held corporations. For example, refusing to pay dividends to any shareholder yields additional cash reserves. One buying a majority interest in the company would obviously pay more for a company with more cash, which they could extract with the powers associated with their majority interest. One buying a minority interest would not necessarily pay more if they have no legal recourse to compel the majority shareholder to pay a dividend to the minority shareholder (and they have no such recourse after today). Such an example is not difficult to find. It occurred the last time we addressed this issue. In *Patton*, the majority shareholder refused to pay dividends to the minority shareholders, and we held that such conduct did not harm the corporation. 279 S.W.3d at 853.

interpreted the oppression statute to allow lesser remedies for oppression that harms minority shareholders but not the corporation.

No other existing remedy the Court discusses adequately protects minority shareholders from such oppression. The remedy that comes closest to affording some relief to the oppressed minority shareholder is a common-law claim for breach of fiduciary duty. But the Court's logic expressly and impliedly negates such a claim. Expressly, the Court observes that we recognized this cause of action in *Patton* and treated it as a derivative action. __ S.W.3d at __. But a shareholder only has standing to bring a derivative action if she fairly and adequately represents the interests of the corporation.[49] TEX. BUS. ORGS. CODE § 21.552(2). Thus, a derivative action would only lie in this context when the oppression of the minority shareholder harms the corporation itself. The Court espouses this principle by observing that "actions that are 'oppressive' under the statute ordinarily will not give rise to derivative suits." __ S.W.3d at __ n.15. But in *Patton*, we recognized that the majority shareholder's misconduct did not harm the corporation itself but nonetheless allowed the minority shareholder's claim for breach of fiduciary duty. 279 S.W.2d at 853 ("[W]e find no evidence . . . that [the corporation] was damaged."). Thus, if the Court is correct today and minority shareholders may only bring fiduciary duty claims for the benefit of the corporation, *Patton* is wrong.[50] But, *Patton* is not wrong; it correctly allowed a minority shareholder claim for breach of

[49] The Court observes that shareholders in closely held corporations that elect to be close corporations do not have to fairly and adequately represent the interests of the corporation. __ S.W.3d at __; TEX. BUS. ORGS. CODE § 21.552. But this offers no remedy for minority shareholders in corporations like RIC that have not elected close corporation status.

[50] The Court also notes that the Business Organizations Code allows courts to treat a closely held corporation's shareholder claim as direct rather than derivative. __ S.W.3d at __; TEX. BUS. ORGS. CODE § 21.563(c). But because the Court interprets the oppression statute to only allow a remedy if the corporation itself is harmed, treating derivative

fiduciary duty even when there was no harm to the corporation.[51] 279 S.W.2d at 853. *Patton* did not require a derivative claim.

The Court's logic also impliedly restricts fiduciary duty claims. As addressed below, the Court's conclusion that the business judgment rule should apply to statutory shareholder oppression claims would seem to apply with equal force to fiduciary duty claims. *See infra* Part II.E. But the rule is fundamentally at odds with the remedy of the fiduciary duty claim, just as it is at odds with shareholder oppression claims. *See supra* Part II.C. In short, the Court acknowledges that its unduly restrictive interpretation of the oppression statute leaves minority shareholders unprotected from conduct that will harm them but not the corporation. It is precisely the Court's restrictive view of the statute that creates the gap in protection and requires a common-law cause of action.

E. Breach of Fiduciary Duty

Shareholder oppression was not the only cause of action in this proceeding. Rupe also sued for breach of fiduciary duty.

Like shareholder oppression, breach of fiduciary duty is a doctrine that protects minority shareholders from abuse and oppression. As one leading commentator has observed:

> The development of the statutory cause of action and the enhanced fiduciary duty reflect the same underlying concerns for the position of minority shareholders, particularly in close corporations after harmony no longer reigns. Because of the

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actions as direct actions offers no meaningful protection to the oppressed minority shareholder.

[51] The Court mischaracterizes *Patton* as standing for the proposition that an improper refusal to declare dividends entitled minority shareholders to relief "either directly to the corporation or through a derivative action." __ S.W.3d at __. But we found no harm to the corporation in *Patton* and required the majority shareholder to declare reasonable dividends for up to five years. 279 S.W.2d at 857–58. We required declaring dividends to benefit the shareholders (which had been harmed) rather than the corporation (which had not been harmed by withholding dividends).

> similarities between the two remedial schemes . . . it makes sense to think of them as two manifestations of a minority shareholder's cause of action for oppression [or] as two sides of the same coin . . . .

Douglas K. Moll, *Shareholder Oppression & Dividend Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841, 852 (2003) (quotation marks and citations omitted). The fiduciary concept for close corporations arose in the 1970s, when the Massachusetts high court recognized that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another." *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 (Mass. 1975).

As the Fifth Circuit has observed, this "recognition of special rules of fiduciary duty applicable to close corporations has gained widespread acceptance." *Hollis*, 232 F.3d at 468. High courts in Indiana, Maryland, Minnesota, New York, Ohio, Utah, and West Virginia have recognized that majority shareholders can owe fiduciary duties to minority shareholders.[52]

We expressly avoided the issue in *Willis v. Donnelly* because the record there could not support the existence of a fiduciary duty. 199 S.W.3d 262, 276–77 (Tex. 2006). But we did recognize the existence of a fiduciary duty in *Patton*, where we held that "[u]ndoubtedly the malicious suppression of dividends is a wrong akin to breach of trust, for which the courts will afford a remedy." 279 S.W.2d at 854. In light of *Patton* and the mainstream approach in American

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[52] *See Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 952 N.E.2d 995, 1001 (N.Y. 2011); *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 381 (Minn. 2011); *McLaughlin v. Schenck*, 220 P.3d 146, 155 (Utah 2009); *Barth*, 659 N.E.2d at 561 n.6 (Ind. 1995); *Crosby*, 548 N.E.2d at 221 (Ohio 1989); *Toner v. Balt. Envelope Co.*, 498 A.2d 642, 648 (Md. 1985); *Masinter*, 262 S.E.2d at 438 (W. Va. 1980); *see also D & J Tire, Inc. v. Hercules Tire & Rubber Co.*, 598 F.3d 200, 206 (5th Cir. 2010) (applying Connecticut law); *Fiederlein v. Boutselis*, 952 N.E.2d 847, 860 (Ind. Ct. App. 2011); *Walta v. Gallegos Law Firm, P.C.*, 40 P.3d 449, 456–57 (N.M. Ct. App. 2001); *Lazenby v. Godwin*, 253 S.E.2d 489, 492 (N.C. Ct. App. 1979).

jurisprudence, Texas courts of appeals have determined on a case-by-case basis whether majority shareholders owe an informal fiduciary duty to minority shareholders of closely held corporations.[53] A key factor weighing in favor of a fiduciary duty is the extent to which the majority shareholders dominate control over a closely held corporation. *Redmon v. Griffith*, 202 S.W.3d 225, 237 (Tex. App.—Tyler 2006, pet. denied).

Finally, the business judgment rule should not apply to these fiduciary duty claims. When we recognized a claim for breach of fiduciary duty in *Patton*, the majority shareholder was harming the minority shareholders but not the corporation itself, and we compelled a dividend to be paid to the minority shareholders. 279 S.W.2d at 853, 857. Had the business judgment rule applied, we could not have compelled a dividend because there was no harm to the corporation.

F. Application

1. Oppression

Rupe prevailed at trial on her shareholder oppression and fiduciary duty claims, and the trial court compelled a $7.3 million buyout. The court of appeals held there was sufficient evidence of shareholder oppression (and therefore did not reach the fiduciary duty issues), but the $7.3 million buyout failed to account for the minority shares' lack of marketability and control. 339 S.W.3d at 302. The jury charge defined oppression as:

> burdensome, harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members, or a visible departure

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[53] *See, e.g.*, *Redmon*, 202 S.W.3d at 237; *Willis*, 118 S.W.3d at 31; *Pabich v. Kellar*, 71 S.W.3d 500, 504–05 (Tex. App.—Fort Worth 2002, pet. denied); *Hoggett v. Brown*, 971 S.W.2d 472, 487–88 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *Fisher v. Yates*, 953 S.W.2d 370, 378–79 (Tex. App.—Texarkana 1997, pet. denied); *Gaither v. Moody*, 528 S.W.2d 875, 877 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

> from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts her money to a company is entitled to rely.

As previously addressed, this definition is more appropriate here than the reasonable expectations definition because Rupe inherited her shares and thus had no expectations when making a decision to invest.

The jury found that Dennard, Ritchie, Lutes, and RIC all engaged in oppressive conduct. The jury also affirmatively answered special submissions that: (1) Dennard paid personal expenses from RIC corporate funds; (2) Dennard, Ritchie, and Lutes offered Rupe a position on the board in exchange for her agreement not to sue a shareholder of RIC; (3) Dennard, Ritchie, and Lutes's buyout offers were oppressive; (4) Dennard, Ritchie, and Lutes's failure to permit Rupe to examine and copy corporate information was oppressive; (5) Dennard, Ritchie, and Lutes owed Rupe a fiduciary duty; (6) Dennard, Ritchie, and Lutes breached their fiduciary duty; and (7) the fair value of Rupe's shares was $7.3 million, not discounted for lack of marketability or control. The trial court entered judgment that compelled a buyout of Rupe's shares for $7.3 million.

Before assessing whether sufficient evidence supports the verdict, one must assess whether the submission was proper. In addition to submitting a broad-form question on oppression,[54] the trial court asked the jury to resolve disputed facts. This submission was proper. If equitable remedies still exist (and the statute specifies they should), the trial court must know what conduct constitutes oppression in order to fashion the least harsh remedy requested to rectify that oppression. For example, if a majority shareholder either refused to pay dividends or issued a bargain buyout offer

[54] Specifically, the jury was asked: "Do you find that the Defendants engaged in oppressive conduct to the rights of [Rupe] as a shareholder in Rupe Investment Corporation?"

and the jury simply answered "yes" to the broad-form question, the trial court sitting in equity would not know whether to compel a dividend or a buyout. Because the oppression statute expressly prefers equitable remedies, I believe the trial court's submission of special issues to the jury here was appropriate.

Having determined the trial court's submission was proper, I also believe there is legally sufficient evidence supporting the findings of oppression. Because Rupe inherited her shares, oppression is defined as burdensome, harsh, or wrongful conduct.[55] There is evidence of the following conduct the jury found to be oppressive: (1) making inferior offers of $1 million and $1.7 million; (2) warning Rupe that RIC would be the only purchaser of her stock; (3) refusing to meet with prospective purchasers of Rupe's shares; and (4) Dennard paying personal expenses from corporate funds.[56] Regarding the offers to purchase, Ritchie testified he thought Rupe was not entitled to a "fair offer." And the $1.7 million valuation reflected discounts beyond those applied to previous redemptions of minority shares. Regarding the refusal to meet with prospective purchasers, Dennard admitted: (1) she disagreed with Ritchie's refusal to meet with prospective purchasers; (2) she would want to meet with the president of a closely held corporation before investing; (3) the request for Ritchie to meet with prospective purchasers was reasonable; and (4) such a refusal would be "oppressive to a minority shareholder." Lutes also agreed that it would be reasonable for Rupe to expect that RIC would help her sell her stock "[t]o the extent possible,"

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[55] *See supra* notes 40–42 and accompanying text.

[56] Despite never having been an RIC employee, Dennard receives health insurance from RIC, receives $2,500 per month, and receives secretarial assistance at home on a weekly basis to balance her personal checkbook and pay her bills. No minority shareholder receives similar benefits.

and that "[i]t would have been possible" for Ritchie to have met with potential purchasers. Accordingly, there is some evidence to support the jury's findings of oppression.

2. Remedy

Having concluded there is legally sufficient evidence of oppression, the question becomes what remedy is appropriate. Rupe primarily requested a buyout and alternatively requested dissolution if the buyout was inadequate. Dissolution is undoubtedly harsher than a buyout. *See* Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U.L.Q. 1099, 1119 (1999) ("[The buyout] is less harsh than dissolution and often gives both parties what they want most."). But the statute does not allow for dissolution based on oppression. Former art. 7.05. Thus, there is no need to compare the harshness of a buyout to a remedy Rupe never requested.[57]

Because I agree with the court of appeals that it was error for the trial court to instruct the jury to not discount the value of Rupe's stock for its lack of marketability or minority status, I would affirm its judgment remanding for a redetermination of the amount of the buyout. 339 S.W.3d at 302. Under Rule of Appellate Procedure 44.1(b), a new trial may be ordered on a separable part of a proceeding, but a separate trial on unliquidated damages is improper if liability is contested. TEX. R. APP. P. 44.1(b). Here, the amount of the buyout is an equitable remedy rather than a measure of

[57] The Court observes that the court of appeals did not analyze whether a buyout is less harsh than a rehabilitative receiver. __ S.W.3d at __. But Rupe never requested a rehabilitative receiver. And the court of appeals actually assessed the alleged harshness of the buyout and determined the trial court did not abuse its discretion in light of RIC's $152 million net sales and $55 million in assets. 339 S.W.3d at 298–99. It would seem premature for the court of appeals to fully assess the comparative harshness of a buyout when it remanded for a recalculation of that amount.

unliquidated damages, and a retrial on the amount of the buyout alone is separable without unfairness to the parties.[58]

III. Conclusion

In sum, I cannot agree that a proper construction of the shareholder oppression statute is that the statute extinguishes the very remedies it expressly prefers. Uniformly, courts in Texas and beyond have held that less harsh remedies at law and equity are available, such as a court-ordered buyout. Under the time-honored definitions of oppression, there is some evidence that the majority shareholders here engaged in burdensome, harsh, and wrongful conduct by (1) making inferior buyout offers; (2) warning Rupe that RIC would be the only purchaser of her stock; (3) withholding corporate information; (4) refusing to meet with prospective purchasers of Rupe's shares; and (5) paying Dennard's personal expenses with corporate funds. RIC's chairman even admitted that refusing to meet with prospective purchasers was oppressive. But because the valuation of Rupe's shares failed to account for their lack of marketability or control, I would affirm the judgment of the court of appeals, which remanded to the trial court for a redetermination of the amount of the buyout. Because the Court renders judgment that Rupe take nothing on her valid shareholder oppression claim, I respectfully dissent.

[58] Rupe's alternative basis of relying on the fiduciary duty claim would not affect that remand for a retrial. Assuming a buyout is the appropriate remedy for the breach of fiduciary duty here, the buyout calculation still failed to account for the shares' lack of marketability or control.

Eva M. Guzman
Justice

Opinion Delivered: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0606

DEPUTY COREY ALEXANDER AND SERGEANT JIMMIE COOK, PETITIONERS,

v.

APRIL WALKER, RESPONDENT

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

PER CURIAM

In *Texas Adjutant General's Office v. Ngakoue* (*TAGO*), 408 S.W.3d 350 (Tex. 2013), we considered the election-of-remedies provision of the Texas Tort Claims Act (TTCA). *See* TEX. CIV. PRAC. & REM. CODE § 101.106. In that opinion, we clarified that one of the provision's purposes is to encourage 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." *TAGO*, 408 S.W.3d at 352. We realized that purpose by holding that a common-law tort suit against a government employee for conduct within the general scope of his employment is considered to have been brought against the government rather than the employee, and thus does not bar suit against the governmental employer. *Id.* at 357–58. We also indicated that in such a situation the employee is entitled to dismissal pursuant to subsection (f) of the election-of-remedies provision. *See id.*

In the case at bar, April Walker brought suit in state court alleging assault, conspiracy, slander, false arrest, false imprisonment, and malicious prosecution against two Harris County Sheriff's Department employees, Deputy Corey Alexander and Sergeant Jimmie Cook. These claims stemmed from the officers' conduct incident to Walker's arrest on two occasions. Several weeks after filing her state court action, Walker brought suit in federal court against Harris County and the Harris County Sheriff alleging the same tort claims she had levied against the officers in state court, based on vicarious liability principles, and also alleging violations of her civil rights pursuant to 42 U.S.C. §§ 1983 & 1988.

In the state court action, the officers moved for summary judgment under the TTCA's election-of-remedies provision. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(a), (e), (f). The trial court denied the officers' motion, and the officers filed an interlocutory appeal. *Id.* § 51.014(a)(5); *see Austin State Hosp. v. Graham*, 347 S.W.3d 298, 300–01 (Tex. 2011) (per curiam). The court of appeals affirmed, and the officers petitioned this Court for review.[1] Because the officers were entitled to dismissal under subsection (f) of the election-of-remedies provision, we reverse the judgment of the court of appeals and render judgment in favor of the officers. *See TAGO*, 408 S.W.3d at 360.

The TTCA provides a limited waiver of governmental immunity. *See* TEX. CIV. PRAC. & REM. CODE § 101.023. Application of the TTCA's election-of-remedies provision requires a

[1] This Court has interlocutory jurisdiction when the decision of one 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." TEX. GOV'T CODE § 22.001(a)(2); *CHCA Woman's Hosp., L.P. v. Lidji*, 403 S.W.3d 228, 230 (Tex. 2013). In this case, the court of appeals correctly notes that its decision conflicts with *Fontenot v. Stinson*, 369 S.W.3d 268 (Tex. App.—Houston [14th Dist.] 2011, pet. filed).

determination as to "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." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008). The Legislature mandates this determination in order to "reduc[e] the resources that the government and its employees must use in defending redundant litigation and alternative theories of recovery." *Id.* To that end, the statute compels "dismissal of government employees when suit should have been brought against the government." *TAGO*, 408 S.W.3d at 355. The statute provides in pertinent part:

> (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.
>
> . . .
>
> (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(a), (b), (f).

The court of appeals held that, because Walker elected to sue the officers first, she triggered the bar to suit against their governmental employer in subsection (b). 355 S.W.3d 709, 713–14. For the same reason, the court held that Walker's subsequent suit against the County did not bar her

previously filed suit against the officers under subsection (a). *Id.* We agree that subsection (a) does not bar the underlying suit, although for different reasons than those expressed by the court of appeals. Those different reasons compel a different result.

In *TAGO*, we recognized that when suit is brought against a government employee for conduct within the general scope of his employment, and suit could have been brought under the TTCA against the government, subsection 101.106(f) provides that "'the suit is considered to be against the employee in the employee's official capacity only.'" 408 S.W.3d at 356 (quoting TEX. CIV. PRAC. & REM. CODE § 101.106(f)). We explained that such a suit "is *not* a suit against the employee; it is, in all but name only, a suit against the governmental unit." *Id.* at 357. This is because a suit against an employee in his official capacity "'actually seeks to impose liability against the governmental unit rather than on the individual specifically named.'" *Id.* at 356 (quoting *Franka v. Velasquez*, 332 S.W.3d 367, 382 n.68 (Tex. 2011)). Accordingly, we held in *TAGO* that a suit against a government employee in his official capacity pursuant to subsection (f) is essentially a suit against the employer and therefore does not trigger the bar to suit against the government under subsection (b). *Id.* at 357–58. We also indicated in *TAGO* that subsection (f) provides the appropriate avenue for dismissal of an employee who is considered to have been sued in his official capacity. *Id.*; TEX. CIV. PRAC. & REM. CODE § 101.106(f) ("On the employee's motion, the suit against the employee shall be dismissed . . . .").

This is in contrast to subsection (a), which contemplates a bar to suit "against any individual employee." TEX. CIV. PRAC. & REM. CODE § 101.106(a). As we have said before, while a suit "against a government employee in his official capacity is a suit against his government employer,"

a suit against an employee "in his individual capacity" is a suit seeking personal liability. *Franka*, 332 S.W.3d at 382–83. The plain language of the election-of-remedies provision, then, demonstrates that a suit against the government triggers subsection (a) and bars suit against an employee who has been sued in his individual rather than official capacity. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(a). Accordingly, the applicability of subsection (a) to the underlying suit turns on whether the suit is considered to be against the officers in their individual or official capacities. This requires us to make a determination as to (1) whether the alleged conduct was within or without the scope of the officers' employment, and (2) whether Walker's suit could have been brought under the TTCA against the officers' governmental employer. *See id.* § 101.106(f).

The TTCA defines the term "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." *Id.* § 101.001(5). The Restatement (Third) of Agency provides additional clarity by defining the term negatively: "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006), *cited by Franka*, 332 S.W.3d at 381 n.63.

The allegations in Walker's petition that relate to the officers stem from their allegedly improper conduct in the course of arresting Walker on two separate occasions. Walker did not allege any independent course of conduct by the officers not intended to serve any purpose of Harris County. On the contrary, Walker's tort claims against the officers in this proceeding are identical to the tort claims she brought against Harris County in federal court, which were based on principles

of vicarious liability. Accordingly, we hold that Walker's suit is based on conduct within the general scope of the officers' employment.[2]

We next consider whether Walker's tort claims "could have been brought under [the TTCA]." TEX. CIV. PRAC. & REM. CODE § 101.106(f). In *Franka*, we held that, barring an independent statutory waiver of immunity, tort claims against the government are brought "under this chapter [the TTCA]" for subsection (f) purposes even when the TTCA does not waive immunity for those claims. 332 S.W.3d at 379–80 (quoting TEX. CIV. PRAC. & REM. CODE § 101.106(f)). Walker's common-law tort claims against the officers therefore could have been brought under the TTCA against the government. *See id.*

Because Walker's suit against the officers was based on conduct within the general scope of their employment and could have been brought under the TTCA against the County, Walker's suit is considered to be against the officers in their official capacities only. TEX. CIV. PRAC. & REM. CODE § 101.106(f). As we held in *TAGO*, such a suit "is *not* a suit against the employee; it is, in all but name only, a suit against the governmental unit." 408 S.W.3d at 357. For that reason, it would be inconsistent to hold that the suit was precluded under subsection (a), which bars claims against "individual employee[s]." TEX. CIV. PRAC. & REM. CODE § 101.106(a). Still, because the officers were sued in their official capacities, they were entitled to dismissal pursuant to subsection (f). *See TAGO*, 408 S.W.3d at 357–58. Accordingly, we grant the officers' petition for review, and, without

[2] In so doing, we express no opinion as to whether the officers were acting in good faith in the performance of their discretionary functions. That inquiry is relevant to the defense of official immunity, but is not at issue here. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

hearing oral argument, reverse the judgment of the court of appeals and render judgment in favor of the officers. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 6, 2014

IN THE SUPREME COURT OF TEXAS

NO 11-0709

KIA MOTORS CORPORATION AND KIA MOTORS AMERICA, INC., PETITIONERS,

v.

LAWRENCE RUIZ (INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ANDREA RUIZ), SHENEQUA RUIZ, CHRISTOPHER RUIZ, AND SUZANNA RUIZ, RESPONDENTS

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

Argued September 9, 2013

JUSTICE LEHRMANN delivered the opinion of the Court.

JUSTICE BOYD did not participate in the decision.

This products-liability case against a vehicle manufacturer, involving the failure of a driver's-side frontal air bag to deploy during a collision, presents several issues for review. We first consider the applicability of section 82.008 of the Texas Civil Practice and Remedies Code, which establishes a rebuttable presumption that a manufacturer is not liable on a design-defect theory for a claimant's injuries if the product complies with certain applicable federal safety standards. Second, we consider a legal-sufficiency challenge to the evidence supporting the jury's design-defect finding. Finally, we consider whether the trial court erred in admitting a spreadsheet

summarizing authorized warranty claims involving air bags in similarly designed vehicles from the same manufacturer. In affirming the trial court's judgment against the manufacturer, the court of appeals held that the nonliability presumption did not apply, that the evidence was legally sufficient to support the design-defect finding, and that the trial court's error in admitting the spreadsheet, if any, was waived or harmless. We agree with the court of appeals on the first two issues, but diverge on the evidentiary question. We hold that the trial court erred in admitting the spreadsheet, that the manufacturer preserved the error, and that the error was harmful. Accordingly, we remand for a new trial.

I. Background

Andrea and Lawrence Ruiz owned a 2002 Kia Spectra. On January 16, 2006, Andrea was driving the Spectra, and her daughter Suzanna was in the front passenger seat. Both were wearing seat belts. They were involved in a head-on collision with a pickup truck driven by Harvey Tomlin. Suzanna's air bag deployed, and she suffered minor injuries. Andrea's did not, and she died at the scene from two dislocated vertebrae in her neck caused by a severe front-to-back head movement.[1]

The Ruiz family[2] sued Kia Motors Corporation and Kia Motors America, Inc. (collectively, Kia), alleging in part that the defectively designed air-bag system in the 2002 Spectra resulted in the driver's-side air bag's failure to deploy during the collision. The Ruizes also brought a negligence claim against Tomlin, with whom they settled before trial. The Ruizes and Kia proceeded to a jury

[1] The air bag warning light came on about a week before the accident and remained on continuously until the accident. Andrea's daughter Shenequa testified that Andrea had planned to have the vehicle serviced the following week; however, the vehicle was not serviced before the accident.

[2] The plaintiffs include Lawrence Ruiz (individually and as representative of the estate of Andrea Ruiz), and Lawrence and Andrea's children, Shenequa Ruiz, Christopher Ruiz, and Suzanna Ruiz.

trial on the negligent-design claim,[3] which was premised on the theory that defective wiring connectors in the air-bag system created an open circuit that prevented the air bag from deploying. The jury found that (1) Kia negligently designed the vehicle's air-bag system, which was a proximate cause of Andrea's injury, (2) Tomlin's negligence was a proximate cause of Andrea's injury, (3) the negligence, if any, of Lawrence Ruiz was not a proximate cause of Andrea's injury,[4] and (4) Kia was grossly negligent. The jury apportioned forty-five percent of the responsibility for the injury to Kia and fifty-five percent of the responsibility to Tomlin. The jury awarded the Ruizes $1,972,000 in compensatory damages and $2,500,000 in exemplary damages.

Kia filed a motion for judgment notwithstanding the verdict, which the trial court denied. But the court disregarded the jury's gross-negligence and punitive-damages findings because the jury was not unanimous in finding Kia negligent. In its final judgment on the verdict, the trial court reduced the amount of actual damages recoverable from Kia by its percentage of responsibility and awarded the Ruizes $887,400 in damages, plus costs and pre- and post-judgment interest. The court of appeals affirmed, 348 S.W.3d 465, and we granted Kia's petition for review.

II. Statutory Presumption

Kia's first issue requires us to interpret section 82.008 of the Texas Civil Practice and Remedies Code. We review questions of statutory construction de novo. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). Our fundamental objective in interpreting a statute is "to determine

[3] In their petition, Plaintiffs asserted both strict-liability and negligence claims against Kia. The jury charge included only a negligence question.

[4] Lawrence had installed a new radio on the Spectra the week before the accident, and Kia posited at trial that the installation may have caused the open circuit. Kia has not challenged the jury's finding on this issue.

and give effect to the Legislature's intent." *Am. Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012). "The plain language of a statute is the surest guide to the Legislature's intent." *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012).

Section 82.008 was enacted in 2003 as part of House Bill 4, a comprehensive tort-reform bill. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 5.02, 2003 Tex. Gen. Laws 847, 861–62. The impetus for enacting section 82.008 was a finding that manufacturers and sellers were being held liable in products liability cases even though the products at issue complied with all applicable federal safety standards. *See* R. Brent Cooper and Diana L. Faust, *Products Liability After House Bill 4*, 46 S. TEX. L. REV. 1159, 1162 (2005). The provision states in pertinent part:

> (a) In a products liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product's formula, labeling, or design complied with mandatory safety standards or regulations adopted and promulgated by the federal government, or an agency of the federal government, that were applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm.

TEX. CIV. PRAC. & REM. CODE § 82.008(a). Put more simply in the context of this case, a manufacturer is entitled to a presumption of nonliability for its product's design if the manufacturer establishes that (1) the product complied with mandatory federal safety standards or regulations, (2) the standards or regulations were applicable to the product at the time of manufacture, and (3) the standards or regulations governed the product risk that allegedly caused the harm.[5] *Id.* The claimant

[5] Kia first raised the presumption as an affirmative defense in its pleadings. The Ruizes filed a motion for partial summary judgment as to this defense, arguing the presumption did not apply as a matter of law. The trial court granted that motion. Kia nevertheless requested a jury instruction on the presumption, which was denied. Finally, in its JNOV motion, which was also denied, Kia challenged the jury's negligence finding in part on grounds that the presumption applied and that no evidence was presented to rebut the presumption.

may rebut this presumption by establishing that "the mandatory federal safety standards or regulations applicable to the product were inadequate to protect the public from unreasonable risks of injury or damage." *Id.* § 82.008(b)(1).

The "mandatory safety standards" that allegedly gave rise to a nonliability presumption in this case are the Federal Motor Vehicle Safety Standards (FMVSS). *See generally* 49 C.F.R. §§ 571.101–.500. These standards were prescribed under the National Traffic and Motor Vehicle Safety Act of 1966, as amended. Pub. L. 89-563, § 1, 80 Stat. 718 (1966) (current version at 49 U.S.C. §§ 30101–30170).[6] With certain exceptions not at issue here, the Safety Act generally precludes the sale of a motor vehicle that does not comply with applicable safety standards like the FMVSS. 49 U.S.C. § 30112(a)(1).

The particular standard at issue is FMVSS 208, which specifies certain "performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208, S1 (2001). The regulation's stated purpose is "to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems." *Id.* § 571.208, S2. As is relevant to this case, FMVSS 208 requires vehicles manufactured on or after September 1, 1997, to have front driver's-side and passenger's-side air bags. *See id.* § 571.208, S4.1.5.1(a)(1), S4.1.5.3. Compliance with

[6] As the court of appeals noted, Congress delegated authority to prescribe such standards under the Act to the Secretary of Transportation, who in turn has delegated such authority to the National Highway Traffic Safety Administrator. 348 S.W.3d at 472 n.1 (citing 49 C.F.R. § 1.50(a) (2008)).

FMVSS 208 is determined by measuring, pursuant to various injury criteria, the protection provided by the air bags to dummy occupants of the vehicle during a crash test. *See id.* § 571.208, S5.1, S6.[7]

Kia contends that the trial court erred in refusing to apply the statutory presumption of nonliability because the design of the 2002 Spectra's air bag system complied with FMVSS 208, a "mandatory safety standard" that, according to Kia, was "applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm." TEX. CIV. PRAC. & REM. CODE § 82.008(a). Rejecting this argument, the court of appeals first noted that FMVSS 208 contains standards governing the required equipment's performance, not its design details. 348 S.W.3d at 472–73. Recognizing that the 2002 Spectra complied with FMVSS 208, the court of appeals nevertheless concluded:

> There is no allegation that the injury results from Kia failing the forces and acceleration tests or because it did not equip the Spectra with one of the regulatory options for passive restraint systems. Instead, the alleged injury results from the failure of the drivers-side frontal airbag to deploy because of defectively designed circuitry—an aspect of design that is outside the scope of FMVSS 208's minimum standards of performance.

Id. at 475. The court of appeals accordingly held that the "no-defect presumption under section 82.008" did not apply. *Id.*

Because there is no dispute that FMVSS 208 (specifically, the 2001 version thereof) was applicable to the Spectra and its air-bag system when manufactured, we need not further address this second prong of the analysis. Kia's entitlement to the nonliability presumption thus depends on whether FMVSS 208 (1) was a mandatory safety standard with which the product complied, and

[7] The injury criteria measure, *inter alia*, "forces and accelerations" involving the head, chest, and upper leg during the crash. 49 C.F.R. § 571.208, S6.2–6.5.

(2) governed the product risk that allegedly caused the harm. TEX. CIV. PRAC. & REM. CODE § 82.008(a). We address these issues in turn.

A. Compliance with Safety Standard

The Ruizes argue that the first prong of the presumption, which requires a showing that the product's design complied with a mandatory federal safety standard, has not been satisfied in two respects. First, the Ruizes contend that the particular air bag at issue—the one in the Ruizes' vehicle—did not comply with FMVSS 208 because it did not deploy in the crash as required. This assertion ignores the language of the relevant statute and regulation as well as the uncontroverted evidence at trial.

Section 82.008 requires that the product's *design* comply with the pertinent standards, not that the particular unit at issue comply. In turn, a motor vehicle's compliance with the standards must be reached before the vehicle—here, the 2002 Spectra—is offered for sale in the United States. 49 U.S.C. § 30112(a)(1). As discussed above, compliance is reached when a vehicle is crash-tested and the resultant forces and accelerations on the dummy occupants are within the stated injury criteria limits. 49 C.F.R. § 571.208, S5.1, S6. The testimony and exhibits at trial demonstrated that the 2002 Spectra was tested under the conditions specified in FMVSS 208, and that the regulatory injury criteria were met.[8] Accordingly, we agree with the court of appeals that the Spectra's design complied with FMVSS 208.

[8] FMVSS 208 requires a crash test from three different frontal angles: a direct frontal crash and a frontal crash from an angle up to thirty degrees in either direction. 49 C.F.R. § 571.208, S5.1.

Second, the Ruizes argue that compliance with FMVSS 208 is immaterial to the nonliability presumption because the regulation contains a performance standard rather than a design standard. *See Perry v. Mercedez Benz of N. Am., Inc.*, 957 F.2d 1257, 1260 (5th Cir. 1992) (noting that FMVSS 208 provides "minimum 'performance requirements' for automobile crash-protection systems, without requiring the use of any single particular system or design"). The Ruizes contend that "for a product's design to comply with a mandatory standard or regulation, there logically must be a standard or regulation that mandates a design." Kia, on the other hand, argues that the absence of a particular design requirement in FMVSS 208 is immaterial to its applicability under section 82.008.[9]

The plain language of section 82.008 supports Kia's interpretation. The statute requires a product's design to comply with mandatory federal *safety* standards or regulations. TEX. CIV. PRAC. & REM. CODE § 82.008(a). The Federal Motor Vehicle Safety Standards, by their terms, are safety standards. In turn, if a particular FMVSS does not specify a design, whatever design the manufacturer does choose must nevertheless comply with that standard. Interpreting section 82.008 to apply only to federal design standards impermissibly adds language and alters the statute's plain meaning. Moreover, such an interpretation would deter manufacturers from creating new and better designs to improve safety. Accordingly, we agree with Kia that, in applying the nonliability presumption to a product design that complies with mandatory safety standards, section 82.008

[9] Amici Texas Civil Justice League, The Association of Global Automakers, The Alliance of Automobile Manufacturers, and Texas Association of Defense Counsel similarly argue that the statute does not require compliance with a federal "design standard."

simply means that a manufacturer's chosen design must comply with the standard, not that the safety standard must mandate a particular design.[10]

FMVSS 208's classification as a performance standard is immaterial; all agree that it is a safety standard. And as the court of appeals held, the undisputed evidence at trial demonstrated that the 2002 Spectra complied with that standard. *See* 348 S.W.3d at 474; *see also* 49 U.S.C. § 30112(a)(1) (generally precluding a vehicle from being sold in the United States absent compliance with applicable safety standards). Accordingly, Kia has satisfied the first prong of section 82.008(a).

B. The Standard Did Not Govern the Product Risk that Allegedly Caused the Harm

Under the third prong of the section 82.008(a) analysis, the 2002 Spectra design's compliance with FMVSS 208 raises a presumption of Kia's nonliability only if that standard "governed the product risk that allegedly caused the harm." TEX. CIV. PRAC. & REM. CODE § 82.008(a). Kia argues that, because this case involves an occupant's death caused by an alleged lack of crashworthiness, the "product risk" at issue here is that of occupant injury during a crash. Kia also argues that FMVSS 208 clearly governs that risk. The Ruizes contend that the "product risk" is properly formulated as the risk that an air bag will fail to deploy because of defective circuitry, arguing that Kia's broad characterization of the risk would result in the presumption's applying in every crashworthiness case.

[10] If, as the Ruizes assert, the presumption only arises in design-defect cases when there is a government-mandated design, then compliance with FMVSS 208 would never trigger the presumption in a design-defect case. Yet the Ruizes concede in their post-submission brief that the presumption could apply in some air bag cases involving an alleged design defect, such as a claim for inflation-induced injuries from a deploying air bag or injuries caused by a deploying air bag's failure to adequately protect the occupant from injury.

We find instructive two Fifth Circuit cases that have addressed section 82.008 in the context of compliance with the FMVSS. In *Wright v. Ford Motor Co.*, the parents of a child who was killed when an SUV owner accidentally backed over him sued Ford, the manufacturer of the SUV, on a design-defect claim. 508 F.3d 263, 267 (5th Cir. 2007). The complaint alleged that the SUV, an Expedition, had a "large and unreasonably dangerous blind spot immediately behind the vehicle" and that Ford should have included a reverse-sensing system as standard equipment on all Expedition models. *Id.* at 267–68. Ford asserted it was entitled to a nonliability presumption in light of the Expedition's compliance with FMVSS 111, which addresses rearview mirror performance and placement in order to reduce deaths and injuries caused by a limited rear view. *Id.* at 269; 49 C.F.R. § 571.111. The district court instructed the jury on the presumption, and the jury found in favor of Ford on the Wrights' claim. 508 F.3d at 269.

The Fifth Circuit affirmed, first rejecting the Wrights' argument that the presumption's applicability under section 82.008 requires that the safety standard at issue govern "the particular *defect* claimed" rather than "the risk arising from that defect." *Id.* at 270. The court then concluded that "[t]he risk that caused the harm and forms the basis of the Wrights' suit is the rear blindspot of the Expedition." *Id.* Holding that the risk was governed by FMVSS 111, the court found persuasive that the National Highway Traffic Safety Administration had considered, but decided against, amending the regulation to require additional rear-visibility systems, including reverse-sensing systems, on certain trucks. *Id.* at 270–72. That the Administration had decided not to impose additional requirements beyond those already in the regulation, to address the exact risk alleged in

the case, was a "further indication that [FMVSS 111] governs the product risk that allegedly caused the harm." *Id.* at 272.

The Fifth Circuit again addressed the applicability of the nonliability presumption in *Trenado v. Cooper Tire & Rubber Co.*, a case involving alleged manufacturing and design defects in a tire that failed and caused an accident. 465 F. App'x 375, 377 (5th Cir. 2012). The applicable regulation was FMVSS 109, which "'specifies tire dimensions and laboratory test requirements for bead unseating resistance, strength, endurance, and high speed performance.'" *Id.* at 379 (quoting 49 C.F.R. § 571.109). FMVSS 109 requires a tire to "exhibit no visual evidence of [various types of damage] after being subjected to a variety of stressful conditions." *Id.* (internal quotation marks omitted). The tire manufacturer argued that the required regulatory tests pertained to the same characteristics—tire strength and durability—that the plaintiffs contended were lacking in the tire that failed. *Id.* at 380. The Fifth Circuit agreed with the manufacturer that "the relevant product risk" was tire failure. *Id.* In holding that the regulation governed that risk, the court explained that FMVSS 109 "require[s] a number of tests aimed at assuring that a tire is sufficiently durable to avoid failure under numerous stressful conditions" and that "the broad range of tests required by FMVSS 109 . . . suggest[s] that the regulation governs tire failure in general, as opposed to a particular mode of failure or type of defect." *Id.*

We agree with the Fifth Circuit that the plain language of section 82.008 requires that a safety regulation govern product *risk*, not a particular product *defect*. *Wright*, 508 F.3d at 270; TEX. CIV. PRAC. & REM. CODE § 82.008(a). But the alleged defect is certainly not immaterial to the analysis. Rather, courts must distinguish between the alleged defect and the risk arising from that

defect. *Wright*, 508 F.3d at 270; *see also* TEX. CIV. PRAC. & REM. CODE § 82.008(a) (standard must govern "the product risk that allegedly caused harm"). Thus, we must closely examine both the product risk arising from an alleged design defect and the parameters of the regulation at issue in evaluating whether the manufacturer's compliance with that regulation entitles it to a presumption of nonliability to an injured claimant.

In this case, the Ruizes alleged that the air bag's defectively designed wiring harness rendered it prone to open circuits and the air bag's corresponding failure to deploy when it should have. The regulation relied upon by Kia, FMVSS 208, requires vehicles to be equipped with frontal air bags and seat belts, and specifies the maximum amount of force and acceleration that dummy occupants may encounter during a frontal-crash test. *See* 49 C.F.R. § 571.208, S5.1, S6. The test thus measures how well the vehicle's air bags and other restraint systems protect occupants. But the test *presumes* air bag deployment. It does *not* measure or apply to air-bag failure rates, and it is that risk—the risk of occupant injury due to the failure of the air bag to reliably activate and deploy—that arises from the alleged defect and is at issue in this case.

By contrast, FMVSS 210, which applies to seat-belt assembly anchorages, contains various requirements relating to the type, location, and strength of these devices that are intended to ensure "effective occupant restraint *and to reduce the likelihood of their failure*." *Id.* § 571.210, S1 (emphasis added). Similarly, the regulation at issue in *Trenado* required tires to undergo various tests designed to measure durability in order "to avoid failure." 465 F. App'x at 380. Nothing in FMVSS 208 suggests a purpose of reducing the likelihood of an air bag's failure to deploy under circumstances in which everyone agrees it should have deployed.

Kia concedes that FMVSS 208 does not test for reliable deployment, but argues in its post-submission brief that this "is not important for triggering the presumption" because "whatever standard the federal agency sets then becomes the default standard for triggering the presumption." Kia asserts that, to the extent the lack of such testing arguably renders FMVSS 208 "inadequate to protect the public from unreasonable risks of injury or damage," the statute gives the plaintiff the opportunity to rebut the nonliability presumption. TEX. CIV. PRAC. & REM. CODE § 82.008(b)(1). We disagree. A significant difference exists between an inadequate standard and a standard that simply does not contemplate the risk at issue. The Ruizes have not, for example, alleged that the Spectra is defective because it lacks additional occupant-restraint equipment, such as a third frontal air bag, that FMVSS 208 does not require. Had that been the case, the presumption would have applied. *See Wright*, 508 F.3d at 270–72. But while FMVSS 208 clearly contemplates *what* occupant-restraint systems are required, it does *not* contemplate the likelihood of their failure to deploy and thus does not address that risk.

For these reasons, we hold that FMVSS 208 does not "govern[] the product risk that allegedly caused the harm" in this case. TEX. CIV. PRAC. & REM. CODE § 82.008(a). The trial court and the court of appeals did not err in concluding that the presumption did not apply. Accordingly, we need not reach the issue of whether the Ruizes rebutted that presumption pursuant to section 82.008(b).[11]

[11] Several amici submitted briefs discussing the application of section 82.008(b), but we need not discuss them in light of our disposition.

III. Evidence of Negligent Design

Kia next argues that, even in the absence of the statutory presumption, the evidence supporting the jury's negligence finding is legally insufficient. A legal-sufficiency challenge will be sustained if the record reveals that evidence offered to prove a vital fact is no more than a scintilla. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). Evidence does not exceed a scintilla if it is "'so weak as to do no more than create a mere surmise or suspicion'" that the fact exists. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). Our ultimate objective in conducting a no-evidence review is to determine "whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict." *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009). Thus, in reviewing the record, we "credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

The trial court instructed the jury in pertinent part as follows:

> Was the negligence, if any, of Kia Motors in designing the 2002 Kia Spectra air bag system a proximate cause of the injury to Andrea Ruiz?
>
> . . . .
>
> For Kia Motors to have been negligent, there must have been a design defect in the 2002 Kia Spectra air bag system at the time it left the possession of Kia Motors.
>
> A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.

> "Safer alternative design" means a product design other than the one actually used that in reasonable probability –
>
> (1) would have prevented or significantly reduced the risk of the injury in question without substantially impairing the product's utility[;] and
>
> (2) was economically and technologically feasible at the time the product left the control of Kia Motors by the application of existing or reasonably achievable scientific knowledge.

Kia argues there is no evidence of a design defect. Kia did not object to this portion of the jury charge, and we therefore analyze the evidence in light of the charge as given. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 n.4 (Tex. 2001).

The parties agree that Andrea's air bag should have deployed in the accident. They also agree that it did not deploy because of an "open circuit" in the air bag's wiring harness, meaning a lack of metal-to-metal contact interrupted the flow of electricity through the harness. The Ruizes' theory at trial was that the open circuit was caused by one of two defectively designed connectors within the wiring harness. *See Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 137 (Tex. 2004) (requiring identification, by competent evidence, of a specific defect that caused the incident). Kia contends that the Ruizes' expert failed to identify the specific defect that caused the open circuit and failed to rule out possible sources of the open circuit other than the two connectors.

As did the court of appeals, in conducting our evidentiary review we find useful the testimony of the parties' experts regarding the overall design of the air bag system. The circuitry begins with an Airbag Diagnostic Unit (ADU), which is mounted to the floor of the vehicle and contains a small computer that signals for the air bags to deploy and the seat belts to tighten when a crash occurs. The ADU is connected to a wiring harness that snakes through the dashboard to four

devices—the two frontal air bags and the frontal seat-belt pretensioners. Because the driver's-side air bag is in the steering column, the wiring from the ADU is routed via a small plastic connector through a device called a clock spring, which allows the wiring to spool and unspool without twisting or breaking as the steering wheel is turned. The wiring exits the clock spring and connects to the air-bag module by another small plastic connector.

The data downloaded from the ADU on the Ruizes' vehicle reflected an error code "56," which corresponds to an open electrical circuit in the driver's-side air bag. The data showed that the open circuit had existed for approximately forty-four hours on the car's lifetimer, which measures how long the ignition is in the "on" position, and that the circuit closed during the crash. Joint expert testing of the air-bag circuitry in the vehicle revealed that the ADU signaled all four devices to activate and therefore functioned properly during the crash. Three of those devices—the seat-belt pretensioners and the passenger's-side air bag—deployed properly. The clock spring, the air-bag module, and the wiring from the ADU to the driver's-side air bag all tested normally and were also ruled out as the cause of the open circuit. After reconnecting the harness to the air-bag module, the experts observed an open circuit occur briefly when Kia's expert picked up the module enough to move the clock spring. Having eliminated the ADU, the clock spring, the module, and the wiring as the cause, the Ruizes' air-bag expert, Geoffrey Mahon, concluded that the source of the open circuit was the connector to the air-bag module or the connector to the clock spring.

Mahon then identified several deficiencies in the designs of the two connectors by comparing them to alternative designs by Packard Electric and Volkswagen in model-year 2002 vehicles. As the court of appeals noted, while the Packard module connector has locking devices that push plastic

tabs outward on all sides to prevent movement, and the Volkswagen module connector is glued into place, the Kia connector locks into place with tabs on only one side. 348 S.W.3d at 478–79. Mahon explained that this allows for "a little bit of motion that you can generate on [the other] side," which can cause the connector to "vibrate out" and cause a loss of electrical connectivity. Mahon also criticized the Kia clock-spring connector for attaching directly to the clock spring, subjecting it to additional vibration, while commending the Packard connector's placement in a more "secure area" with less movement. In addition, both the Packard and Volkswagen clock-spring connectors contain an additional locking device, while Kia's does not. Finally, the Packard clock-spring connector has a larger metal surface area than the Kia connector, which provides a better chance of "having a good metal-to-metal contact."

Mahon testified that the alternative designs were safer as well as technologically and economically feasible at the time the 2002 Spectra was designed, as they were in production in other vehicles. The utilization of either of these designs, Mahon concluded, would have significantly reduced the risk of the open circuit that occurred in the Ruizes' accident. Mahon also testified that, based on the fact that the air-bag system in general and the connectors in particular had not been tampered with or adjusted before the accident, he was "fairly certain" that the design problems existed when the vehicle left Kia's control. Mahon ultimately concluded that the wiring harness's connector system in the 2002 Spectra was defectively designed, rendering it unreasonably dangerous and proximately causing the open circuit that led to the failure of Andrea's air bag to deploy during the accident.

Kia argues that Mahon never explained what particular defect existed in either the module connector or the clock-spring connector to cause the open circuit. Instead, Kia contends, Mahon described the open circuit as a "gremlin" of unknown origin that was possibly located in one of those connectors.[12] Kia thus concludes that the only evidence of a defect is the product failure—specifically, the air bag's failure to deploy because of an open circuit—which by itself is insufficient to prove a defect. *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006) ("Texas law does not generally recognize a product failure standing alone as proof of a product defect."). Comparing Mahon's testimony to expert testimony in other cases, we disagree with Kia's characterization of the evidence.

For example, in *Cooper Tire*, a manufacturing-defect case involving tread separation on a tire, we discounted as legally insufficient expert testimony offered to prove that the separation occurred because of wax contamination at the manufacturing plant. *Id.* We identified several deficiencies with the primary expert's testimony, including the novel nature of the theory that wax contamination is a cause of tread separation and the lack of general acceptance in the scientific community of that theory, *id.* at 803; the absence of evidence that the tire in question was even contaminated with wax, *id.*; the expert's reliance on a report that undermined his theory, *id.* at 804; and the lack of proof that wax would "cause lack of adhesion between the components of the tire after it is 'cooked' in the vulcanization process," *id.* at 805. Accordingly, we held that the expert's

[12] Amicus Product Liability Advisory Counsel similarly argues there was no proof of a specific defect that caused the open circuit.

testimony amounted to no more than "a naked hypothesis untested and unconfirmed by the methods of science." *Id.*

In *Ridgway*, the plaintiff alleged that a manufacturing defect in a truck's electrical system caused the truck to catch fire while he was driving. 135 S.W.3d at 599–600. We agreed with the trial court's summary judgment on the claim, noting that the plaintiff's expert "could say no more than that he 'suspects' the electrical system caused the fire," and that the expert expressly declined to rule out part of the fuel system as a possible cause and suggested further investigation. *Id.* at 600–01.

Mahon's testimony did not suffer from these types of shortfalls. Mahon used the term "gremlin" in describing the open circuit as an "intermittent fault" that was difficult to find because it corrected itself before it could be observed. But he did not, as Kia contends, take an unsupported leap from "gremlin" directly to "product defect." Rather, Mahon explained that this type of fault, which was triggered during joint expert testing of the harness, "ha[s] to occur where two pieces of metal come together." Mahon and Kia's expert jointly eliminated the ADU, the air bag, the clock spring, and the wiring as the cause, leaving only the connectors as the possible source. Further, as discussed above, Mahon identified several specific deficiencies in the module and clock-spring connectors that increased the risk of their failure to make reliable electrical contact. Mahon ultimately concluded that these deficiencies proximately caused the open circuit that prevented the air bag in the Ruizes' vehicle from deploying. We hold that Mahon's testimony "does not present a case where 'there is simply too great an analytical gap between the date and the opinion proferred,' or where the expert's testimony amounted to nothing more than a recitation of his credentials and

a subjective opinion." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 40 (Tex. 2007) (quoting *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998), and citing *Cooper Tire*, 204 S.W.3d at 801).

Kia also argues that Mahon's testimony was legally insufficient because he failed to rule out a third connector—the ADU connector—or a manufacturing defect in the module or clock-spring connector as potential causes of the open circuit. We disagree.

As to the ADU connector, Kia argues that Mahon never tested that connector, that it may not be ruled out merely because it was not attached when the experts generated the intermittent open circuit during testing, and that, because the ADU connector is a multi-port connector, it may not be ruled out by the fact that the ADU successfully commanded three of the four restraint devices to deploy during the accident. Mahon testified, however, that he and Kia's consulting expert tested the driver's-side circuit wires while they were attached to the connector and found nothing wrong. This testimony, in conjunction with the experts' triggering the intermittent open circuit during testing that did not involve the ADU connector, constitutes some evidence that the ADU connector was not the source of the open circuit that caused Andrea's air bag not to deploy.

Kia also relies on *Cooper Tire* in arguing that the Ruizes were required to rule out the possibility that a manufacturing defect caused the open circuit. In *Cooper Tire*, we held that none of the plaintiffs' experts' testimony was sufficiently reliable to constitute evidence supporting the plaintiffs' claim that a manufacturing defect involving wax contamination caused a tire to fail. 204 S.W.3d at 807. We then concluded that "the mere fact that the tire failed . . . is insufficient to establish a manufacturing defect of some sort. Such a failure could have been caused by design

defect." *Id.* Kia contends that, conversely, the Ruizes may not recover for a design defect without ruling out a manufacturing defect. Unlike *Cooper Tire*, however, the Ruizes did not rely on "the mere fact that the [air bag] failed" to establish a design defect. *Id.* Further, we have never held that a manufacturing defect must be ruled out in all design-defect cases, or vice versa. Rather, we have held that an expert should exclude "other plausible causes" presented by the evidence. *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 218 (Tex. 2010) (citations and internal quotation marks omitted). Ironically, Kia appears to argue that the mere fact that the air bag failed to deploy is evidence of a manufacturing defect that must be ruled out. But Kia points to no other evidence suggesting such a defect. In light of the affirmative evidence the Ruizes presented that a design defect caused the open circuit, we decline to reverse the jury's findings based on a failure to rule out a manufacturing defect.

IV. Admission of Other Incidents

During discovery, the Ruizes made a broad request for information regarding warranty claims involving a short or open circuit in a frontal air bag in 2002 Spectras and similar Kia vehicles. In response, Kia produced a spreadsheet summarizing that information. The spreadsheet listed 432 paid warranty claims, but only sixty-seven of those claims involved the code 56 that was at issue in this case. The information for each claim was prepared by the dealership that submitted it for payment. It included various cause codes and, for most claims, contained notes summarizing the customer complaint, the problem that was diagnosed, and the repair that was made. The trial court admitted the spreadsheet as an exhibit at trial over Kia's objection on hearsay and relevance grounds, and the court of appeals held that admission of the evidence was not an abuse of discretion.

See U-Haul Int'l, Inc. v. Waldrip, 380 S.W.3d 118, 132 (Tex. 2012) (trial court's evidentiary rulings are reviewed for an abuse of discretion).

The court of appeals first held that the portion of the spreadsheet reflecting the sixty-seven code-56 claims qualified as an admission by party-opponent under Rule 801 of the Texas Rules of Evidence and therefore was not hearsay. 348 S.W.3d at 484. The court went on to hold that Kia had waived any error stemming from admission of the remainder of the document by failing to request a limiting instruction. *Id.* Finally, the court held that any error by the trial court in admitting the spreadsheet was harmless. *Id.* at 484–85.

A. Waiver

As an initial matter, we disagree with the court of appeals' holding that, because the portion of the spreadsheet summarizing the code-56 claims was not hearsay, Kia waived its objection to the admission of the remainder of the spreadsheet by failing to request a limiting instruction. The court appeared to hold that, if one portion of a document is admissible, and another portion is inadmissible, a party must request a limiting instruction to preserve error in the admission of the improper portion. *See* 348 S.W.3d at 484. This holding mischaracterizes the nature of a limiting instruction, which must be requested to preserve error "[w]hen evidence . . . is admissible as to one party or for one purpose but not admissible as to another party or for another purpose." TEX. R. EVID. 105(a).[13] A limiting instruction does not provide a mechanism for the admission of a document that contains both admissible evidence and inadmissible, unredacted evidence. In other

[13] To the extent the Ruizes argue that Kia was required to offer a redacted version of the spreadsheet to preserve error, they fail to cite any authority for this contention. Further, Kia objected to the spreadsheet in its entirety, but also twice argued to the trial court that, at a minimum, the spreadsheet should be redacted.

words, such an instruction does not allow for admission of evidence that is otherwise inadmissible for any purpose.

Further, assuming the code-56 warranty claims are not hearsay,[14] they must still be relevant to be admissible. TEX. R. EVID. 402 ("Evidence which is not relevant is inadmissible."); *see also TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 241 (Tex. 2010) (noting that whether evidence is hearsay "has nothing to do with the relevancy requirement in Rules 401 and 402"). Kia objected to the entire spreadsheet on relevance grounds, arguing that the warranty claims were not sufficiently similar to the underlying incident to merit admission. *Armstrong*, 145 S.W.3d at 138 (describing the degree of similarity required for evidence of other incidents to be admissible). The court of appeals did not discuss the relevance of any portion of the spreadsheet, holding only that any error in admitting it was waived or harmless.

The Ruizes also argue that Kia waived its objection to the portion of the spreadsheet describing the code-56 claims by failing to object when the Ruizes' counsel questioned Kia's corporate representative, Michelle Cameron, at trial about the information contained in that portion of the document. Before trial Kia filed, and the trial court granted, a motion in limine requesting that the Ruizes' counsel be prohibited from introducing evidence of other incidents or claims absent a demonstration, outside the jury's presence, that such incidents were "substantially similar" to the one at issue. At trial, before Cameron took the stand and outside the jury's presence, Kia renewed its objection to the admissibility of the entire spreadsheet on hearsay and relevance grounds, and the

[14] Kia has not challenged the court of appeals' holding that the claims are not hearsay, and we do not address it here.

trial court overruled Kia's objection. While questioning Cameron, the Ruizes' counsel formally offered the spreadsheet, Kia's counsel again objected, and the trial court overruled the objection and admitted the spreadsheet. Only then was Cameron questioned about the contents of the document.

Under Rule 103 of the Texas Rules of Evidence, a party preserves error in the admission of evidence if "a timely objection or motion to strike appears of record, stating the specific ground of objection." TEX. R. EVID. 103(a)(1). The rule clarifies that "[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." *Id.* Under Rule 103(a), Kia was not required to object to the Ruizes' counsel's questioning Cameron about the spreadsheet to preserve error.

The Ruizes argue that Kia nevertheless failed to preserve error, at least as to the admission of the code-56 warranty claims, because Kia "voluntarily allowed the jury to hear the same substantive information" through Cameron's testimony, independently of the spreadsheet.[15] Specifically, the Ruizes contend that Kia failed to object to counsel's questioning Cameron "about 'the big picture'—her search of Kia's database of warranty claims—before eliciting any testimony about [the database]." This line of questioning, the Ruizes argue, led to Cameron's testifying without objection that she found sixty-seven code-56 open circuits occurring on or before the date of the accident at issue in the case. We disagree with this characterization of the record.

[15] The court of appeals agreed with the Ruizes' characterization of Cameron's testimony as cumulative of the spreadsheet, although the court did so in the context of holding that admission of the spreadsheet was harmless. 348 S.W.3d at 484–85.

After the trial court formally admitted the spreadsheet in its entirety over Kia's objection, the Ruizes' counsel proceeded to question Cameron extensively about the creation and contents of the document. In the middle of that line of questioning, Cameron was asked, "in terms of the big picture," how many open circuits in the driver's-side air bag she found when compiling the claims. Cameron responded that she found sixty-seven claims involving a code-56 notation, and she was then asked to elaborate on the additional notes that were included on the spreadsheet with respect to those claims. This testimony about the code-56 claims was not independent of the spreadsheet, but was based directly on the information contained in it. Kia objected multiple times to the admission of evidence of the warranty claims, including those involving a code 56, and the trial court overruled those objections. On this record, we hold that Kia did not waive its relevance complaint about the trial court's admission of the spreadsheet. Accordingly, we turn to the substance of that complaint.

B. Relevance of Other Incidents

In *Armstrong*, we held that evidence of other incidents involving a product may be relevant in a products-liability case if the incidents "occurred under reasonably similar (though not necessarily identical) conditions." 145 S.W.3d at 138. We further noted that the relevance of other incidents "depends upon the purpose for offering them." *Id.* Kia argues that none of the warranty claims were sufficiently similar to the underlying case to be admissible. The Ruizes effectively concede that the claims not involving a code 56 were not relevant, arguing only that any error in admitting those claims was harmless. This concession is significant; it is undisputed that almost

eighty-five percent of the claims on the admitted spreadsheet are irrelevant to the underlying proceedings.

As to the code-56 claims, we agree with Kia to an extent and hold that some, but not all, of the code-56 claims described in the spreadsheet are sufficiently similar to be relevant to the Ruizes' claims. Given that the alleged defect here involves the design of the connectors at the clock spring and air-bag module, a particular code-56 warranty claim must at least implicate one of those connectors as the source of the open circuit. In *Armstrong*, for example, the plaintiff sued Nissan under various products liability theories, alleging that her vehicle accelerated on its own because of a defective throttle cable. 145 S.W.3d at 135–36. In analyzing the admissibility of other incidents of unintended acceleration, we held that such reports were irrelevant to the extent that they made no mention of the throttle cable and instead indicated "an unknown or some other cause." *Id.* at 142. By comparison, in this case, to the extent the descriptions of the code-56 claims reflect a problem with one of the two pertinent connectors, they are sufficiently similar to be probative of the design defect alleged by the Ruizes.[16] However, with respect to the code-56 claims that reflect an unknown cause, do not address the cause, or reflect a cause unrelated to one of the two pertinent connectors, those incidents are not admissible to prove Kia's negligence in this case.[17]

[16] For example, the notes for one of the code 56 claims describe an "intermittent connection problem at steering column connector" that was corrected by "tighten[ing] and clean[ing] terminal." The notes for another code 56 claim state: "R&R [presumably meaning repaired and replaced] connector to drivers side air bag module, and chkd [sic] connec[ti]ons. Pin fit connectors and applied stabilant onto connector when reassembled."

[17] For example, the notes for one of the code 56 claims states only: "checked all pin connectors to module, replaced air bag module." The notes on another claim state that the wiring and air bag were replaced, but say nothing about the connectors.

The nature of the Ruizes' products liability suit against Kia affects our relevance analysis. To be successful on a defective-product claim, a plaintiff must identify "a specific defect . . . by competent evidence." *Id.* at 137. In *Armstrong*, the database of other incidents involving unintended acceleration was inadmissible because there was "nothing in the database to suggest that the defect, if any, causing those . . . incidents was similar to any of the defects alleged" in the case. *Id.* at 141. Here, the Ruizes identified certain aspects of the design of the module and clock-spring connectors as the "specific defect" in the Spectra's air-bag system that caused the open circuit. For the code-56 warranty claims reflected on the spreadsheet to be relevant and admissible, then, some indication must exist that the module and clock-spring connectors contributed to the open circuits in those other incidents.[18]

The Ruizes, however, insist that they "were not relying on [those] claims to show a defect (although the claims certainly corroborated the other evidence of a defect)," but instead offered them for the limited purposes of (1) showing Kia's notice of open circuits and conscious indifference to the problem, and (2) rebutting Kia's contention that Lawrence Ruiz's replacement of the radio caused the open circuit. In turn, the Ruizes contend that Kia's failure to request a limiting instruction rendered the claims admissible for all purposes. *See* TEX. R. EVID. 105(a).

We fail to see how warranty claims involving open circuits not tied to the alleged defect are relevant to "notice" in a meaningful way. As discussed above, such claims are not reasonably similar to the incident in question and thus are not relevant to show Kia's negligence. In turn, notice

[18] We note that there is no indication that any of the warranty claims involved incidents in which an air bag actually failed to deploy under circumstances in which it should have deployed.

of incidents that are not reasonably similar to the one at issue has no bearing on Kia's gross negligence in this particular case. *See Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 921 (Tex. 1993) (prior incident "involv[ing] facts nearly identical to this one" was relevant to claim of gross negligence related to manufacturer's failure to warn); *see also E-Z Mart Stores, Inc. v. Terry*, 794 S.W.2d 63, 65 (Tex. App.—Texarkana 1990, writ denied) (in store employee's suit claiming that employer's negligence caused his back injury suffered while lifting a heavy box at work, evidence of other lawsuits involving back injuries suffered at employer's store was not admissible to show store's prior notice of such injuries where employee failed to show that other incidents occurred under reasonably similar circumstances). The reasonable-similarity requirement does not disappear simply because other incidents are being offered to show notice rather than negligence.

Further, the Ruizes' argument that the spreadsheet was admissible to rebut Kia's assertion that the radio replacement caused the open circuit is specious. Had Kia contended that open circuits caused by radio replacements were common, the claims may have been admissible to rebut that contention. *See Armstrong*, 145 S.W.3d at 142 (reports of other incidents suggesting that a deteriorated boot could and did jam the throttle cable were admissible to rebut Nissan's claim that the possibility of such an occurrence "was about as likely as 'being struck by lightning'"). But Kia never made this argument, and evidence that radio replacements did not cause other occurrences of open circuits simply has no bearing on whether a radio replacement caused *this* open circuit. Further, Cameron testified that, because the spreadsheet only listed paid warranty claims, it did not include claims that were excluded from warranty coverage because the repairs stemmed from

alterations or modifications to the vehicle. Thus, an open circuit caused by a radio replacement would not have been covered and would not have been included on the spreadsheet.

For these reasons, we hold that the trial court erred in admitting the spreadsheet. Both the claims not involving a code 56 and the code-56 claims that did not at least implicate the module connector or clock-spring connector were irrelevant to the issues in the case. Because those claims were not admissible for any purpose, Kia did not waive error by failing to request a limiting instruction under Rule 105.

C. Harmful Error

Although the trial court's admission of the spreadsheet was error, such error is reversible "only if the error probably (though not necessarily) resulted in an improper judgment." *Armstrong*, 145 S.W.3d at 144; TEX. R. APP. P. 61.1. In analyzing whether the trial court's error was harmful, "[w]e review the entire record, and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted." *Id.* The court of appeals concluded that admission of the spreadsheet was harmless because (1) it was cumulative of Cameron's testimony, (2) the Ruizes emphasized only the portion relating to the code 56 claims, (3) the spreadsheet is difficult to decipher, and (4) the warranty claims were not the only evidence presented of a defect. 348 S.W.3d at 485.

We disagree with the court of appeals that the spreadsheet was cumulative of Cameron's testimony. As discussed above, Cameron's testimony cannot be examined in a vacuum; her discussion of the warranty claims, whether involving a code 56 or not, was elicited in conjunction with the spreadsheet itself and may not be analyzed independently of that document. After all, she

was called to the witness stand for one purpose only—to discuss the warranty claims summarized in the spreadsheet—and absent that document there would have been no reason for her to testify. As to the jury's ability to understand the spreadsheet, Cameron was asked extensively about the document's organization, how it was compiled, and the nature of the information that was included. The only possible purpose of such an exercise was to allow the jury to consider the document intelligently. While the document is long and includes some technical terms and codes, it is not indecipherable, particularly when considered with Cameron's testimony.

We also disagree with the court of appeals' conclusion that the Ruizes' emphasis on the code- 56 claims during trial weighs against finding harm. Again, the Ruizes do not dispute that the vast majority—almost eighty-five percent—of the incidents reflected on the spreadsheet were irrelevant and inadmissible. And we find neither the witness testimony nor counsel's argument nearly as limited as the Ruizes suggest. In his opening statement, the Ruizes' counsel posited that the air-bag system in question "has a failure rate of open circuits a thousand times higher . . . than the U.S. industry standard."[19] In comparing Kia with the industry standard, Mahon at some points discussed the code-56 claims, but at others was asked about claims in which the term "loose connector" or "poor contact" was used, irrespective of whether those claims involved a code 56. Indeed, both Mahon and Cameron were asked to highlight the fact that, independent of the occurrence of a code 56, the most frequent cause-code description on the spreadsheet was "poor contact." The "poor contact" code was again emphasized in the questioning of Kia's expert, John

[19] The experts testified that the U.S. industry standard for air bag failure rates is 1 failure per 1 million over the fifteen-year life of the vehicle.

Hinger, who was also asked whether "we have over 400 confirmed problems with Kia's system . . . compared to the warranty . . . [v]ersus one reported complaint for the Volkswagen seat belt clasp." In closing arguments, counsel asked the jury to examine the spreadsheet and "look at how many times they list 'poor contact, poor contact, poor contact, poor contact, poor contact, loose connection, loose connection, loose connection, loose connection.'"

Further, there is no indication that the witnesses were ever asked to focus on the portion of code-56 claims that referenced a problem with a module connector or clock-spring connector. At one point, the Ruizes' counsel effectively conflated the code-56 claims with occurrences of "open connectors," asking Mahon: "Now, if you want to look at why there is [sic] 60 or so open connectors – assembled connectors nevertheless get opened, do you need to go to design drawings and the inspection of the components themselves to see why connectors aren't staying connected?" In a follow-up question, counsel asked whether Mahon had "seen a single detailed analysis of why Kia's assembled connectors are coming unconnected during normal use." The record thus demonstrates significant emphasis throughout trial on the overwhelming number of claims that were not relevant.

The court of appeals and the Ruizes downplay this emphasis by arguing that the spreadsheet was not the only evidence of a defect and thus was not the sole basis underlying the jury's verdict in the Ruizes' favor. As discussed above, legally sufficient evidence separate and apart from the spreadsheet supports the defect finding. But that does not end the discussion. In conducting the legal-sufficiency review, we credited evidence favorable to the verdict, disregarded evidence contrary to the verdict, and found that more than a scintilla of evidence supported the negligence finding. *City of Keller*, 168 S.W.3d at 827. In analyzing the harm caused by the improperly

admitted spreadsheet, however, we review the entire record, which reveals that the existence of a defect was hotly contested by competing expert testimony at trial. The spreadsheet is an oversized (18"x24"), sixteen-page document and was one of the exhibits requested by the jury during deliberations. The sheer volume of irrelevant yet prejudicial information presented to the jury in that document and the consistent focus on it at trial—often on the document as a whole—make it very difficult to overlook the likely effect it had. On this record, Kia has demonstrated, and we hold, that the erroneously admitted spreadsheet probably caused the rendition of an improper judgment. TEX. R. APP. P. 61.1(a). We therefore reverse and remand for a new trial.

V. Conclusion

We hold that the presumption of nonliability in section 82.008 of the Texas Civil Practice and Remedies Code does not apply because Kia has not shown that the design of the 2002 Spectra complied with a federal safety standard governing the product risk that allegedly caused the harm in this case. We further hold that the Ruizes presented legally sufficient evidence to support the jury's verdict on their negligence claim against Kia. Accordingly, Kia is not entitled to a take-nothing judgment. However, we also hold that the trial court erroneously admitted irrelevant evidence of other, dissimilar incidents and that such error was harmful, requiring a new trial. We accordingly reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

Debra H. Lehrmann
Justice

OPINION DELIVERED: March 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0732

IN RE STEPHANIE LEE, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued February 28, 2012

JUSTICE LEHRMANN announced the Court's decision and delivered the opinion of the Court with respect to Parts I, II, III, V, and VII, in which JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE BOYD joined, and delivered an opinion with respect to Parts IV and VI, in which JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE BOYD joined.

JUSTICE GUZMAN filed a concurring opinion.

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

"If a mediated settlement agreement meets [certain requirements], a party is *entitled to judgment* on the mediated settlement agreement notwithstanding . . . another rule of law." TEX. FAM. CODE § 153.0071(e) (emphasis added). We are called upon today to determine whether a trial court abuses its discretion in refusing to enter judgment on a statutorily compliant mediated settlement agreement (MSA) based on an inquiry into whether the MSA was in a child's best interest. We hold that this language means what it says: a trial court may not deny a motion to enter judgment on a

properly executed MSA on such grounds. Accordingly, we conditionally grant the writ of mandamus.

I. Background

Relator Stephanie Lee and Real Party in Interest Benjamin Redus are the parents and joint managing conservators of their minor daughter. Stephanie has the exclusive right to designate the child's primary residence under a 2007 order adjudicating parentage. Benjamin petitioned the court of continuing jurisdiction to modify that order, alleging that the circumstances had materially and substantially changed because Stephanie had relinquished primary care and possession of the child to him for at least six months. *See* TEX. FAM. CODE § 156.101. Benjamin sought the exclusive right to determine the child's primary residence and requested modification of the terms and conditions of Stephanie's access to and possession of the child, alleging that Stephanie's "poor parenting decisions" had placed the child in danger. He also sought an order requiring that Stephanie's periods of access be supervised on the basis that she "has a history or pattern of child neglect directed against" the child. Additionally, Benjamin sought an order enjoining Stephanie from allowing the child within twenty miles of Stephanie's husband, Scott Lee, a registered sex offender, and requiring Stephanie to provide Benjamin with information on her whereabouts during her periods of access so that Benjamin could verify her compliance with the twenty-mile restriction.

Before proceeding to trial, the parties attended mediation at which they were both represented by counsel. The mediation ended successfully with the parties executing a mediated settlement agreement modifying the 2007 order. The MSA gives Benjamin the exclusive right to establish the child's primary residence, and it gives Stephanie periodic access to and possession of the child.

Among the terms and conditions of Stephanie's access and possession, the MSA contains the following restriction concerning Scott:

> At all times[,] Scott Lee is enjoined from being within 5 miles of [the child]. During [Stephanie]'s periods of possession with [the child,] Scott Lee shall notify [Benjamin] through Stephanie Lee by e-mail or other mail where he will be staying . . . [a]nd the make and model of the vehicle he will be driving. This shall be done at least 5 days prior to any visits. [Benjamin] shall have the right to have an agent or himself monitor Mr. Lee's location by either calling or driving by the location at reasonable times.

The introductory paragraph of the MSA explains that "[t]he parties wish to avoid potentially protracted and costly litigation, and agree and stipulate that they have carefully considered the needs of the child[] . . . and the best interest of the child." The MSA also contains the following language in boldfaced, capitalized, and underlined letters:

> **THE PARTIES ALSO AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON BOTH OF THEM AND IS NOT SUBJECT TO REVOCATION BY EITHER OF THEM.**

The MSA was signed by both Stephanie and Benjamin, as well as their attorneys.

Benjamin appeared before an associate judge to present and prove up the MSA. During Benjamin's testimony in support of the MSA, the associate judge inquired about the injunction regarding Scott. Benjamin informed the judge that Scott was a registered sex offender, and he testified that Scott "violated conditions of his probation with [Benjamin's] daughter in th[e] house" and that he "sle[pt] naked in bed with [Benjamin's] daughter between [Scott and Stephanie]."

Stephanie did not attend the hearing and therefore was not able to respond to these allegations.[1] Based on this testimony, the associate judge refused to enter judgment on the MSA.

Stephanie filed a motion to enter judgment on the MSA, and Benjamin filed a written objection withdrawing his consent to the MSA, arguing that it was not in the best interest of the child. At the hearing on Stephanie's motion, the district judge heard brief testimony on the MSA from Benjamin and Stephanie, including testimony regarding whether the MSA was in the child's best interest. Stephanie testified that she believed the MSA was in the child's best interest, and Benjamin also admitted on cross-examination that, at the time of execution, he thought the MSA was in the child's best interest. Both Stephanie and Benjamin testified that Benjamin was not a victim of family violence.

The judge also heard testimony on Scott's status as a registered sex offender. Stephanie testified that, in 2009, Scott was served with a violation of his deferred adjudication because of his contact with the child.[2] Stephanie admitted that, although Scott was placed on additional probation conditions in 2011, she allowed Scott to have contact with the child and to reside in the same house with her and the child in violation of those conditions. Stephanie specifically denied that she ever allowed Scott to take care of the child without her supervision. Notably, although Benjamin testified

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[1] Stephanie was represented by substitute counsel at the hearing, but neither Stephanie nor her attorney who signed the MSA was present and therefore could not respond to any allegations made by Benjamin at the hearing. Benjamin appeared personally and, although his attorney who signed the MSA did not appear with him, he was accompanied by alternate counsel. Finally, the Attorney General was represented by counsel at the hearing, although the Attorney General was not a party to either the MSA or the mediation.

[2] In her brief, Stephanie admits that Scott received a deferred adjudication for a sex offense years earlier in 2001.

that he knew about Scott's status as a registered sex offender, he did not repeat the allegation that Scott had slept naked with the child.

The district court concluded that entry of the MSA was not in the best interest of the child and denied Stephanie's motion to enter judgment. The court advised the parties that they were free to reach a new agreement on their own, but the court declined to send the parties back to mediation and instead set the case for trial.

Stephanie petitioned the court of appeals for a writ of mandamus ordering the trial court to enter judgment on the MSA. Stephanie argued that the trial court lacked discretion to refuse judgment based on the best interest determination. No. 14-11-00714-CV, 2011 WL 4036610, at *1. The court of appeals held "that the trial court [did] not commit[] a clear abuse of discretion in refusing to enter judgment on a mediated settlement agreement that is not in the child's best interest." *Id.* at *2. Stephanie then timely petitioned this Court for a writ of mandamus.

II. The Need For Mediation in High-Conflict Custody Disputes

Encouragement of mediation as an alternative form of dispute resolution is critically important to the emotional and psychological well-being of children involved in high-conflict custody disputes. Indeed, the Texas Legislature has recognized that it is "the policy of this state to encourage the peaceable resolution of disputes, *with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children*, and the early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM. CODE § 154.002 (emphasis added). This policy is well-supported by, *inter alia*, literature discussing the enormous emotional and financial costs of

high-conflict custody litigation, including its harmful effect on children.[3] Children involved in these disputes—tellingly, referred to as "custody battles"—can face perpetual emotional turmoil, alienation from one or both parents, and increased risk of developing psychological problems.[4] All the while, most of these families have two adequate parents who merely act out of fear of losing their child. For the children themselves, the conflict associated with the litigation itself is often much greater than the conflict that led to a divorce or custody dispute.[5] The Legislature has thus recognized that, because children suffer needlessly from traditional litigation, the amicable resolution

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[3] *See, e.g.*, Sarah H. Ramsey, Rep., *Conference Report and Action Plan, High-Conflict Custody Cases: Reforming the System for Children*, 34 FAM. L.Q. 589, 589 (2001) (discussing "recommendations for changes in the legal and mental health systems to reduce the impact of high-conflict custody cases on children").

[4] *See* Ramsey, *supra* note 3, at 589–90 (detailing the damaging impact high-conflict custody litigation can have on the children involved); *see also* Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice Ethics*, 38 HOFSTRA L. REV. 537, 539 (2009) (noting the "growing recognition that children are collateral damage in many divorces, especially high conflict divorces"); Linda D. Elrod, *Reforming the System to Protect Children in High-Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 501–04 (2001) (criticizing the adversarial system as unnecessarily harmful to children); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1284–85 (2008) ("Family law disputes carry terrible potential for a high level of emotional harm . . . . High-conflict divorces hold even greater potential of harm for the parties and children." (footnotes omitted)); Jessica J. Sauer, *Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs and Desires of Litigious Parents*, 7 PEPP. DISP. RESOL. L.J. 501, 509–14 (2007) (discussing the health benefits of mediation for children in custody cases).

[5] *See* Huntington, *supra* note 4, at 1283 ("Whatever breach the members of the family have suffered, subjecting that breach to the pressures of the adversarial system is likely to heighten the emotions surrounding the breach."); Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009) (commenting on the move away from the adversary paradigm in family law because "social science suggests that children's adjustment to divorce and separation depends significantly on their parents' behavior during and after the separation process: the higher the levels of parental conflict to which children are exposed, the more negative the effects of family dissolution"); Solangel Maldonado, *Taking Account of Children's Emotions: Anger and Forgiveness in "Renegotiated Families,"* 16 VA. J. SOC. POL'Y & L. 443, 444–45 (2009) ("Anger causes too many divorcing parents to behave badly—to disparage the other parent or interfere with access to the child, to withhold child support, to contest custody out of spite, and, in rare cases, to make false accusations of abuse. Legal scholars have recognized that interparental anger is harmful to both parents and children and have advocated for reforms, such as no fault divorce, mediation, and parenting education, in an effort to alleviate parties' anger during and after the divorce." (footnotes omitted)); *see also* CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 83 (1994) (noting that "for families and children caught in the stress of parental alienation, litigation is likely to exacerbate the polarization").

of child-related disputes should be promoted forcefully. With the Legislature's stated policy in mind, we turn to the statute in question.

III. Statutory Interpretation

The sole issue before us today is whether a trial court presented with a request for entry of judgment on a validly executed MSA may deny a motion to enter judgment based on a best interest inquiry.[6] While Texas trial courts have numerous tools at their disposal to safeguard children's welfare, the Legislature has clearly directed that, subject to a very narrow exception involving family violence, denial of a motion to enter judgment on an MSA based on a best interest determination, where that MSA meets the statutory requirements of section 153.0071(d) of the Texas Family Code,

[6] While this is an issue of first impression in this Court, several courts of appeals have analyzed the statute governing entry of judgment on MSAs. *See In re S.A.D.S.*, No. 2-09-302-CV, 2010 WL 3193520, at *4 (Tex. App.—Fort Worth Aug. 12, 2010, no pet.) ("The express provision on mediated settlement agreements, however, contains no express exceptions giving the trial court discretion not to enforce the mediated settlement agreement."); *Barina v. Barina*, No. 03-08-00341-CV, 2008 WL 4951224, at *4 (Tex. App.—Austin Nov. 21, 2008, no pet.) (mem. op.) ("Unless there is an allegation of family violence, a section 153.0071 agreement may be ruled on without a determination by the trial court that the terms of the agreement are in the best interest of the child."); *Beyers v. Roberts*, 199 S.W.3d 354, 360 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (noting that a trial court may hold a best interest hearing in an MSA case if presented with proper facts); *Zimmerman v. Zimmerman*, No. 04-04-00347-CV, 2005 WL 1812613, at *1 (Tex. App.—San Antonio Aug. 3, 2005, pet. denied) (mem. op.) (holding that the trial court was required to enter judgment on the agreement); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 331–32 (Tex. App.—Dallas 2004, no pet.) (holding that the trial court had no authority to enter a judgment that varied from the terms of the MSA, but that the court did have authority not to enforce illegal provisions in the MSA); *In re Circone*, 122 S.W.3d 403, 406 (Tex. App.—Texarkana 2003, no pet.) ("The Family Code contains no language allowing the trial court to review the mediation and explicitly requires the court to enter judgment based on the mediation agreement."); *In re J.A.W.-N.*, 94 S.W.3d 119, 121 (Tex. App.—Corpus Christi 2002, no pet.) (concluding that if the requirements for a binding MSA are met, the parties are entitled to have the MSA enforced); *Alvarez v. Reiser*, 958 S.W.2d 232, 233 (Tex. App.—Eastland 1997, pet. denied) (holding that even if one party withdraws its consent to the MSA, the trial court is required to enter judgment on the agreement).

is not one of those tools. Accordingly, the trial court in this case abused its discretion by denying entry of judgment on the MSA and setting the matter for trial.[7]

A. Standard of Review

"We review questions of statutory construction de novo." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). Our fundamental objective in interpreting a statute is "to determine and give effect to the Legislature's intent." *Am. Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012); *accord Molinet*, 356 S.W.3d at 411. In turn, "[t]he plain language of a statute is the surest guide to the Legislature's intent." *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012). "We take the Legislature at its word, and the truest measure of what it intended is what it enacted." *In re Office of Attorney Gen.*, ___ S.W.3d ___, ___ (Tex. 2013). "[U]nambiguous text equals determinative text," and "'[a]t this point, the judge's inquiry is at an end.'" *Id.* (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 (Tex. 2006)).

It is inappropriate to resort to rules of construction or extratextual information to construe a statute when its language is clear and unambiguous. *Id.* "This text-based approach requires us to study the language of the specific section at issue, as well as the statute as a whole." *Id.* When construing the statute as a whole, we are mindful that "[i]f a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to

[7] Mandamus relief is available to remedy a trial court's erroneous refusal to enter judgment on an MSA. *See Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 659 (Tex. 1996) (orig. proceeding) (holding that the relator lacked an adequate remedy by appeal with respect to the court of appeals' refusal to abate the appeal pending resolution of a separate action to enforce a settlement agreement, noting that "[i]f the agreement is ultimately upheld, [relator] will have lost much of the settlement's benefit if he has been required to expend time and resources in prosecuting the appeal"). In a child-related dispute, the inadequacy of the appellate remedy in the context of refusal to enforce a settlement agreement is even more pronounced because the significant benefits to the family in peaceably resolving the dispute through mediation are lost.

both." TEX. GOV'T CODE § 311.026(a). However, in the event that any such conflict is irreconcilable, the more specific provision will generally prevail. *Id.* § 311.026(b); *see also In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 470–71 (Tex. 2011). Further, in the event of an irreconcilable conflict between two statutes, generally "the statute latest in date of enactment prevails." TEX. GOV'T CODE § 311.025(a).

B. Section 153.0071

Consistent with the legislative policy discussed above regarding the encouragement of the peaceable resolution of disputes involving the parent-child relationship, the Legislature enacted section 153.0071 of the Family Code, which provides in pertinent part as follows:

> (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.
>
> (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.
>
> (c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.
>
> (d) A mediated settlement agreement is binding on the parties if the agreement:
>
> > (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
> >
> > (2) is signed by each party to the agreement; and
> >
> > (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:
>
> > (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
> >
> > (2) the agreement is not in the child's best interest.

TEX. FAM. CODE § 153.0071(a)–(e-1). Subsection (d) provides that an MSA is binding on the parties if it is signed by each party and by the parties' attorneys who are present at the mediation and states prominently and in emphasized type that it is not subject to revocation. *Id.* § 153.0071(d). Subsection (e) goes even further, providing that a party to an MSA is "entitled to judgment" on the MSA if it meets subsection (d)'s requirements. *Id.* § 153.0071(e). Finally, subsection (e-1), added in 2005, provides a narrow exception to subsection (e)'s mandate, allowing a court to decline to enter judgment on even a statutorily compliant MSA if a party to the agreement was a victim of family violence, the violence impaired the party's ability to make decisions, *and* the agreement is not in the best interest of the child. Act of June 18, 2005, 79th Leg., R.S., ch. 916, § 7, 2005 Tex. Gen. Laws 3148, 3150.

C. The Parties' Arguments

Stephanie argues that the trial court abused its discretion by refusing to enter judgment on the MSA and setting the case for trial. She contends that, under section 153.0071, she was "entitled to judgment on the [MSA]" because it complied with the statutory requirements. *See* TEX. FAM.

CODE § 153.0071(d)–(e). She further argues that a court may refuse to enter judgment on a properly executed MSA only when the family violence exception is met and the court finds that the MSA is not in the child's best interest. *See id.* § 153.0071(e-1). Because there was no family violence at issue in this case, she argues, this narrow exception does not apply.

In response, Benjamin first argues that the MSA does not meet the statutory requirements for a binding agreement because it was not signed by the Office of the Attorney General. Additionally, he argues that entry of judgment on an MSA that is not in the best interest of the child violates public policy and is unenforceable. His argument is based on the Family Code's mandate that "[t]he best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession." *Id.* § 153.002. He argues that trial courts therefore have the discretion to void all or part of an MSA that is not in the child's best interest.

In response to our request that the Office of the Solicitor General provide the position of the State of Texas, the State submitted a brief in favor of the trial court's and court of appeals' disposition, arguing that the "overarching purpose of Texas Family Code chapter 153 is to ensure trial courts' ability to act in the best interests of minor children—even when their parents do not." The State urges that we must not look at section 153.0071 in isolation; rather, we must construe it within the broader context of the Legislature's concern for the best interest of children as expressed in the Family Code. *See id.* §§ 153.001, .002. The State argues that, in light of this overarching state policy, the trial court did not abuse its discretion by refusing to enter judgment on the MSA.

Finally, the State Bar of Texas Family Law Council (the Council) submitted an amicus curiae brief in support of Stephanie's petition. The Council argues that a strict interpretation of section

153.0071 fulfills the state policy favoring amicable resolution of disputes and suggests that holding as the courts below did could lead to a loss in confidence in mediation and an increase in litigation over the best interest of the child. The Council argues that rules of statutory construction make clear that the Legislature intended to remove the best interest determination in the context of an MSA, instead deferring to parents to determine the best interest of the child, except where family violence is involved. *See id.* § 153.0071(e-1). The Council urges that to hold otherwise would "gut the legislative intent favoring alternative dispute resolution of family law matters by mediation," increasing both the cost of the proceedings and the stress on families forced to resolve "their disputes in the adversarial venue of the courts, rather than the cooperative environment of mediation." The Council contends that "[t]his result is certainly not in a child's best interest."

D. Analysis of Section 153.0071

Section 153.0071(e) unambiguously states that a party is "entitled to judgment" on an MSA that meets the statutory requirements "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." *Id.* § 153.0071(e). Subsection (e-1) provides a narrow exception, allowing a trial court to decline to enter judgment on an MSA when three requirements are all met: (1) a party to the agreement was a victim of family violence, *and* (2) the court finds the family violence impaired the party's ability to make decisions, *and* (3) the agreement is not in the child's best interest. *Id.* § 153.0071(e-1). By its plain language, section 153.0071 authorizes a court to refuse to enter judgment on a statutorily compliant MSA on best interest grounds *only* when the court also finds the family violence elements are met. Stated another way, "[t]he statute does not authorize the trial court to substitute its judgment for the mediated settlement agreement entered by the parties

unless the requirements of subsection 153.0071(e-1) are met." *Barina v. Barina*, No. 03-08-00341-CV, 2008 WL 4951224, at *4 (Tex. App.—Austin Nov. 21, 2008, no pet.) (mem. op.). Subsection (e-1), enacted after subsection (e), makes it absolutely clear that the Legislature limited the consideration of best interest in the context of entry of judgment on an MSA to cases involving family violence. Allowing a court to decline to enter judgment on a valid MSA on best interest grounds without family violence findings would impermissibly render the family violence language in subsection (e-1) superfluous. *See In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008) (reaffirming rule that courts must give effect to all words in a statute without treating any statutory language as mere surplusage).

Section 153.0071(b), governing arbitration of child-related disputes, is also instructive. In stark contrast with subsection (e), subsection (b) explicitly gives trial courts authority to decline an arbitrator's award when it is not in the best interest of the child. *Compare* TEX. FAM. CODE § 153.0071(b), *with id.* § 153.0071(e). This distinction between arbitration and mediation makes sense because the two processes are very different. Mediation encourages parents to work together to settle their child-related disputes, and shields the child from many of the adverse effects of traditional litigation. On the other hand, arbitration simply moves the fight from the courtroom to the arbitration room. If the Legislature had intended to authorize courts to inquire into the child's best interest when determining whether to render judgment on validly executed MSAs, as it did in section 153.0071(b) with respect to judgments on arbitration awards, it certainly knew how to do so.

Benjamin argues that, despite section 153.0071's plain language, "[n]othing precludes the court from considering the best interests of the child, including a request for entry on a mediated

settlement agreement." Benjamin and the State are correct that the Family Code provides that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." *Id.* § 153.002. However, section 153.0071(e) reflects the Legislature's determination that it is appropriate for parents to determine what is best for their children within the context of the parents' collaborative effort to reach and properly execute an MSA. This makes sense not only because parents are in a position to know what is best for their children, but also because successful mediation of child-custody disputes, conducted within statutory parameters, furthers a child's best interest by putting a halt to potentially lengthy and destructive custody litigation. However, as discussed further below, a trial judge with cause to believe that a child's welfare is at risk due to suspected abuse or neglect is required to report such abuse or neglect to an appropriate agency, as is any other individual with this type of knowledge. *Id.* §§ 261.101–.103. In this sense, parents who enter into MSAs are no different from the myriad of parents in intact families who are presumed to act in their children's best interests every day. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (observing that "the interest of parents in the care, custody, and control of their children[ ]is perhaps the oldest of the fundamental liberty interests recognized by this Court").

To the extent the two statutes do conflict, applicable rules of construction require us to hold that section 153.0071 prevails. First, section 153.0071(e) mandates entry of judgment "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." TEX. FAM. CODE § 153.0071(e). The use of the word "notwithstanding" indicates that the Legislature intended section 153.0071 to be controlling. *Molinet*, 356 S.W.3d at 413–14 (holding that a "notwithstanding any

other law" provision evidenced clear legislative intent to resolve any interpretation conflicts in favor of the statute containing the provision); *see also Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 639 (Tex. 2010) (holding that a statute "manifest[ing] clear legislative intent that conflicting statutes are ineffective" controlled over such conflicting statutes).[8]

Further, the specific statutory language of section 153.0071(e) trumps section 153.002's more general mandate. TEX. GOV'T CODE § 311.026(b); *see also Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 297 (Tex. 2011) (reiterating the rule that specific statutory provisions prevail over general mandates). Finally, the MSA provision was added long after the general "best interest" provision and therefore prevails as "the statute latest in date of enactment." TEX. GOV'T CODE § 311.025(a); *Jackson*, 351 S.W.3d at 297. Thus, it is clear that the MSA statute was enacted with the intent that, when parents have agreed that a particular arrangement is in their child's best interest and have reduced that agreement to a writing complying with section 153.0071, courts must defer to them and their agreement.

For these reasons, we hold that section 153.0071(e) encourages parents to peaceably resolve their child-related disputes through mediation by foreclosing a broad best interest inquiry with respect to entry of judgment on properly executed MSAs,[9] ensuring that the time and money spent

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[8] The dissent would hold that the reference to Rule 11 narrows the mandate such that subsection (e) controls only over other "provisions under which similar types of agreements to resolve family disputes may be repudiated or withdrawn prior to entry of judgment." ___ S.W.3d at ___. This is undercut by subsection (e-1), which allows the trial court to decline to enter judgment on an MSA if the family violence exception is met and the MSA is not in the child's best interest, "*[n]otwithstanding Subsections (d) and (e)*." TEX. FAM. CODE § 153.0071(e-1) (emphasis added). There would have been no need to include such "notwithstanding" language in subsection (e-1) if subsection (e) were intended to control only in the narrow set of circumstances specified by the dissent.

[9] Again, the court may decline to enter judgment when the family violence exception is met.

on mediation will not have been wasted and that the benefits of successful mediation will be realized. Allowing courts to conduct such an inquiry in contravention of the unambiguous statutory mandate in section 153.0071 has severe consequences that will inevitably harm children. The decisions below ignore clearly expressed legislative intent, undermining the Legislature's goal of protecting children by eroding parents' incentive to work collaboratively for their children's welfare. This frustrates the policies underlying alternative dispute resolution in the custody context, which are firmly grounded in the protection of children.[10]

IV. A Trial Court's Duty to Take Protective Action

The dissent is concerned that the statute, as written, would require trial courts to ignore evidence that the parents' agreed arrangement would endanger a child by subjecting the child to neglect or abuse. This case, however, does not present that issue. The trial court in this case refused to enter judgment on the parents' MSA because the court believed the agreed arrangement was not in the child's best interest, not because the court believed the arrangement would subject the child to neglect or abuse or would otherwise endanger the child. Thus, we need not, and should not, decide in this case the contours of a trial court's duties and discretion when faced with an MSA that would endanger a child, as that issue is not before us and any such opinion would be advisory.

[10] Several lower courts have addressed the issue of whether section 153.0071 mandates entry of judgment on a statutorily compliant MSA under any and all circumstances, even where, for example, the agreement "'was illegal or . . . was procured by fraud, duress, coercion, or other dishonest means.'" *See, e.g.*, *In re Calderon*, 96 S.W.3d 711, 718 (Tex. App.—Tyler 2003, orig. proceeding) (quoting *Boyd v. Boyd*, 67 S.W.3d 398, 403 (Tex. App.—Fort Worth 2002, no pet.) (analyzing comparable Family Code provision governing MSAs in suits involving marital property)). That issue is not presented or decided here.

Nevertheless, because endangerment appears to lie at the heart of the dissent's concern, we are compelled to note that section 153.0071 does not require a trial court to blindly leave a child whose welfare is at risk in harm's way. To the contrary, courts can never stand idly by while children are placed in situations that threaten their health and safety. However, this does not mean courts can refuse to abide by section 153.0071(e) by denying a motion to enter judgment on a properly executed MSA on best interest grounds.[11] Trial courts have other statutorily endorsed methods by which to protect children from harm without eviscerating section 153.0071(e)'s mandatory language or reading language into the statute under the guise of "interpreting" it.

The Family Code provides trial courts with numerous mechanisms for protecting a child's physical and emotional welfare, both during and after the pendency of a suit affecting the parent-child relationship (SAPCR). For example, a trial court may find it necessary to involve a government agency like the Department of Family and Protective Services (DFPS), the agency charged with the duty to investigate and protect endangered children, before rendering final judgment. Specifically, a court "having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . *shall immediately*" notify DFPS or another appropriate agency. TEX. FAM. CODE § 261.101 (emphasis added); *see also id.* § 261.103. Under these and related statutes, when a person has cause to believe that a child is being or may be harmed by abuse or neglect, a DFPS investigation will be triggered, regardless of whether a SAPCR is pending. *Id.* § 261.101; *id.* § 261.301(a) ("The investigation shall be conducted without regard

[11] As discussed further below, a best interest inquiry is much broader than an evaluation of whether the child's physical or emotional welfare is in jeopardy.

to any pending suit affecting the parent-child relationship."); *see also id.* § 153.0071(g) (stating that the applicability of the provisions for confidentiality of alternative dispute resolution procedures "does not affect the duty of a person to report abuse or neglect under Section 261.101").[12] In these and similar types of situations, a trial court may enter temporary orders, temporary restraining orders, and temporary injunctions to protect a child's safety and welfare, all upon proper motion, before rendering the final order.[13] The trial court may also appoint a representative for the child, such as an amicus attorney or an attorney ad litem. *See id.* § 107.021. Even after issuing a final order, a trial court may act to protect the safety and welfare of a child by issuing protective orders, by issuing temporary orders during an appeal, by ruling on motions to modify, or through habeas corpus proceedings, again upon proper motion.[14]

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[12] As noted above, in this manner, section 153.0071 effectively places parents involved in a SAPCR who enter into valid MSAs in the same position as parents in intact families—they are presumed to act in their child's best interest in reaching an agreement, subject to a DFPS investigation if a report of suspected abuse or neglect is made.

[13] *See, e.g.*, TEX. FAM. CODE § 105.001(a) ("In a suit, the court may make a temporary order, including the modification of a prior temporary order, for the safety and welfare of the child . . . ."); *id.* § 105.001(b) ("[T]emporary restraining orders and temporary injunctions . . . shall be granted without the necessity of an affidavit or verified pleading . . . ."); *id.* § 105.001(c) (providing that a temporary order may not be rendered taking the child into the possession of the court or of a designated person, or excluding a parent from possession of or access to the child, except on a verified pleading or affidavit); *see also id.* § 156.006(b) (providing that while a modification suit is pending, the court may not render a temporary order that alters which person has the exclusive right to designate the child's primary residence under a final order unless the temporary order is necessary to protect "the child's physical health or emotional development" and is in the best interest of the child).

[14] *See, e.g.*, TEX. FAM. CODE § 81.001 (requiring a court to render a protective order if it finds that family violence has occurred and is likely to occur in the future); *id.* § 82.002(a) (allowing an adult family member to seek a protective order "to protect the applicant or any other member of the applicant's family"); *id.* § 85.001 (providing for issuance of protective orders when court finds that family violence has occurred and is likely to occur in the future); *id.* § 109.001(a) (allowing trial courts to issue temporary orders "to preserve and protect the safety and welfare of the child during the pendency of the appeal"); *id.* § 156.101(a)(1) (allowing modification of an order if it would be in the child's best interest and the circumstances of the child have materially and substantially changed since the date of the signing of the MSA); *id.* § 157.374 (providing that in habeas corpus proceedings, "the court may render an appropriate temporary order if there is a serious immediate question concerning the welfare of the child").

While instigating any of the protective measures described above or elsewhere in the Family Code does not allow a trial court to conduct a broad best interest inquiry in ruling on a motion to enter judgment on an MSA under section 153.0071, it may warrant the trial court's exercise of discretion to continue the MSA hearing for a reasonable time. This allows the trial court, upon proper motion, to render any temporary orders that might be necessary and to determine whether further protective action should be taken. In the event the trial court involves DFPS, a continuance will provide the court with the benefit of the resulting investigation.

Finally, we note that the Legislature's choice to defer to the parties' best interest determination in the specific context of mediation recognizes that there are safeguards inherent in that particular form of dispute resolution compared to various other methods of amicably settling disputes.[15] Under Texas law, "[m]ediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them." TEX. CIV. PRAC. & REM. CODE § 154.023(a). To qualify for appointment by the court as an impartial third party when a case is referred to an alternative dispute resolution procedure like mediation, a person must meet certain requirements for training in alternative dispute resolution techniques. *Id.* § 154.052(a). To qualify for appointment "in a dispute relating to the parent-child relationship," the person must complete additional training "in the fields of family dynamics, child development, and family law." *Id.* § 154.052(b). Significantly, all participants in the proceeding,

[15] The dissent cites the inapplicable Collaborative Law Act, which allows a tribunal to "issue an emergency order [during the process] to protect the health, safety, welfare, or interest of a party or a family." TEX. FAM. CODE § 15.104. We note that engagement in the collaborative law process under this Act "operates as a stay of the proceeding," *id.* § 15.103(a), and that section 15.104 provides limited authority for the court to act notwithstanding the stay, *id.* § 15.104.

"including the impartial third party," are subject to the mandatory DFPS reporting requirements discussed above. *Id.* § 154.053(d). Thus, the process itself is geared toward protecting children.[16]

In sum, we hold today that a trial court may not deny a motion to enter judgment on a properly executed MSA under section 153.0071 based on a broad best interest inquiry. But we certainly do not hold that a child's welfare may be ignored. Rather, we recognize that section 261.101's mandatory duty to report abuse or neglect, the numerous other statutes authorizing protective action by the trial court, and the safeguards inherent in the mediation process fulfill the need to ensure that children are protected. And they do so without subjecting MSAs to an impermissible level of scrutiny that threatens to undermine the benefits of mediation. The trial court's authority to continue an MSA hearing and to take protective action under the various statutes discussed above is triggered not by a determination that an MSA is not in a child's best interest, but by evidence that a child's welfare is in jeopardy. Thus, the mediation process and its benefits are preserved, and, most importantly, children are protected.

V. The MSA in This Case

The MSA in this case contains a broad range of provisions governing conservatorship of the child, responsibility for health insurance and medical expenses for the child, child support, possession of and access to the child, and allocation of other parental rights and duties. Included among these is the protective provision enjoining Scott from being within five miles of the child at all times, requiring Stephanie to provide Benjamin with information on Scott's whereabouts during

[16] The mediator in the underlying case was Judge Leta Parks. Judge Parks was an associate judge in Harris County for eighteen years and is board-certified in family law. She is a former President of Gulf Coast Family Law Specialists and a former President of the Association of Family and Conciliation Courts, Texas Chapter.

her visits with the child, and allowing Benjamin to monitor compliance with the provision.[17] Compliance with the MSA, then, means the child will have no contact with Scott.

As is relevant to section 153.0071, the MSA is signed by the parties and their lawyers,[18] and it displays in boldfaced, capitalized, and underlined letters that it is irrevocable; thus, it meets the statutory requirements described in that statute to make the agreement binding on Stephanie and Benjamin. *See* TEX. FAM. CODE § 153.0071(d). Additionally, the parties admit that Benjamin was not a victim of family violence, and thus the exception in subsection (e-1) does not apply. The trial court nevertheless denied the motion to enter judgment on the MSA and set the matter for trial based on the court's conclusion that the MSA was not in the child's best interest.[19] Because section 153.0071 did not permit the court to do so, the court's actions were an abuse of discretion.

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[17] The dissent expresses concern that the injunction provision is directed more at Scott, a nonparty, than at Stephanie. *See* ___ S.W.3d at ___. We agree that the provision could have been more artfully worded, but the intent is clear: Stephanie may not allow the child to come within five miles of Scott. Further, in entering judgment on an MSA, trial courts may include "[t]erms necessary to effectuate and implement the parties' agreement" so long as they do not substantively alter it. *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—Dallas 2006, no pet.). Thus, to the extent there is no dispute about the parties' intent, the trial court has discretion to provide clarification of this or any other provision. In the unlikely event the parties disagree on the intent of this provision, that dispute may be resolved in accordance with the terms of the MSA. *Milner v. Milner*, 361 S.W.3d 615, 622 (Tex. 2012).

[18] Benjamin's argument that the MSA does not meet the statutory requirements because it is not signed by the Office of the Attorney General of Texas (the Office) misunderstands the signature requirement. He argues that the statute requires the signature of the Office because the Office is "a party to this litigation." However, the statute only requires the signature of "each party *to the agreement*." TEX. FAM. CODE § 153.0071(d)(2) (emphasis added). Because the Office is not a party to the agreement, its signature is not required for the MSA to be binding.

[19] The dissent characterizes the trial court's rejection of the MSA as being based on the trial court's "clear[] determin[ation], based on Stephanie's own admissions, that Stephanie has little regard for court orders to protect children from her sex-offender husband, and that she has repeatedly made decisions against her daughter's best interest, which put her daughter at substantial risk." ___ S.W.3d at ___. But the trial court made no such findings. As noted above, the trial court stated only that the MSA "is not in the best interest of the child[]."

VI. Additional Response to the Dissent

The dissent claims that the Court's holding compels trial courts to disregard the fundamental public policies of protecting children from harm and acting in their best interests. ___ S.W.3d at ___. Nothing could be further from the truth. Rather, we are respecting the Legislature's well-supported policy determination, reflected in the plain language of the MSA statute, that courts should defer to the parties' determinations regarding the best interest of their children when those decisions are made in the context of a statutorily compliant MSA. As discussed above, the harmful effects of litigation in family disputes are well-documented, leading the Legislature to vigorously promote the avoidance of such litigation. This is particularly so when the parties reach agreement pursuant to the mediation process, which is itself designed to ensure that children are protected. The dissent engages in a tortured reading of the MSA statute, flouts well-settled principles of statutory interpretation, and ignores the ramifications of discouraging mediation. And it does so unnecessarily, as our children's welfare can, and indeed must, be protected at the same time that the mediation process and its benefits are preserved.

We agree with the dissent that "[s]urely the Legislature did not commit a useless act in enacting each of more than one hundred statutory provisions to assist courts in determining *how* and *when* to consider a child's best interest." ___ S.W.3d at ___.[20] But the Legislature's explicit direction to courts to make best interest determinations in so many other provisions reinforces our

[20] We recognize the serious policy reasons underlying the Family Code's numerous references to a child's best interest and agree that a child's best interest should always be the paramount concern when adjudicating custody and access issues. We simply disagree about whether the statute requires courts to defer to parents' decisions about such matters within the context of properly executed MSAs.

interpretation of section 153.0071, rather than the dissent's, and highlights the particular policy considerations, discussed at length above, underlying enforcement of statutorily compliant MSAs. The dissent erroneously concludes that those provisions support grafting similar language onto section 153.0071, even though the Legislature chose not to include it. For example, the dissent reads subsection (e-1), the family violence exception, "to allow a trial court to consider the terms of a modification when the presumption that MSA parties act in the best interest of the child has been negated." *Id.* at ___. But the exception is not nearly as broad as the dissent suggests. Instead, the Legislature carefully identified the specific circumstance in which a trial court may override the parties' best interest determinations and decline to enter judgment on an MSA: when a party to the MSA is a victim of family violence, and the family violence impaired the party's ability to make decisions.[21] TEX. FAM. CODE § 153.0071(e-1). The dissent's insistence that "nothing in the statute expressly limits a trial court's authority to decline to enter judgment on a properly executed, binding MSA to the family violence context addressed in section 153.0071(e-1)" raises the question: why include the exception at all? *See* ___ S.W.3d at ___.

The dissent dismisses our concern that allowing statutorily compliant MSAs to be set aside on best interest grounds will interfere with the state policy favoring peaceable resolution of family disputes and will discourage parties from engaging in mediation. *Id.* at ___. We disagree, as

[21] The dissent aptly notes that "[h]ad the Legislature used 'or' instead of 'and' between the two parts of that family violence provision, a trial court would be able to reject an MSA simply because a parent was induced by family violence to enter into an MSA." ___ S.W.3d at ___. By the same token, had the Legislature used "or" instead of "and" between the two parts of the provision, a trial court would be able to reject an MSA solely because the court concluded it was not in a child's best interest. But the Legislature did use the word "and," and the trial court cannot reject an MSA without making affirmative findings as to both parts.

(apparently) did the Legislature in failing to include a best interest determination as a prerequisite for or barrier to entry of judgment on an MSA. Why would parties spend considerable time, effort, and money to mediate their dispute in accordance with the statutory requirements when the trial court could very well decide to hold a full trial on the merits anyway? The dissent's claim that this will happen only in rare cases simply is not supportable.

To that end, a trial court's determination that an MSA is not in a child's best interest is not dependent upon, or equivalent to, a finding that the child has been harmed by abuse or neglect or is in danger of such harm. Rather, "best interest" is a term of art encompassing a much broader, facts-and-circumstances based evaluation that is accorded significant discretion. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (identifying nine factors that may be considered in determining best interest).[22] Under the dissent's interpretation, the trial court would thus have significant leeway, in contravention of the statute's intent, to decide when entry of judgment on a statutorily compliant MSA is or is not appropriate. The possibility that this would lead to an increase in child-related litigation is very real, as parents would be encouraged to contest on best interest grounds the very agreements that they freely entered into through mediation.[23] Even more concerning, parents would

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[22] Those factors are: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the 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 these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Holley*, 544 S.W.2d at 372.

[23] The dissent insists that it is not reading section 153.0071 to allow a trial court to "refuse to enter judgment on an MSA based on any one of the [*Holley*] factors" and that the issue presented here is "whether a trial court has discretion to reject an MSA that the trial court determines, based on evidence, places a child's safety and welfare in danger and, consequently, cannot possibly be in the child's best interest." ___ S.W.3d at ___. But again, the trial court made no endangerment findings, stating only that the MSA "is not in the best interest of the child[]." More importantly,

be discouraged from using the mediation process to begin with, out of concern that their agreements could be ignored and their efforts wasted.

Ultimately, the dissent's suggestion that enforcing section 153.0071 as written leads to an absurd result falls flat. If it were indeed the case that our interpretation would leave trial courts with no ability to protect a child from an MSA that put a child's welfare at risk, we would agree with that suggestion. But as discussed at length above, that simply is not the case, as trial courts have numerous tools at their disposal to protect children that operate in conjunction with, rather than in opposition to, the mandate in section 153.0071.[24]

VII. Conclusion

Because the MSA in this case meets the Family Code's requirements for a binding agreement, and because neither party was a victim of family violence, we hold that the trial court abused its discretion by denying the motion to enter judgment on the MSA. Accordingly, we conditionally grant mandamus relief. We order the trial court to withdraw its orders denying entry of judgment on the MSA and setting the matter for trial. We are confident that the court will comply, and the writ will issue only if it does not.

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there is simply no principled basis for the line the dissent draws between those MSAs on which a trial court must enter judgment and those they may disregard. The dissent thus ignores the clear mandate in section 153.0071 and trivializes the numerous other means by which trial courts can and must protect children. In the end, the dissent envisions a trial on whether the disputed MSA provision is in the child's best interest under *Holley*, *id.* at ___, which is exactly what the Legislature intended to foreclose under section 153.0071.

[24] The dissent's assertion that "we cannot have it both ways" misses the point—that protecting children involves shielding them from high-conflict custody disputes as well as from abuse and neglect. Continuing the case until an investigation is complete—so that the trial court has sufficient information upon which to make a proper determination about whether protective orders should be entered contemporaneously with the MSA—makes complete sense and furthers this critical policy.

Debra H. Lehrmann
Justice

OPINION DELIVERED: September 27, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0732

IN RE STEPHANIE LEE, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE GUZMAN, concurring.

In this mandamus proceeding, the Court must construe section 153.0071 of the Texas Family Code to determine whether the trial court abused its discretion by refusing to enter judgment on a properly executed mediated settlement agreement (MSA) and instead setting the matter for trial. Despite discord on other issues, the opinions make several matters apparent. First, the Court holds that section 153.0071 of the Family Code prohibits a trial court from conducting a broad best-interest inquiry at a hearing for the purpose of entering judgment on a properly executed MSA.[1] Second, a different majority of the Court would hold that a trial court does not abuse its discretion by refusing to enter judgment on an MSA that could endanger the safety and welfare of a child—an issue on

[1] JUSTICE JOHNSON, JUSTICE WILLETT, myself, JUSTICE LEHRMANN, and JUSTICE BOYD conclude that section 153.0071 precludes a broad best-interest inquiry on a properly executed MSA. __ S.W.3d __, __. Parts IV and VI of JUSTICE LEHRMANN's opinion are a plurality, but for ease of reference, this writing will refer to that opinion and the Justices who join it as the Court.

which the remaining four justices express no opinion.[2] Third, no Justice disputes that trial courts possess a number of mechanisms to protect children from endangerment, such as issuing temporary orders and contacting the Texas Department of Family and Protective Services. Finally, a majority of the Court agrees that if there is evidence of endangerment, an additional mechanism the trial court possesses to protect the child is to refuse to enter judgment on the MSA.

I write separately because although I agree with Court that section 153.0071 precludes a broad best-interest inquiry, I also believe that it does not preclude an endangerment inquiry. The Court fails to address the endangerment inquiry, but I believe the issue is critical because the facts of this case potentially implicate the inquiry—discussion of which provides much-needed guidance to trial courts. I agree with the Court that mandamus is appropriate because there is legally insufficient evidence of endangerment to support the trial court's decisions to set aside the MSA and place the matter on its trial docket. The trial court sustained a hearsay objection to the only statement at the hearing that could have demonstrated the mother might not comply with the MSA (a statement from the father that the mother informed him after signing the MSA that she did not have to inform him of her and her husband's whereabouts). Thus, this record is sparse and does not establish the threshold I believe must be met before a trial court may disregard legislative policy concerning the deference to which MSAs are entitled. Accordingly, I believe the trial court abused its discretion and therefore join the Court's decision to conditionally grant mandamus relief as well as all but Parts

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[2] CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE GREEN, myself, and JUSTICE DEVINE believe that section 153.0071 does not preclude an endangerment inquiry. __ S.W.3d __, __ & n.1 (Green, J., dissenting); *infra* Part II. Though the Court expressly avoids the issue, __ S.W.3d at __, the dissent observes that the Court's decision to not require the trial court here to enter judgment on the MSA must mean the Court recognizes that a trial court may refuse to enter judgment on an MSA that could endanger a child's safety and welfare. __ S.W.3d at __ (Green, J., dissenting).

IV and VI of the Court's opinion. If on remand the trial court considers evidence and finds that entry of judgment on the MSA could endanger the child, I am certain the trial court will take appropriate action.

I. Background

The parties in this case entered into a settlement agreement after a lengthy mediation in which they were both represented by counsel. The MSA was memorialized in accordance with section 153.0071(d) of the Family Code, which requires trial courts to enter judgment on a properly executed MSA notwithstanding any other rule of law (unless the MSA was procured due to family violence). TEX. FAM. CODE §§ 153.0071(d)–(e-1). But, as often happens in family law cases, the agreement began to unravel after the parties left the mediation. In fact, this particular agreement began to fall apart during the "prove-up" in front of an associate judge.[3]

The matter was subsequently presented to the district court judge, who conducted a *de novo* hearing and expressly indicated she did not have the record from the hearing before the associate judge.[4] The trial court heard limited evidence and argument from the child's mother, Stephanie Lee, and father, Benjamin Redus. Although Redus had alleged before the associate judge that Stephanie allowed her husband—a convicted sex offender—to sleep naked with Redus's daughter in the bed,

[3] Associate judges in family law cases are appointed pursuant to Chapter 201 of the Family Code.

[4] The trial court acknowledged "there is no written report" from the hearing before the associate judge "save and except what's on this docket sheet" and accordingly conducted a *de novo* hearing. Under section 201.015(a) of the Family Code, "[a] party may request a de novo hearing before the referring court . . . ." TEX. FAM. CODE § 201.015(a). In addition, the referring court "*may* also consider the record from the hearing before the associate judge." *Id.* § 201.015(c) (emphasis added).

tellingly, he did not repeat this allegation to the trial court. And importantly, this record does not establish that the trial court considered Redus's prior testimony.

In refusing to enter judgment on the MSA, the trial court held, without further explanation, that the MSA was "not in the best interest of the child[]." In addition to entering an order refusing to enter judgment on the MSA, the trial court set the entire matter for trial.

II. Discussion

The question in this mandamus proceeding is whether the trial court's orders denying the MSA and setting the matter for trial constitute an abuse of discretion. Mandamus relief will lie if the relator establishes a clear abuse of discretion for which there is no adequate appellate remedy. *In re AutoNation, Inc.*, 228 S.W.3d 663, 667 (Tex. 2007) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Regarding factual issues, a trial court abuses its discretion if it reasonably could only have reached one decision. *Id.* at 840; *see GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding) (granting mandamus relief when no evidence supported trial court determination). But a trial court has no discretion in determining what the law is or in applying the law to the facts, even when an area of the law is unsettled. *Walker*, 827 S.W.2d at 840; *Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996) (orig. proceeding).

Here, Stephanie argues that the court's refusing to enter judgment on the MSA and setting the matter for trial were abuses of discretion because section 153.0071 of the Family Code forecloses

a broad best-interest inquiry. Redus contends that the trial court's actions were proper because the Family Code always allows a trial court to examine the best interests of the child.

Our courts of appeals have wrestled with precisely what inquiry, if any, section 153.0071 allows.[5] I agree with the Court that section 153.0071 in fact forecloses a broad best-interest inquiry. In doing so, the statute furthers the time-honored "presumption that fit parents act in the best interests of their children"[6] and comports with the public policy and purpose of mediation by letting the parties settle their affairs "as they see fit"—keeping those matters out of the courtroom.[7]

But I disagree that this principle alone resolves this proceeding. I agree with the dissent to the extent it believes that a contextual reading of the Family Code allows a narrow inquiry into whether entering judgment on an MSA could endanger the safety and welfare of a child.[8] *See Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) ("We must read the statute as a whole and not just isolated portions."). The dissent convincingly argues that requiring the trial court to enter a judgment that could endanger the child would be an absurd result. __ S.W.3d __, __ (Green, J., dissenting). It is, in my view, not only absurd but also plainly nonsensical

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[5] *See, e.g.*, *Philipp v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-00418-CV, 2012 WL 1149291, at *10 (Tex. App.—Austin Apr. 4, 2012, no pet.) (mem. op.) ("although a trial court may do so if presented with proper facts, nothing in section 153.0071 requires best-interest hearings in every case involving a mediated settlement agreement"); *Barina v. Barina*, No. 03-08-00341-CV, 2008 WL 4951224, at *5 (Tex. App.—Austin Nov. 21, 2008, no pet.) (mem. op.) (holding that section 153.0071 does not allow a trial court to refuse to enter judgment on an MSA when one party believes the agreement is different than what the plain language of the MSA reflects); *Beyers v. Roberts*, 199 S.W.3d 354, 359 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("Nothing in [section 153.0071] requires that a trial court conduct a best interest hearing before entering an order pursuant to a mediated settlement agreement.").

[6] *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

[7] *Barina*, 2008 WL 4951224, at *4.

[8] Emotional and physical danger to the child is one of the nine factors in determining the best interest of the child. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

and against public policy to read section 153.0071 to require a trial court to enter judgment on an MSA when presented with evidence that doing so could endanger the child.[9] *See Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013); *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). In holding that the statute forecloses the broad best-interest inquiry, the Court does not expressly state whether the Family Code allows a narrow endangerment inquiry.[10] But allowing the inquiry places the statute in accord with the Family Code's many mechanisms to protect the safety and welfare of children[11] and preserves the right of the State, as *parens patriae*, to intervene when parents' decisions could endanger the safety and welfare of their children.[12]

Here, however, even assuming the trial court's inquiry was a narrow inquiry into whether entering judgment on the MSA could endanger the child, the dissent and I diverge as to whether there was legally sufficient evidence of endangerment.

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[9] The contractual defense of illegality may also allow a trial court to refuse to enter judgment on an MSA that could endanger the safety and welfare of a child. It is illegal to contract to harm a child. Further, it is well established that courts may refuse to enforce contracts that are either expressly or impliedly prohibited by statute or by public policy. *Woolsey v. Panhandle Ref. Co.*, 116 S.W.2d 675, 678 (Tex. 1938). Though we have yet to decide the issue, our courts of appeals have observed that MSAs are contracts and courts may not enforce them if they are illegal. *See, e.g.*, *Garcia-Udall v. Udall*, 141 S.W.3d 323, 331–32 (Tex. App.—Dallas 2004, no pet.) ("A trial court has authority not to enforce illegal provisions in mediated settlement agreements."). Thus, an MSA containing provisions that would result in abuse is void. *See, e.g.*, *United States v. King*, 840 F.2d 1276, 1283 (6th Cir. 1988) ("[A] parent's contract allowing a third person to burn, assault, or torture his child is void.").

[10] As the dissent observes, the Court's decision to not mandamus the trial court to enter judgment on the MSA must mean the Court believes "that the Family Code allows a trial court discretion to refuse to sign a judgment pursuant to an MSA that places a child's safety and welfare in danger." __ S.W.3d at __ (Green, J., dissenting).

[11] __ S.W.3d at __ (discussing temporary orders, temporary restraining orders, temporary injunctions, protective orders, motions to modify, habeas corpus proceedings, continuing the MSA hearing, and contacting the Texas Department of Family and Protective Services as options under the Family Code to protect the safety and welfare of the child).

[12] *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (recognizing the state retains "a *parens patriae* interest in preserving and promoting the welfare of the child"); *Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003) ("The State's role as *parens patriae* permits it to intercede in parental decision-making under certain circumstances.").

III. Application

Applying the above framework, it was an abuse of discretion for the trial court to refuse the MSA and set the matter for trial because no legally sufficient evidence of endangerment was admitted at the *de novo* hearing. Initially, it is important to note the MSA contains an injunction requiring Scott Lee, a registered sex offender, to not be within five miles of the daughter when Stephanie has possession of her and to inform Redus through Stephanie of Scott's whereabouts during Stephanie's possession. As the Court properly observes, "[c]ompliance with the MSA, then, means the child will have no contact with Scott." __ S.W.3d __, __. Thus, entering judgment on the MSA could only endanger the daughter if Stephanie violated the MSA by allowing Scott to violate the injunction.

There was no legally sufficient evidence admitted at the hearing before the trial court that Stephanie would violate the MSA by allowing Scott to violate the injunction. Redus testified at the hearing that approximately one week after signing the MSA, Stephanie informed him that "I don't have to tell you everywhere we go." But the trial court sustained opposing counsel's hearsay objection to the statement. Redus did not challenge that ruling on appeal, and neither side asked Stephanie if she intended to comply with the MSA. Because on its face the MSA does not endanger the child, and the trial court heard no legally sufficient evidence that entering judgment on the MSA could endanger the child because Stephanie would violate the MSA, mandamus relief is warranted for this particular situation. *See Walker*, 827 S.W.2d at 840.[13]

[13] In deciding to refuse the MSA and set the matter for trial, the trial court also disregarded portions of the MSA wholly unrelated to any allegations of endangerment, such as provisions setting child support amounts, determining which parent would cover the child's health insurance, and which parent would claim the child as a dependent for federal

The dissent mischaracterizes the record in an attempt to buttress its conclusion that the trial court did not abuse its discretion. Specifically, the dissent concludes that "[n]ot only did this mother admit on the record that she allowed her daughter to have unsupervised visitation with a registered sex offender, but her testimony informed the trial court that she had helped her husband to violate the terms of an existing court order by allowing such contact." __ S.W.3d at __ (Green, J., dissenting). The law and the record, however, belie this bold assertion. As to the law, courts must presume parties will comply with their orders, just as we presume that fit parents act in the best interest of their children (including when entering into MSAs).[14] Section 153.0071 enforces these presumptions unless there is rebutting evidence that entering judgment on the MSA could endanger the safety and welfare of the child. As to the record, Stephanie never testified whether she would comply with the MSA. The dissent relies upon testimony by Stephanie that it believes indicates she knew Scott had violated his probation. __ S.W.3d at __ & n.2 (Green, J., dissenting). But this is not evidence that Stephanie would violate the potential court order at issue. Importantly, unlike the probation order—which would not subject Stephanie to punishment for violations—a judgment on this MSA would bind Stephanie to comply and subject her to contempt of court, including potential incarceration, for a violation. And notably, even this testimony itself is not as unequivocal as the dissent suggests. When specifically asked about Scott's probation violation, Stephanie stated that it "was that he was—I had unsupervised visitation contact with my daughter," an ambiguous statement at best. Later, upon direct inquiry as to whether she allowed unsupervised visits to occur,

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income tax purposes.

[14] *See Troxel*, 530 U.S. at 68 ("there is a presumption that fit parents act in the best interests of their children").

Stephanie responded "[n]o, she has not." Though the hearing involved no further inquiry as to this issue, the dissent interprets this testimony to mean unsupervised contact did occur between Stephanie's husband and her daughter—which is still irrelevant to the MSA. __ S.W.3d at __ & n.2 (Green, J., dissenting).

Finally, it is not uncommon for family courts to find themselves at a crossroads between divining the legislature's intent on a particular statute and making expedient decisions regarding the safety and welfare of the children entrusted to their judgment. Often, they must interpret statutory language without the benefit of guidance from the court of last resort. This difficulty is greatly heightened by the significant effect family law decisions have on the daily lives of parties. I have no doubt that the experienced trial judge in this case—now having the benefit of this Court's interpretation—will protect the safety and welfare of the child within the parameters established by the Family Code and consistent with legislative policy choices embodied in section 153.0071.

IV. Conclusion

In sum, I believe section 153.0071 of the Family Code precludes a broad best-interest inquiry. A trial court may, however, when presented with evidence that entering judgment on an MSA could endanger the safety and welfare of a child, refuse to enter judgment on the MSA. But because the record before us today reveals no legally sufficient evidence that entering judgment on the MSA could endanger the safety and welfare of the child, I join all but Parts IV and VI of the Court's opinion, as well as its decision that conditional mandamus relief is warranted. *See Walker*, 827 S.W.2d at 840.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: September 27, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0732

IN RE STEPHANIE LEE, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE GREEN, joined by CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, and JUSTICE DEVINE, dissenting.

The Court holds that a trial court cannot deny a motion to enter judgment on a binding mediated settlement agreement (MSA) to modify child custody, possession, or access based on a broad inquiry into the child's best interest. ___ S.W.3d at ___. Although the Court tries to distinguish between this case—in which the trial court stated on the record that it was not in the best interest of the child to approve the MSA—and a case in which modification pursuant to an MSA could endanger a child, here it is a distinction without a difference. Whether the trial court calls its grounds "best interest" or "endangerment," the bottom line is the same—the trial court, having heard testimony of the parties, refused to adopt the parents' agreed modification that it believed would subject the child to exposure to a registered sex offender. The Legislature has made the policy of this state clear: "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." TEX. FAM. CODE § 153.002 (emphasis added). I would hold that under Texas Family Code section 153.0071,

and the Family Code as a whole, a trial court has discretion to refuse to enter judgment on a modification pursuant to an MSA that could endanger the child's safety and welfare and is, therefore, not in the child's best interest.[1] To suggest that the Legislature intended otherwise is, I believe, absurd. I respectfully dissent.

I. Facts and Procedural Background

Stephanie Lee, mother of a young girl, knew when she started dating Scott Lee that he was a convicted sex offender. She later married the sex offender. Despite knowing the conditions of Scott's deferred adjudication, which apparently prohibited him from being around children, she allowed her daughter to be in his presence. She allowed Scott to live with her and her daughter, knowing that it violated the terms of his probation. She allowed her daughter to have unsupervised contact with Scott, knowing that it violated his probation.[2] Moreover, Benjamin Redus, the child's father, testified before the associate judge that Stephanie had allowed her daughter to sleep in the bed between her and Scott, who was naked.[3] Not only did this mother admit on the record that she allowed her daughter to have unsupervised visitation with a registered sex offender, but her

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[1] The concurrence agrees with this conclusion. ___ S.W.3d at ___. Therefore, a majority this Court would hold that a trial court does not abuse its discretion by refusing to enter judgment on an MSA that places a child's safety and welfare at risk.

[2] In a hearing before the trial court, Stephanie was asked about an April 6, 2009, violation of Scott's deferred adjudication. When the trial court asked about the nature of the violation, Stephanie responded: "It was that he was – I had unsupervised visitation contact with my daughter." Later, when asked if Scott "has taken care of [the child] without your supervision," Stephanie answered, "No, she has not." Although the record is not entirely clear, I interpret Stephanie's testimony to mean that her sex-offender husband was allowed to be alone with the child, in violation of his probation.

[3] Benjamin did not repeat this allegation during the hearing before the district court judge.

testimony informed the trial court that she had helped her husband to violate the terms of an existing court order by allowing such contact.

After additional probation conditions were imposed on Scott following his probation violations, the child went to live with her father. Benjamin later filed a petition to modify the parent-child relationship, alleging that circumstances had materially and substantially changed because Stephanie had voluntarily relinquished the primary care and possession of the child to him for more than six months. *See* TEX. FAM. CODE §§ 156.101, .401. Benjamin asserted that Stephanie's "poor parenting decisions . . . have placed our daughter in danger" and that Stephanie had "a history or pattern of child neglect directed against [the child]." He requested that the court limit Stephanie's possession and access and grant her only supervised visitation, and he sought to enjoin Stephanie from allowing Scott to be within twenty miles of the child.

Benjamin and Stephanie ultimately entered into an MSA reflecting their agreed modification of the initial order that established custody and possession. The MSA gave Benjamin the exclusive right to designate the primary residence of the child—a right previously afforded Stephanie—and allowed Stephanie periodic, unsupervised possession of the child. Additionally, the MSA contained a provision directed at Scott, who did not attend the mediation and was not a party to the suit or the MSA:

> At all times[,] Scott Lee is enjoined from being within 5 miles of [the daughter]. During the mother's periods of possession with [the daughter], Scott Lee shall notify [Benjamin] through Stephanie Lee by e-mail or other mail where he shall be staying . . . [a]nd the make and model of the vehicle he will be driving. This shall be done at least 5 days prior to any visits. [Benjamin] shall have the right to have an agent or himself monitor [Scott] Lee's location by either calling or driving by the location at reasonable times.

Although both Benjamin and Stephanie maintained that the MSA was in the child's best interest when the MSA was presented to the associate judge for entry of judgment, the associate judge refused to accept the MSA. Benjamin later requested to withdraw his consent to the MSA, stating that he believed it was not in the best interest of his daughter. He testified before the district court that he no longer believed the agreement was in his daughter's best interest and that when he signed the MSA, he was under the impression that Scott was still under probation guidelines and was going to move, which had not happened. The district court, which heard only brief testimony from Stephanie and Benjamin, determined that the MSA was not in the best interest of the child and denied Stephanie's motion to enter judgment on the MSA. The court then set the case for a full evidentiary trial.

II. Section 153.0071 and the Family Code

This case presents a single issue of first impression: Does section 153.0071 of the Texas Family Code allow a trial court any discretion to refuse to enter judgment on an MSA that seeks to modify an existing court order pertaining to possession, access, or conservatorship of a child when the MSA complies with the statutory prerequisites but the court determines that the MSA endangers the child's safety and welfare and, thus, is not in the child's best interest? I believe it does.

A. Statutory Provisions

Since at least 1935, Texas statutes have reflected the policy of this state to ensure that trial courts protect minor children's best interests. *See* Act of May 15, 1935, 44th Leg., R.S., ch. 39, § 1, 1935 Tex. Gen. Laws 111, 112 (providing that the trial court "shall make such orders regarding the custody and support of each such [minor] child or children, as is for the best interest of same"); Act

of May 25, 1973, 63d Leg., R.S., ch. 543, § 1, sec. 14.07(a), 1973 Tex. Gen. Laws 1411, 1425 ("The best interest of the child shall always be the primary consideration of the court . . . ."). Section 153.002 of the Texas Family Code describes this overarching policy: "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." TEX. FAM. CODE § 153.002 (emphasis added). In suits affecting the parent-child relationship, it is the public policy of the State of Texas to:

> (1) assure that children will have frequent and continuing contact with parents *who have shown the ability to act in the best interest of the child*;
>
> (2) provide a *safe*, stable, and nonviolent environment for the child; and
>
> (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

Id. § 153.001(a) (emphasis added).

Texas statutes also reflect the state's general public policy "to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM. CODE § 154.002. Advancing that policy, the Legislature enacted Texas Family Code section 153.0071 to address the resolution of suits affecting the parent-child relationship, providing in pertinent part:

(a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.

(b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.

(c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.

(d) A mediated settlement agreement is binding on the parties if the agreement:

> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:

> (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
>
> (2) the agreement is not in the child's best interest.

TEX. FAM. CODE § 153.0071.[4] When first enacted in 1995, section 153.0071 addressed resolution of both dissolution-of-marriage cases and suits affecting the parent-child relationship, but in 1997 the Legislature enacted Family Code section 6.602 to address alternative dispute resolution in divorce cases and limited section 153.0071 to suits affecting the parent-child relationship. *See* Act of May 26, 1995, 74th Leg., R.S., ch. 751, § 27, sec. 153.0071, 1995 Tex. Gen. Laws 3888, 3899; Act of April 7, 1997, 75th Leg., R.S., ch. 7, § 1, sec. 6.602, 1997 Tex. Gen. Laws 8, 31–32; Act of April 7, 1997, 75th Leg., R.S., ch. 937, § 3, sec. 153.0071(f), 1997 Tex. Gen. Laws 2941, 2941. In 2005, the Legislature added the family violence provision in 153.0071(e-1), expressly recognizing a trial court's role in considering the best interest of a child when presented with an MSA. Act of June 18, 2005, 79th Leg., R.S., ch. 916, § 7, sec. 153.0071(e-1), 2005 Tex. Gen. Laws 3148, 3150.

B. Analysis of Section 153.0071

Stephanie contends that she is "entitled to judgment" on the MSA because the MSA meets section 153.0071(d)'s prerequisites and the family violence provision set forth in section 153.0071(e-1) does not apply. *See* TEX. FAM. CODE § 153.0071(d), (e), (e-1). I do not disagree that

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[4] The Collaborative Family Law Act, enacted in 2011, contains a similar provision:

> (a) A settlement agreement under [chapter 15, the Collaborative Family Law Act] is enforceable in the same manner as a written settlement agreement under Section 154.071, Civil Practice and Remedies Code.
>
> (b) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law, a party is entitled to judgment on a collaborative family law settlement agreement if the agreement:
>
> > (1) provides, in a prominently displayed statement that is in boldfaced type, capitalized, or underlined, that the agreement is not subject to revocation; and
> >
> > (2) is signed by each party to the agreement and the collaborative lawyer of each party.

TEX. FAM. CODE § 15.105.

this MSA is binding on the parties or that the family violence provision does not apply in this case, but the Court's statutory analysis must not end there. We construe statutes as a whole, not as isolated provisions. *See, e.g.*, *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). We take into consideration the statutory context. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results."); *Tex. Lottery Comm'n v. First State Bank of Dequeen*, 325 S.W.3d 628, 635 (Tex. 2010) ("We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context . . . ."). When analyzing the plain language of section 153.0071, the Court cannot ignore the fundamental best interest consideration required by section 153.002 and the overarching public policies set forth in section 153.001 to ensure the safety and welfare of children. *See* TEX. FAM. CODE §§ 153.001, .002, .0071.

1. "Entitled to Judgment" Should Not Be Read As Absolute

I agree that section 153.0071 does not *require* a trial court to determine that an MSA is in a child's best interest before entering judgment on an MSA. This makes sense because trial courts will generally delegate to parties entering an MSA the role of ensuring that the child's best interest is protected. *See id.* § 151.001(a)(2) ("A parent of a child has the following rights and duties . . . the duty of care, control, protection, and reasonable discipline of the child . . . ."). As we explained in *Miller ex rel. Miller v. HCA, Inc.*:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making

> life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.
>
> The Texas Legislature has likewise recognized that parents are presumed to be appropriate decision-makers . . . .

118 S.W.3d 758, 766 (Tex. 2003) (internal citations omitted); *see In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007) (recognizing that the Legislature amended the grandparent access statute following the United States Supreme Court's plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 68 (2000), to provide that "a trial court must presume that a fit parent acts in his or her child's best interest"). Trial courts, therefore, should refrain from performing a broad best interest inquiry or conducting a full evidentiary hearing on every MSA presented. The question here is what happens when the trial court believes, based on evidence, that the parties have entered into an MSA without safeguarding the child's best interest. Can the presumption that parties act in the child's best interest, and protect the child's safety and welfare, be rebutted or negated? And does the Family Code, in that situation, allow the trial court to ensure that the child's safety and welfare are protected by refusing to enter judgment on an MSA that places the child in danger? I believe the answer to both questions is yes.

Section 153.0071(e) states that if an MSA satisfies the prerequisites of 153.0071(d), "a party is entitled to judgment on the [MSA] notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." TEX. FAM. CODE § 153.0071(e). The Court implies that "entitled to judgment" is absolute, making the presumption that parties act in a child's best interest irrebuttable and disallowing a trial court discretion to reject an MSA that jeopardizes a child's safety and welfare.[5]

[5] Yet, curiously, the Court has not ordered the trial court to enter judgment on the MSA.

But when read in context and in harmony with other statutory provisions, I cannot conclude that the Legislature intended such an absurd result. *See Molinet*, 356 S.W.3d at 411 (recognizing that a statute's plain language is the best indicator of the Legislature's intent, "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results").

Woven throughout the Family Code is the clearly defined policy of this state that courts must ensure protection of a child's best interest. *See* TEX. FAM. CODE §§ 153.001–.002. More than one hundred sections of the Family Code contain specific provisions to protect children's best interests.[6] Indeed, children who are the subject of custody cases are particularly vulnerable, and Texas family law, as a whole, seeks to address the needs and interests of those children, who generally do not have a voice in the legal system and often cannot fully exercise their legal rights and advocate for their interests. *See, e.g.*, *Miller*, 118 S.W.3d at 766 ("The State's role as *parens patriae* permits it to intercede in parental decision-making under certain circumstances. . . . The Texas Legislature has acknowledged the limitations on parental decision-making."); *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) (recognizing that courts cannot ignore section 153.001's remedial purpose of protecting

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[6] *See, e.g.*, TEX. FAM. CODE §§ 2.103(a), (f); 31.002(a); 31.005; 33.003(i); 33.008(a); 45.004(a); 51.11(b); 54.04(i); 54.05(m); 54.11(k); 60.010; 85.001(b); 85.005(c); 105.004(2); 105.009(a); 107.001(1), (5); 107.002(a), (e); 107.004(e); 107.005(a), (c); 107.008(b), (c); 107.011(a), (b); 107.021(a), (b); 153.001(a); 153.002; 153.004(b), (d), (e); 153.006(c); 153.007(b), (d); 153.0071(b), (e-1); 153.009(c); 153.015(b); 153.072; 153.131(a), (b); 153.133(a); 153.134(a); 153.191; 153.193; 153.252(2); 153.254(a); 153.256(1); 153.257; 153.312(a); 153.317(a); 153.373(2); 153.374(b); 153.433(a), (b); 153.501(b); 153.551(c); 153.601(4); 153.605(b); 153.6051(b); 153.6082(e); 153.703(a), (c); 153.704(d); 153.705(a), (c); 153.709(b); 154.122(a); 154.123(a), (b); 154.124(b), (d); 154.131(c); 154.182(b); 156.006(b); 156.101(a); 156.102(b); 156.103(a), (b); 156.402(a), (b); 156.409(a-2); 160.608(b); 161.001(2); 161.003(a); 161.004(a); 161.005(a); 161.007(3); 161.101; 161.103(b); 161.2011(a); 161.204; 161.205(2); 162.0025; 162.009(b); 162.010(c); 162.014(b); 162.015(a); 162.016(a), (b); 162.020; 162.102; 162.2061(a); 162.302(e); 162.308(a); 231.101(d); 261.004(b); 262.1015(b); 262.114(c); 263.102(c); 262.201(e); 262.205(e); 263.007(b); 263.302; 263.3026(b); 263.306(a); 263.307; 263.401(b); 263.403(a); 263.404(a); 263.502(c), (d); 263.503(a), (b); 264.108(a); 264.403(b); 264.601(2); 264.754; 264.903(c); 266.004(b), (e), (g); 266.0041(b), (c), (e); 266.010(g), (i).

abused and neglected children, even in parental rights termination proceedings). The Family Code's many best interest provisions reflect this state's policy that children's interests are to be paramount in legal proceedings, and that judges have the power to safeguard children from endangerment. *See, e.g.*, *In re E.R.*, 385 S.W.3d 552, 555 (Tex. 2012) (referring to the "State's responsibility to promote the child's best interest" and recognizing that although "a parent must remain vigilant with respect to her child's welfare, . . . courts must *always* consider the child's best interest" (emphasis added)); *Miller*, 118 S.W.3d at 766 ("Of course, this broad grant of parental decision-making authority is not without limits."). Although "the emotional and physical danger to the child now and in the future" is but one factor we listed as pertinent to a best interest determination, *see Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976), surely a custody, possession, or access arrangement that endangers a child's safety and welfare is not in the child's best interest and, thus, should not be adopted as the court's judgment.

The Family Code provision governing modification of orders for custody, possession, access, and determination of residence reflects this state policy favoring judicial authority to protect children's best interests. Section 156.101 provides, in pertinent part:

> The court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child *if modification would be in the best interest of the child* and:
>
> > (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since . . .
> >
> > (A) the date of the rendition of the order; . . .
> >
> > . . . or

> (3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.

TEX. FAM. CODE § 156.101 (emphasis added). Nothing in section 156.101 addresses the processes through which modification terms can be reached, but regardless of whether those terms reflect a party agreement as expressed in a Rule 11 agreement, agreed parenting plan, or MSA, or are the product of binding arbitration or a full evidentiary hearing, the result is the same—the trial court modifies the terms of an earlier order that provided for conservatorship, possession, access, or determination of residence. Section 156.101 requires that a trial court modify such an order only when it would be in the child's best interest.

Section 153.0071, which reflects the state policy favoring the peaceable resolution of family disputes through alternative dispute resolution (ADR) procedures, *see* TEX. CIV. PRAC. & REM. CODE § 154.002, allows a trial court to enter judgment on an MSA for modification without a best interest determination. But the statute does not require trial courts to *always* enter judgment on binding MSAs without considering a child's best interest, as the Court's opinion suggests. In fact, the statute expressly authorizes consideration of a child's best interest in some MSA cases. *See* TEX. FAM. CODE § 153.0071(e-1). Section 153.0071(e-1), enacted a decade after the other MSA provisions, allows a trial court to consider a child's best interest when a party to an MSA was a victim of family violence, which impaired that party's decision-making ability. *See id.* "Family violence," as used in the Family Code, includes a threat that reasonably places the party or a household member "in fear of imminent physical harm, bodily injury, assault, or sexual assault." *Id.* §§ 71.004(1), 101.0125. The family violence provision in section 153.0071(e-1) makes sense only when read to mean that

(1) a party's impaired judgment resulting from physical violence or the threat of violence negates the presumption that the parties acted in the child's best interest in entering the MSA, and (2) the trial court can therefore look beyond the face of the MSA and consider whether the terms and provisions of the agreement are, in fact, in the best interest of the child. If the trial court determines that, despite family violence and impaired judgment, the MSA is in the child's best interest, the court must enter judgment on the MSA. But if the agreement is not in the child's best interest, the trial court can reject the agreement. Had the Legislature used "or" instead of "and" between the two parts of that family violence provision, a trial court would be able to reject an MSA simply because a parent was induced by family violence to enter into an MSA. But by using "and," the Legislature affirmed that the court's paramount concern, even in the case of MSAs obtained through family violence, is the child's best interest.[7] Although there is no indication that the family violence provision in section 153.0071(e-1) applies here, I believe that this last-enacted part of section 153.0071 indicates the will of the Legislature to allow a trial court to consider the terms of a modification when the presumption that MSA parties act in the best interest of the child has been

[7] At oral argument, Benjamin's counsel stated that he believed the Legislature inadvertently used "and" instead of "or" in the family violence provision, despite its intention to allow trial courts to consider the child's best interest before entering judgment on an MSA. *See* TEX. FAM. CODE § 153.0071(e-1); *Bd. of Ins. Comm'rs of Tex. v. Guardian Life Ins. Co. of Tex.*, 180 S.W.2d 906, 908 (Tex. 1944) (explaining that "and" is sometimes construed as "or," but only when "the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake"). I am not convinced that the Legislature erred in this instance, as it is plausible that the Legislature, in the interest of avoiding the hardship of prolonged custody litigation on children in family violence situations, would want a court to invalidate an MSA that was the result of family violence only if the court finds that the MSA is not in the child's best interest. I do not disagree with Benjamin, however, that the Legislature might effectuate the overarching policy for courts to act in the child's best interest, as codified in section 153.002 and expressed throughout the Family Code, by allowing trial courts to reject MSAs when either the family violence requirement is met *or* the court finds it is not in the best interest of the child. I leave Benjamin's suggested revision of the statute to the Legislature to enact an amendment as it deems necessary.

negated. I further believe that section 153.0071, in the context of the Family Code as a whole, affords a trial court discretion to decline to enter judgment on a modification pursuant to an MSA when the court determines that it threatens a child's safety and welfare and is therefore not in the child's best interest. *See* TEX. GOV'T CODE § 311.025 (instructing that when statutes or statutory amendments are irreconcilable, those statutes or amendments enacted latest prevail).

Allowing trial court discretion to consider the terms of an MSA in rare cases such as this comports with section 153.004 of the Family Code, which allows a trial court to protect a child's safety and welfare in family violence cases by hearing evidence to ensure that a parent is granted access to a child only when it would not endanger the child and would be in the child's best interest. Section 153.004 states, in relevant part:

> (b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child . . . .
>
> (c) The court shall consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.
>
> (d) The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit, unless the court:
>
> > (1) finds that awarding the parent access to the child *would not endanger the child's physical health or emotional welfare* and *would be in the best interest of the child*; and
> >
> > (2) renders a possession order that is designed to *protect the safety and well-being of the child* and any other person who has been a victim of family violence committed by the parent and that may include a requirement that:

> (A) the periods of access be continuously supervised by an entity or person chosen by the court; . . . .
>
> (e) It is a *rebuttable presumption that it is not in the best interest of a child* for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern or past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

TEX. FAM. CODE § 153.004 (emphasis added). Although some of the language of section 153.004 is directed at the acts of a parent, "family violence" is defined more broadly in the Family Code, to include:

> (1) an act by a member of a family *or household* against another member of the family *or household* that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is *a threat* that reasonably places the member *in fear of* imminent physical harm, bodily injury, assault, or sexual assault . . . [or]
>
> (2) abuse, as that term is defined by Sections 261.001(1)(C), (E), and (G), by a member of a family *or household* toward a child of the family or household.

Id. §§ 71.004(1) (emphasis added), 101.0125. The definition of "abuse" in section 261.001(1)(C) includes "physical injury that results in substantial harm to the child, or the *genuine threat of substantial harm* from physical injury to the child." *Id.* § 261.001(1)(C) (emphasis added). Taken together, it is nonsensical and absurd to read section 153.0071 as requiring a trial court to enter a judgment that section 153.004 prohibits a trial court from entering, especially in light of the specific directive that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." *Id.* § 153.002; *see also Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) (recognizing that this Court "interpret[s] statutes to avoid an absurd result").

In the recently-enacted Collaborative Law Act (CLA), which contains a provision very similar to section 153.0071(e) but is not implicated in this case, the Legislature expressly authorized trial courts to issue emergency orders to protect children's welfare, despite the fact that the parties are engaging in a collaborative process to avoid litigation. *See* TEX. FAM. CODE § 15.104. Section 15.104 of the Family Code provides:

> During a collaborative family law process, a tribunal may issue an emergency order *to protect the health, safety, welfare, or interest of a party or a family*, as defined by Section 71.003. If the emergency order is granted without the agreement of all parties, the granting of the order terminates the collaborative process.

Id. (emphasis added). Under the CLA, the collaborative family law process concludes by "resolution of a . . . signed record," presumably meaning a signed settlement agreement. *See id.* § 15.102(c)(1). However, a collaborative process does not conclude "if, with the consent of the parties to a signed record resolving all or part of the collaborative matter, a party requests a tribunal to approve a resolution of the collaborative family matter or any part of that matter as evidenced by a signed record." *Id.* § 15.102(h). So when parties present a signed settlement agreement to a trial court judge for approval or entry of judgment, the court has authority to issue an emergency order to protect the safety or welfare of the children. The CLA thus confirms the Legislature's intent that trial courts are to protect children from harm and protect their best interests, even when children are placed at risk of harm by an agreement reached by the parties through a collaborative process.

I read section 153.0071, in the broader context of the family violence provision and the Family Code as a whole, as allowing a trial court discretion in rare cases such as this to consider the terms of an MSA before issuing a modification order, when evidence negates the presumption that

the parties acted in the child's best interest when negotiating or agreeing to an MSA. This reading gives effect to the state policy favoring amicable, efficient resolution of disputes through ADR, while also giving effect to the state policy ensuring protection of children's best interests in custody, possession, and access cases. *See* TEX. FAM. CODE §§ 153.001–.002, 156.101; TEX. CIV. PRAC. & REM. CODE § 154.002; *see also Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982) ("The trial court is given wide latitude in determining the best interests of a minor child."); *Leonard v. Lane*, 821 S.W.2d 275, 277 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("The court has the right to act in the best interest of the child, notwithstanding any agreements of the parties."). Moreover, this construction of the statute harmonizes provisions of the Family Code to streamline resolution of disputes in most suits affecting the parent-child relationship, while allowing trial courts to safeguard children's welfare in rare cases where parents or caregivers cannot be trusted to do so. In this case, Stephanie, who would be given unsupervised possession under the MSA, testified that she dated and then married a man she knew to be a convicted sex offender, and testified that she allowed him to live with her and her young daughter and allowed him unsupervised contact with the child, both in violation of his probation restrictions. Although the MSA contains provisions requiring Scott to stay away from the child during Stephanie's periods of possession, I question the enforceability of those provisions against either Stephanie, whose agreement purports to bind a non-party, or Scott, who did not agree to those provisions and is not a party to the lawsuit. I cannot join the Court in concluding that the trial court here abused its discretion by refusing to enter judgment on the MSA and ordering a full evidentiary hearing. Nor can I agree with the concurrence that the trial court abused it discretion because the evidence of endangerment was insufficient. *See* ___ S.W.3d at ___.

The Court takes the position that recognizing a trial court's discretion to consider an MSA's terms in some MSA cases renders the family violence provision in section 153.0071(e-1), as well as other statutory provisions mentioning children's best interests, mere surplusage. *See id.* at ___; *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008) (instructing that "we 'give effect to all [a statute's] words and, if possible, do not treat any statutory language as mere surplusage'" (quoting *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006))). I do not accept that use of the term "best interest" outside the expression of the state's policy in sections 153.001 and 153.002 is surplusage; rather, I read the "best interest" provisions in section 153.0071(e-1) and elsewhere in the Family Code as guidance to courts implementing the overarching policy directive expressed in sections 153.001 and 153.002. Surely the Legislature did not commit a useless act in enacting each of more than one hundred statutory provisions to assist courts in determining *how* and *when* to consider a child's best interest.[8] *See Tex. Lottery Comm'n*, 325 S.W.3d at 637 ("Courts 'do not lightly presume that the Legislature may have done a useless act.'" (quoting *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998))). No, the Legislature continues to enact provisions using "best interest" to further the clearly defined policy of the state that best interest *always* be the court's primary consideration, and that trial courts are to protect the safety and welfare of children.

As further support for its construction, the Court points to the arbitration provision in section 153.0071(b), which allows a trial court to consider the best interest of the child before entering

[8] *See supra* at n.6.

judgment on an arbitrator's award, as indicating that the Legislature knew how to authorize courts to refuse to enter judgment on best interest grounds but chose not to do so for MSAs. *See* ___ S.W.3d at ___. I read the Legislature's language in section 153.0071(b) as wholly consistent with the Family Code's overarching policy that courts have discretion to protect the best interests of children, and not inconsistent with section 153.0071(e), under which courts generally presume that MSA parties have ensured that an MSA is in the child's best interest. In the rare instance that the evidence before the trial court negates that presumption, however, I believe the Family Code gives the court discretion to consider whether a proposed modification could place a child's safety or welfare at risk and thus not be in the child's best interest, just as the court has discretion to consider whether an arbitration award is in a child's best interest. Under the MSA between Stephanie and Benjamin, any disputes regarding interpretation or performance of the agreement or its provisions are to be decided by binding arbitration conducted by the mediator,[9] which the trial court could then review on best interest grounds pursuant to section 153.0071(b). It seems nonsensical to conclude, as the Court does, that the trial court cannot consider the child's best interest at the MSA stage but could consider the child's best interest only after an arbitration award deciding issues relating the entry, interpretation, or performance of the MSA.[10]

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[9] Under the MSA, the parties agreed to have their attorneys first attempt to resolve disputes through phone conference with the mediator, and if the disputes cannot be resolved by phone conference, then they are to be decided by arbitration, with the mediator serving as arbitrator.

[10] Under this construction, Benjamin is powerless to challenge the MSA when a motion for entry of judgment is being considered. Instead, he must wait until the trial court enters judgment on the MSA and then challenge its enforcement through arbitration and, ultimately, again in court. Surely this inefficient process is not what the Legislature intended.

To be clear, I would not hold that a trial court can refuse to enter judgment on an MSA based on any one of the factors we listed in *Holley v. Adams* as pertinent to a best interest determination. *See* 544 S.W.2d at 371–72. That issue is not before us in this case,[11] as here we must decide only whether a trial court has discretion to reject an MSA that the trial court determines, based on evidence, places a child's safety and welfare in danger and, consequently, cannot possibly be in the child's best interest. I would hold that, under the unusual facts of this case, the trial court did not abuse its discretion by declining to enter judgment on the MSA that provides Stephanie unsupervised visitation and contains protective provisions directed only at Scott, who is not a party to the agreement or the lawsuit.

2. "Notwithstanding . . . Another Rule of Law" Should Be Read Narrowly

The Court reads "notwithstanding . . . another rule of law" in section 153.0071(e) broadly, as evidencing legislative intent that cases involving binding MSAs be excepted from the overarching public policy interests embodied (1) in section 153.002—that "[t]he best interest of the child shall always be" a court's "primary consideration" when "determining the issues of conservatorship and

[11] The Court suggests I misstate the issue because the trial court rejected the MSA on best interest grounds and did not make specific findings that the MSA places the child's safety and welfare in danger. ___ S.W.3d at ___ n.23. But findings necessary to support a trial court judgment will be implied when they are supported by evidence. *See, e.g.*, *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003) ("When neither party requests findings of fact and conclusions of law, it is implied that the trial court made all fact findings necessary to support its judgment." (citing *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002))); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (holding that findings of fact should be implied in favor of an order modifying child support (citing *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988) (per curiam))). In the hearing before the trial court, there was no discussion of the specific *Holley* factors, but there was testimony about Scott, his contact with the child, and resulting probation violations. I believe I have accurately stated the issue and that in this case, as with any case in which an MSA endangers a child, these grounds for rejecting an MSA—that it jeopardizes a child's safety and that it is not in the child's best interest—are simply two sides of the same coin. Whether the trial court abused its discretion in rejecting an MSA that puts a child's safety and welfare in danger should not come down to whether the trial court used the word "endangerment" or tracked the language of the statute and instead used the phrase "not in the best interest of the child."

possession of and access to the child," and (2) in section 153.001—the state's public policy to "provide a safe, stable, and nonviolent environment for the child." *See* ___ S.W.3d at ___. But nothing in the statute expressly overrides either the Family Code's fundamental requirement that the court act in a manner consistent with the child's best interest or the express best interest provision for modifications in section 156.101. In addition, nothing in the statute expressly limits a trial court's authority to decline to enter judgment on a properly executed, binding MSA to the family violence context addressed in section 153.0071(e-1).

Although the Court cites our recent opinion in *Molinet v. Kimbrell*, 356 S.W.3d 407 (Tex. 2011), as support for its construction, we have never construed the precise language in section 153.0071(e). *See* ___ S.W.3d at ___. In *Molinet*, we considered a limitations statute that applied "[n]otwithstanding any other law," where a separate conflict-of-laws provision stated that in the event of a conflict, the chapter containing the limitations statute prevails. *See* 356 S.W.3d at 411–15. We held that the limitations statute conflicted with a separate statute regarding joining persons designated as responsible third parties, and that the Legislature resolved the conflict in favor of the limitations statute. *See id.* at 413. That analysis offers little guidance here, where the statutory language differs significantly and there is no conflict-of-laws provision to help resolve any conflict.

The Court equates *Molinet*'s "[n]otwithstanding any other law . . . ," language with the language at issue in this case: ". . . notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." *See* ___ S.W.3d at ___. But we cannot presume that the Legislature used the different terms interchangeably. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) ("[W]e . . . must presume that the Legislature chose its words carefully . . . ." (citing *City of*

Beaumont v. Bouillion, 896 S.W.2d 143, 148 (Tex. 1995))). In fact, we "presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind." *Tex. Lottery Comm'n*, 325 S.W.3d at 635. Although "another" can mean simply "an additional," it seems more likely in the context of section 153.0071(e) that the Legislature used "another" to mean "one more person or thing of the same type as before." *See Another Definition*, MACMILLANDICTIONARY.COM, http://www.macmillandictionary.com/us/dictionary/american/another (last visited Sept. 18, 2013); *Another Definition*, OXFORDDICTIONARIES.COM, http://www.oxforddictionaries.com/definition/american_english/another (last visited Sept. 18, 2013) (defining "another" as "used to refer to an additional person or thing of the same type as one already mentioned or known about; one more; a further"); *see also In re Hall*, 286 S.W.3d 925, 929 (Tex. 2009) (explaining that "if a different, more limited, or precise definition is apparent from the term's use in the context of the statute, we apply that meaning," and applying the second dictionary definition of "detention"). I would construe "another rule of law" with reference to section 153.0071(e)'s preceding clause, "Rule 11 of the Texas Rules of Civil Procedure."

Prior to the enactment of ADR provisions in section 153.0071, parties settled family disputes by entering into agreements pursuant to Texas Rule of Civil Procedure 11, Chapter 154 of the Civil Practice and Remedies Code, and general principles of contract law. *See In re Calderon*, 96 S.W.3d 711, 717–18 (Tex. App.—Tyler 2003, orig. proceeding). Rule 11 provides a mechanism for parties or attorneys to narrow the issues before the trial court and independently resolve other matters in a pending lawsuit through properly executed written agreements. TEX. R. CIV. P. 11 ("Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit

pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."); *see also Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 (Tex. 2007); *Padilla v. LaFrance*, 907 S.W.2d 454, 459–61 (Tex. 1995). If a party to a settlement agreement—typically a Rule 11 agreement—withdrew consent before the trial court entered judgment, the other party could enforce the agreement only as any other contract, by filing a separate breach-of-contract suit. *See Calderon*, 96 S.W.3d at 718. With the enactment of section 153.0071 and the later enactment of section 6.602 for resolution of divorce disputes, the Legislature created a procedural shortcut to eliminate the requirement of a separate suit for enforcement of MSAs when a party repudiates the agreement, instead allowing the opposing party to easily seek enforcement of, and judgment on, an MSA that meets the statutory prerequisites, without a separate breach-of-contract suit. *See id.* ("[W]e hold that the phrase 'notwithstanding Rule 11, Texas Rules of Procedure or another rule of law' in section 153.0071(e) means that Rule 11, Chapter 154 of the Texas Civil Practice and Remedies Code, and general contract law, insofar as they apply to the enforcement of settlement agreements, do not apply to the enforcement of a mediated settlement agreement in a [suit affecting the parent-child relationship (SAPCR)] if the agreement meets the requirements of 153.0071(d)."); *Boyd v. Boyd*, 67 S.W.3d 398, 403 (Tex. App.—Fort Worth 2002, no pet.) (holding that "notwithstanding Rule 11 . . . or another rule of law" means "the requirements of [R]ule 11 and the common law that ordinarily apply to the enforcement of settlement agreements do not apply to mediated settlements . . . if the agreements meet the three requirements listed"); *Cayan v. Cayan*, 38 S.W.3d 161, 164–66 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that the "notwithstanding Rule 11 . . . or another rule of law" language

reflects the Legislature's intent to eliminate the requirement of enforcement by a separate suit and that "another rule of law" refers to the rules of law that require a separate suit for enforcement). Because section 153.0071(e) specifically refers to Rule 11 agreements—the primary mechanism for settlement agreements prior to enactment of section 153.0071—I interpret the general phrase "another rule of law" in this instance to mean that, regardless of any provisions under which similar types of agreements to resolve family disputes may be repudiated or withdrawn prior to entry of judgment, a party's withdrawal of consent to a binding MSA shall not interfere with the entry of judgment on or enforcement of a properly executed, binding MSA. This Court agreed with this view when it considered section 6.602, which provides for MSAs in divorce cases and contains the same language at issue in section 153.0071. *See Milner v. Milner*, 361 S.W.3d 615, 618 (Tex. 2012) ("[O]nce signed, an MSA cannot be revoked like other settlement agreements.").

By giving the phrase "notwithstanding . . . another rule of law" such an expansive meaning, the Court renders meaningless the Legislature's specific reference to Rule 11. If the Legislature intended "another rule of law" to mean *all* rules of law without restriction, then the Legislature would not have needed to reference Rule 11. *See Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 n.35 (Tex. 2010) ("We construe statutes to give effect to every provision and ensure that no provision is rendered meaningless or superfluous."). Under the canon of construction *noscitur a sociis*, we interpret the Legislature's words in their statutory context. *See, e.g.*, *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 606 (Tex. 2008) ("Under the traditional canon of construction *noscitur a sociis* ('a word is known by the company it keeps'), each of the words used . . . must be construed in context."); *Feiss v. State Farm Lloyds*, 202 S.W.3d 744, 750 (Tex. 2006) ("In

construing the [statutory] term, we are governed by the traditional canon of construction *noscitur a sociis*—'that a word is known by the company it keeps.'"); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003) ("[T]he meaning of particular words in a statute may be ascertained by reference to other words associated with them in the same statute."). The purpose of this rule of statutory construction is "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Feiss*, 202 S.W.3d at 750 n.29 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). Because "another rule of law" appears in the context of "Rule 11, Texas Rules of Civil Procedure," I would construe the phrase narrowly.

The Court suggests that allowing a trial court to consider the specific terms of an MSA before entering judgment, even in a very rare case such as this, would undermine the state's strong public policy in favor of ADR. *See* ___ S.W.3d at ___. But the overarching best interest policy expressed in section 153.002 of the Family Code and the ADR public policy in section 154.002 of the Civil Practice and Remedies Code are not incompatible or mutually exclusive. *Compare* TEX. FAM. CODE § 153.002, *with* TEX. CIV. PRAC. & REM. CODE § 154.002. I would harmonize those provisions to promote the state's strong interest in both, by encouraging parties to rely upon ADR procedures to amicably and peaceably resolve disputes but also by providing courts the judicial oversight to effectuate the state's fundamental and longstanding public policy of acting in the child's best interest—especially, in those rare cases, when parents may not. I am not convinced, as Stephanie argues and the Court seems to believe, that recognizing the trial court's authority to protect children from custody and possession modifications that threaten their safety and welfare, and are therefore not in their best interests, would unravel the entire structure and efficacy of ADR procedures in child

custody disputes. Nor am I convinced that parties in suits affecting the parent-child relationship would cease to rely upon the mechanisms of peaceable resolution through mediation or another form of ADR. Rather, I believe that sensible parties would continue to rely upon the most effective and efficient procedures available to resolve their disputes.[12]

We must presume that the Legislature enacted section 153.0071 with the intent that it not conflict with existing statutory provisions such as sections 153.001 and 153.002, that it further the public interest, and that it lead to a just and reasonable result. *See* TEX. GOV'T CODE § 311.021. "[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." *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963). Guided by the Legislature's specific reference to Rule 11 agreements and use of the word "another," I do not read "notwithstanding . . . another rule of law" so broadly as to mean any and all other statutory provisions. In fact, I believe such a broad construction leads to an absurd result, as it potentially allows parties to circumvent statutory provisions enacted to protect children, as well as the clear policy of the state to ensure protection of children's best interests. *See Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011) ("We . . . interpret statutes to avoid an absurd result."); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) ("[W]e construe the statute's words according to their plain and common meaning . . . unless such a construction leads to absurd

[12] If parents know what is best for their children, as the Court believes, and if children suffer needlessly from traditional custody litigation, a fact the Court says is well-documented, and if successful mediation largely avoids those harmful effects, as the Court asserts, then why would parents opt not to use mediation to settle their disputes? *See* ___ S.W.3d at ___.

results."); *Leonard*, 821 S.W.2d at 278 ("Parties cannot by contract deprive the court of its power to guard the best interest of the child.").

III. The Trial Court's Discretion to Reject This MSA

The trial court clearly determined, based on Stephanie's own admissions, that Stephanie has little regard for court orders to protect children from her sex-offender husband, and that she has repeatedly made decisions against her daughter's best interest, putting her daughter at substantial risk. Thus, this is a rare case where a party's testimony negated the presumption that the parties acted in the child's best interest when entering into the MSA. Under these circumstances, I would hold that it was not an abuse of discretion for the court to consider the terms of the MSA and whether the modification, which would allow Stephanie unsupervised periods of possession, posed a threat to the child's safety and welfare.

Although the MSA contains provisions to keep Scott away from the child during Stephanie's periods of possession and appears at first glance to offer the child more protection than the 2007 order adjudicating parentage,[13] those protective provisions are directed only at Scott, who is not a party to the MSA or the lawsuit. The MSA provides:

> At all times[,] Scott Lee is enjoined from being within 5 miles of [the daughter]. During the mother's periods of possession with [the daughter], Scott Lee shall notify [Benjamin] through Stephanie Lee by e-mail or other mail where he shall be staying . . . [a]nd the make and model of the vehicle he will be driving. This shall be done at least 5 days prior to any visits. [Benjamin] shall have the right to have an

[13] The record contains no indication that the trial court has issued temporary orders or otherwise altered the custody, possession, and access provisions of the 2007 order.

> agent or himself monitor [Scott] Lee's location by either calling or driving by the location at reasonable times.[14]

Under this provision, Stephanie could have only one duty with regard to protecting her child from exposure to the registered sex offender who lives with her: She must pass along to Benjamin information that Scott provides. But Stephanie can perform only if Scott provides the notification in the first place. If Scott offers no information, the MSA requires nothing of Stephanie. If Scott does not stay the required distance from the child, the MSA requires nothing of Stephanie. If Scott appears at the house while the child is there, the MSA requires nothing of Stephanie. Scott could provide no location or vehicle information, could appear at the house during Stephanie's period of possession, and could climb naked into bed with the child, and Stephanie would have complied with the MSA. The effectiveness of the MSA's provisions designed to safeguard the child's welfare depend almost entirely on the voluntary actions of Scott, a non-party.

The parties have not briefed or argued the enforceability of those protective provisions aimed at Scott, and that question is not squarely before us in this proceeding. Nevertheless, I question the enforceability of MSA provisions that purport to bind a non-party and require little if anything of the

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[14] Because the MSA uses the word "enjoined," the Court and the concurrence refer to the protective provision as an injunction. ___ S.W.3d at ___ n.17. The parties have presented no arguments about whether an agreed MSA provision could be construed as or enforced as a true injunction. *See* TEX. FAM. CODE § 105.001 (providing for trial court issuance of temporary injunctions in family law matters); *see, e.g., Peck v. Peck*, 172 S.W.3d 26, 35 (Tex. App.—Dallas 2005, pet. denied) (noting that although the Family Code does not speak to permanent injunctions, many Texas cases address final orders in family law matters that incorporate permanent injunctions). Nor have the parties presented arguments about whether an MSA provision, if it indeed can be an injunction, could be binding on a person who is not a party to the MSA or the lawsuit. *See* TEX. R. CIV. P. 683 (stating that an order granting an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"). I leave those questions for another day, but I do not assume that simply because Stephanie and Benjamin chose to "enjoin" a non-party, it is in fact an injunction that can be enforced against Scott.

parties themselves to protect the child from harm, as well as the availability of a remedy for failure to comply.[15] *See* TEX. FAM. CODE § 153.0071(d) ("A mediated settlement agreement is binding *on the parties* if the agreement [satisfies particular requirements]." (emphasis added)); *cf. Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993) ("Under Texas law, in the absence of a relationship between the parties giving rise to the right of control, one person is under no legal duty to control the conduct of another . . . ."). The Court, which agrees that the MSA could have been more "artfully worded," *see* ___S.W.3d at ___ n.17, rationalizes that only a violation of the agreement could subject the child to harm. But the Court misses the point—a possession and access modification that (1) does not require Stephanie to keep the child away from Scott, (2) contains no supervision requirements, and (3) relies on Scott to act voluntarily in accordance with an MSA that he did not agree to does, on its face, subject the child to harm.

The Court suggests that the trial court can cure the MSA's inartful wording by altering the agreement to clarify its terms. *See id.* That proposition was not briefed or argued, and I am not convinced that the trial court can take such action. The Court relies on *Haynes v. Haynes*, 180 S.W.3d 927, 930 (Tex. App.—Dallas 2006, no pet.), a case involving a property division settlement in a divorce and not an MSA to modify child custody, access, or possession. *See id.* at 928–29. *Haynes* relied on *McLendon v. McLendon*, 847 S.W.2d 601, 606 (Tex. App.—Dallas 1992, writ denied), an earlier case from the same court that also involved a property division settlement in a

[15] We have held that third parties can be bound by arbitration agreements they did not sign under certain circumstances, but those cases are inapplicable here. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738–39 (Tex. 2005) (explaining that, under federal substantive law, non-signatories have been bound by arbitration agreements under contract and agency law principles of (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary).

divorce and addressed a Rule 11 agreement, not an MSA under the Family Code. *See id.* at 604–06; *Haynes*, 180 S.W.3d at 930. Although this Court has not, until today, addressed trial court authority to modify the terms of an MSA under section 153.0071,[16] we have previously held that "a final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement." *Vickrey v. Am. Youth Camps, Inc*., 532 S.W.2d 292, 292 (Tex. 1976). Just over a year ago, this Court held that when an MSA contained a process for resolution of disputes regarding ambiguities in the MSA's terms, the mediator was the appropriate authority under the MSA to resolve a factual dispute regarding the parties' intent, not the trial court. *See Milner*, 361 S.W.3d at 622. The MSA in this case contains just such a provision, under which disputes regarding "the interpretation, omitted issues, and/or performance" of the MSA shall be resolved by phone conference with the mediator or, if unsuccessful, by binding arbitration with the mediator serving as arbitrator. I cannot understand why this Court would hold that the parties in *Milner* must, pursuant to their agreement, have the mediator resolve issues regarding the parties' intent, and hold that the trial court can modify the parties' agreement in this case to reflect the parties' "clear intent." *See* ___ S.W.3d at ___ n.17. Even if a trial court can, as the Court says,

[16] The issue is far from settled in the courts of appeals. *See, e.g.*, *Byrd v. Byrd*, No. 04-11-00700-CV, 2012 Tex. App. LEXIS 9840, at *10 (Tex. App.—San Antonio Nov. 30, 2012, no pet.) (mem. op.) ("While a trial court in these circumstances has authority not to enforce the mediated settlement agreement, it has no authority to sign a judgment that varies from the terms of the mediated settlement agreement."); *Philipp v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-00418-CV, 2012 Tex. App. LEXIS 2760, at *12 & n.3 (Tex. App—Austin Apr. 4, 2012, no pet.) (mem. op.) ("The trial court has no authority to enter a judgment that varies from the terms of the mediated settlement agreement," and even if the family violence provision were implicated, "the trial court would be permitted only to decline to enter a judgment on the MSA, not to modify its terms."); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 332 (Tex. App.—Dallas 2004, no pet.) ("[T]he trial court has no authority to enter a judgment that varies from the terms of the mediated settlement agreement."). *But see, e.g.*, *Wallace v. McFarlane*, No. 01-10-00368-CV, 2013 Tex. App. LEXIS 10587, at *22 (Tex. App.—Houston [1st Dist.] Aug. 22, 2013, no pet. h.) ("A trial court may modify the terms of an MSA, however, so long as those modifications do not add terms, significantly alter the original terms, or undermine the parties' intent.").

modify an MSA to effectuate and implement the parties' intent, I find no support in this case for the Court's conclusion that the parties clearly intended to require Stephanie to keep the child at least five miles away from Scott at all times. *See id.* The MSA provides only that Stephanie must pass on information provided to her by Scott. Nowhere does the record indicate that Stephanie intended herself to be bound by and face contempt charges for violation of the provision requiring *Scott* to stay five miles from the child. Just as we cannot assume that every MSA parents agree to is in their child's best interest, we cannot assume that every provision in an MSA was intended to protect the child to the maximum extent possible. I would hold, as this Court did in *Milner*, that any question regarding the parties' intent with regard to the protective provisions in this MSA must be resolved by the mediator according to the MSA, and not by the trial court. And even if there were no question or ambiguity about the parties' intent, the issue of whether a trial court can modify the terms of the MSA to "clarify" that intent is best left for another day and not decided in a footnote, without briefing or argument.

The trial court heard only brief testimony from Stephanie and Benjamin in a short hearing on a motion for entry of judgment on the MSA, but neither party put on any additional evidence.[17]

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[17] The concurrence concludes that the record does not support a finding that entry of judgment on the MSA could endanger the child. ___ S.W.3d at ___. We give trial courts wide latitude in determining matters relating to a child's best interest, however. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). "With the opportunity to observe the appearance and demeanor of the witnesses, to weigh their testimony, and evaluate the virtues of parties, no one is in a position to do this better than the trial court." *Taylor v. Meek*, 276 S.W.2d 787, 790 (Tex. 1955) (quoting *Valentine v. Valentine*, 203 S.W.2d 693, 696 (Tex. Civ. App.—Amarillo 1947, no writ)). We must not second-guess the trial court simply because we read short, awkwardly-phrased testimony differently. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995) ("The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles[,] . . . not whether, 'in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action.'" (internal citations omitted)); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) ("[T]he reviewing court may not substitute its judgment for that of the trial court . . . . Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown

In this instance, where the MSA does not require Stephanie's periods of possession to be supervised, as Benjamin had requested in his motion to modify the 2007 order, and where the child's welfare depends upon the acts of a non-party to the MSA who, testimony indicates, has previously disregarded a court order that apparently prohibited him from being around children, I would hold that it was not an abuse of discretion for the trial court to decline to enter judgment on the MSA and instead set the case for trial at which the parties can put on evidence of whether unsupervised visitation with Stephanie is in the child's best interest.[18] *See Holley*, 544 S.W.2d at 371–72 (describing factors pertinent to the best interest determination, including the emotional and physical dangers to the child now and in the future).

Believing that a trial court can protect children subject to harmful MSAs by continuing hearings seeking entry of judgment, the plurality attempts to resolve the absurdity of the Court's holding by telling trial courts to stall. *See* ___ S.W.3d at ___. But we cannot have it both ways—either the Family Code requires a trial court to enter judgment on a statutorily compliant

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to be arbitrary and unreasonable."); *Bell v. Campbell*, 328 S.W.3d 618, 620 (Tex. App.—El Paso 2010, no pet.) ("We recognize that the trial court is best situated to observe the demeanor and personalities of the witnesses and can 'feel' the forces, powers, and influences that cannot be discerned by merely reading the record."). I agree with the concurrence that a finding of endangerment and rejection of an MSA on that basis should not occur without evidentiary support, but I disagree with the conclusions the concurrence draws on this record. Under our mandamus standard of review, any evidence of endangerment—even arguably ambiguous statements, and even when there is conflicting evidence—is *some* evidence; when then there is some evidence to support the trial court's decision, no abuse of discretion exists. *See Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998) ("An abuse of discretion does not exist where the trial court bases its decisions on conflicting evidence." (quoting *Davis v. Huey,* 571 S.W.2d 859, 862 (Tex. 1978))); *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) ("Although the court of appeals reversed the trial court on the ground that there was 'no evidence' to support the issuance of the turnover order, the court of appeals should have reviewed the trial court's judgment under an abuse of discretion standard." (internal citations omitted)).

[18] I disagree with the concurrence's implication that a trial court with concerns about a child's safety under an MSA must, at the prove-up stage, conduct a full evidentiary hearing regarding the potential effects of the modification and the intent of parties and non-parties to comply with provisions of the MSA.

MSA when it is presented, or the Family Code allows the trial court discretion not to enter judgment when the MSA's modification terms jeopardize the child's safety and welfare. Under the plurality's analysis, it is unlikely that a trial court would ever discover that a modification pursuant to an MSA would jeopardize a child's safety and welfare. Even if the trial court did somehow reach that conclusion, the plurality concludes that the trial court can do nothing about that except delay the inevitable entry of judgment. *See id.* at ___. To allow the court to do otherwise—to reject an MSA it determines could subject the child to harm—would, in the plurality's view, mean that a trial court can conduct a broad best interest inquiry. But a court armed with enough information to determine that a child is in danger under an MSA need not analyze the *Holley* factors to conclude that modification pursuant to the MSA is not in the child's best interest. Any MSA that places a child's safety and welfare in danger—through unenforceable provisions that could leave a child exposed to a convicted sex offender, or otherwise—simply cannot be in a child's best interest. To say that a trial court can do nothing except delay entry of judgment and call the Department of Family and Protective Services runs counter to public policy and leaves children whose parents act against their best interest without a voice—without protection—in the legal system. I believe that the Legislature intended for trial court authority to extend beyond simply placing an MSA in legal limbo and to include the discretion to refuse entry of judgment on dangerous MSAs. Moreover, I believe that the plurality's continuance procedure, which seemingly allows trial courts to put off entry of judgment that the Court implies is non-discretionary, invites parties to file mandamus actions seeking to force trial courts to stop delaying the inevitable entry of judgment on MSAs that satisfy the statutory prerequisites.

Further, the plurality advises that a trial court faced with a potentially harmful MSA should issue some sort of temporary orders or protective orders in conjunction with entry of judgment. *Id.* at ___. If the Family Code allowed trial courts to issue whatever orders are necessary to protect children, there might be no disagreement in this case. But the Family Code limits the availability of protective actions, and trial courts often must rely on parties protecting children's best interests to request such orders.[19] For example, although the Family Code authorizes a trial court to make temporary orders for the safety and welfare of the child, such orders are available while a SAPCR is pending and "before final order," making the availability in cases of statutorily-compliant MSAs questionable. *See* TEX. FAM. CODE § 105.001; *Ex parte Brown*, 382 S.W.2d 97, 99 (Tex. 1964) (explaining that once a trial court has rendered judgment awarding custody of a child, a temporary custody order is no longer in effect). Even if temporary orders could be issued in this MSA context, it seems a perversion of the Family Code to suggest that trial courts should delay entry of judgment *for the purpose* of entering temporary orders. Similarly, although the Family Code authorizes a trial court to issue a protective order, several things must happen before the court can do so: an adult must file an application to protect a child from family violence, the respondent accused of family violence must have notice and an opportunity to answer, the trial court must conduct a hearing, and the court must find that family violence occurred and is likely to occur in the future. *See* TEX. FAM. CODE §§ 81.001, 82.001–.005, .021, .041–.043, 84.001, 85.001, .021. If the Family Code contains a provision under which this trial court could have entered orders to ensure protection of this child

[19] The Court again misses the critical question in cases such as this—what can a trial court do when parents are not acting in the child's best interest?

despite the MSA, nobody has told us where to find it. Even if, as the plurality assumes, trial courts can mitigate the effects of harmful MSAs by issuing some sort of orders to protect children, what might those orders look like? Could the trial court in this case order that Stephanie's periods of possession be supervised? Could the trial court order that Stephanie keep the child out of the Scott's presence? Although such orders would certainly do more to protect the child, they would also alter the parties' agreement, a result that the Court believes the Legislature intended to avoid. In the end, although I agree with the sentiment that trial courts must protect children from harm, the plurality's purported solution to the problem posed by its interpretation of section 153.0071—which is not much of a solution at all when the Court prohibits trial courts from rejecting dangerous MSAs—relies on a "tortured reading" of the Family Code's protective action provisions. *See* ___ S.W.3d at ___ (referring to the dissent's interpretation of the MSA statute as a "tortured reading").

Compelling the trial court to disregard the fundamental public policies set forth in sections 153.001 and 153.002, including the policy to "provide a safe, stable, and nonviolent environment for the child," simply because the parents executed an irrevocable MSA would not only render these policies meaningless, but yield an absurd result. TEX. FAM. CODE § 153.001(a)(2); *see Jose Carreras, M.D., P.A.*, 339 S.W.3d at 73. I can easily imagine scenarios more outlandish than this, where parents execute an MSA that puts a child in even more danger. It would be absurd and nonsensical for a trial court to have no ability to protect a child from such an MSA, and to compel the court to enter judgment on an MSA that it concludes could be harmful to the child. The Court's overwrought opinion purports to protect the interests of children by championing the mediated

settlement agreement process, but when a child is placed in danger by the actual terms of an agreement, as opposed to the process by which a dispute is resolved, the Court's holding falls short.

IV. Mandamus Relief

In granting mandamus relief, the Court orders the trial court to do two things: (1) vacate its order denying Stephanie's motion to enter judgment on the MSA, and (2) vacate its order setting the case for trial. Nowhere does the Court say that the trial court must enter judgment on the MSA. It is a curious result—a trial court cannot deny a motion to enter judgment, but a trial court need not actually enter judgment; a party is "entitled to judgment," and cannot be denied judgment, but may not actually get the judgment to which she is entitled. Why would the Court issue such a perplexing ruling?

Perhaps it is all a matter of semantics. One could argue that the Court's opinion *impliedly* requires the trial court to enter judgment on the MSA. But as a court of last resort, we are not usually in the business of implying rulings.

Perhaps the Court hopes the trial court will not have to sign a judgment on this MSA because it will instead delay so that it can enter temporary orders, and then DFPS will seek to have Stephanie's parental rights terminated or take some action that will moot the MSA issue. But we are not usually in the business of banking on unpredictable contingencies either.

Surely the Court's conspicuous lack of an order directing the trial court to enter judgment on the MSA must mean *something*. After all, Stephanie's petition for writ of mandamus specifically requested that the Court grant a writ requiring the trial court to enter judgment based upon the MSA. I think the absence of any requirement that the trial court enter judgment on the MSA can be

explained only as follows: (1) a majority of this Court believes that the Family Code allows a trial court discretion to refuse to sign a judgment pursuant to an MSA that places a child's safety and welfare in danger, and (2) a majority of this Court does not believe that the Family Code requires the trial court, on this record, to enter judgment on this MSA. Of course, the Court does not say that either. But if a majority of the Court believed "entitled to judgment . . . notwithstanding . . . another rule of law" created a non-discretionary, ministerial duty to enter judgment, surely it would say so. Instead, the Court goes out of its way to avoid saying just that, and in the process provides no guidance about what a trial court is to do with an MSA that endangers a child, or what this trial court is to do with this MSA. The only clear holding today appears to be that a trial court cannot refuse to enter judgment on an MSA using the words "best interest."

If the trial court here believes, based on the evidence presented, that the child's safety and welfare will be endangered under a modification pursuant to the MSA, then it appears the court can comply with this Court's ruling by withdrawing its order rejecting the MSA on best interest grounds and issuing a new order rejecting the MSA on endangerment grounds. Or maybe, as the concurrence implies, the court could hear additional evidence to inquire further into the child's safety and welfare under the MSA and, if appropriate, issue a new order rejecting the MSA on endangerment grounds. *See* ___ S.W.3d at ___. Only then will the Court explain today's curious ruling and give trial courts and the family law bar guidance on whether and when a trial court has discretion to refuse to enter judgment on an MSA that places a child's safety and welfare in danger.

For the reasons explained, I believe a trial court faced with such an MSA is entitled to use the best tool available—rejection of the dangerous MSA—to protect the child.

V. Conclusion

I would hold that, in a rare case in which the presumption that MSA parties acted in a child's best interest has been negated by evidence, the trial court does not abuse its discretion by considering the terms of an MSA's custody, possession, or access modification. If those terms jeopardize a child's safety and welfare, so that the modification could not possibly be in the child's best interest, I would hold that the trial court does not abuse its discretion by refusing to enter judgment on the MSA. Here, the mother admitted on the record that she (1) allowed her husband, a registered sex offender, unsupervised contact with her daughter, (2) resided with the sex offender in her home, despite knowing that it was a violation of his conditions of probation, and (3) allowed her husband to violate the terms of his probation through contact with her daughter. I would deny Stephanie's petition for writ of mandamus.

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Paul W. Green
Justice

OPINION DELIVERED: September 27, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0737

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER,

v.

BOSQUE RIVER COALITION, 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.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

This case is a companion to *Texas Commission on Environmental Quality v. City of Waco*, ___ S.W.3d ___ (Tex. 2013). In that case, we concluded that the Texas Commission on Environmental Quality did not abuse its discretion in denying a contested case hearing to an interested party, who claimed a right to such a hearing under the Texas Water Code. As it did in *City of Waco*, the court of appeals concludes in this case that the interested party is entitled to a contested case hearing on a proposed amendment to an existing water-quality permit because it is an "affected person" as defined by the Water Code. 347 S.W.3d 366 (Tex. App.–Austin 2011). In *City of Waco*, this Court concluded that a party's status as an affected person was not determinative of the right to

a contested case hearing because the statute expressly exempted the proposed amendment from contested case procedures. *See City of Waco,* ___ S.W.3d at ___ (citing TEX. WATER CODE § 26.028(d)). For the same reason, we conclude that the interested party here was not entitled to a contested case hearing under the Water Code and accordingly reverse the court of appeals' judgment and render judgment for the Commission.

I

This proceeding arises from Gerben Leyendekker's application to amend his existing water-quality permit. Leyendekker is the owner and operator of a dairy located in the North Bosque River watershed. The dairy is also considered a concentrated animal feed operation. A concentrated animal feed operation or "CAFO" is an animal feeding operation in which confined poultry or livestock are housed and fed in numbers that exceed a threshold set by rule. 30 Tex. Admin. Code § 321.32(13). CAFOs are regulated by the Commission to protect surface water by restricting any flow of waste or wastewater from their premises. *See* Tex. Admin. Code §§ 321.38, .39 (describing control facility design and operational requirements). The Commission does not ordinarily permit CAFOs to discharge waste into surface water directly, but discharges may nevertheless be allowed whenever a rainfall event, either chronic or catastrophic, causes an overflow from a properly designed and operated facility. CAFO wastes have traditionally been managed by beneficial reuse through land application as fertilizers and composts.

Leyendekker's application sought to increase his dairy's herd from 700 to 999 head and to extend his dairy's waste application fields onto land nearer Gilmore Creek. Gilmore Creek is in the North Bosque River watershed and runs through property owned by some members of the Bosque

River Coalition, a non-profit Texas corporation whose stated purpose is the conservation and environmental protection of the Bosque River watershed. The Coalition was formed by Waco's city manager and assistant city manager about two weeks after the district court affirmed the Commission's decision to deny Waco's request for a contested case hearing in the companion case. *See City of Waco*, ___ S.W.3d ___.

The Commission's executive director reviewed Leyendekker's application, declared it administratively complete, prepared a draft permit, and ultimately recommended approval of the application. As Leyendekker requested, the draft permit increased the dairy's herd size and extended its waste application fields. The Commission staff also incorporated several new measures into the draft permit to strengthen the facility's overall water-quality protections. These measures aimed to reduce the possibility of discharges from the dairy's retention control structures by more than doubling their total storage capacity and by expanding the size of non-vegetative buffer zones around the waste application fields. The draft permit also required the dairy to beneficially apply its wastewater and manure as fertilizer under standards developed by the Natural Resource Conservation Service. The Commission had previously targeted soluble phosphorus as the key variable that could be controlled to limit algal plant growth in the North Bosque River. New standards implemented under the proposed amendment limit the application of fertilizer to the land's phosphorus needs, thereby reducing the likelihood that phosphorus will leach from the soil into Gilmore Creek as rainfall runoff.

During a public comment period for the Leyendekker permit, the City of Waco submitted numerous comments in opposition to the proposed permit. Waco has been prominent among those

advocating stricter regulatory limits on dairies that operate in the North Bosque River watershed. The dairy industry has seen significant growth in this area, resulting in a continuing dialogue among regulators, scientists, elected officials, and members of the public regarding the animal waste generated by these dairies and its effect on water quality in the North Bosque River and ultimately Lake Waco, which is the City of Waco's municipal water supply.

The Coalition–because it did not exist at the time–did not submit any comments on the proposed Leyendekker permit, but later adopted Waco's comments. These comments complained that the application failed to adequately protect water quality and failed to comply with federal and state statutes and regulations designed to protect water quality. The executive director responded to Waco's comments and revised the draft permit to address some of Waco's concerns, but otherwise determined that the application and draft permit met the requirements of applicable law. Unsatisfied, the Coalition asked to intervene as a party in a contested-case hearing. In its hearing request, the Coalition described how three of its members were "affected persons" as defined by the Water Code because each had "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." The named members, The Ranch at Hico, LLC, Claude Kilpatrick, and Torrey Moncrief, own property downstream from the dairy along Gilmore Creek. The hearing request stated that "[t]he proposed discharge authorized by the Draft Permit, and resulting effects on water quality in Gilmore Creek, threaten the use and enjoyment of their property and their use of Gilmore Creek," including its use for fishing, recreation, religious activities, and stock watering.

The executive director filed a response in opposition to the Coalition's request for a contested-case hearing. *See* 30 Tex. Admin. Code § 55.209(d), (e). He concluded that the Coalition lacked standing because it had failed to identify any member with standing as an "affected person." *See* Tex. Admin. Code § 55.205(a)(1). The Coalition filed a reply, arguing that the proximity of three named members to the dairy (about two to three miles downstream) and their specific use of Gilmore Creek distinguished them from the general public and qualified them (and the Coalition by association) as an affected person.

The Commission subsequently considered the Coalition's hearing request and Leyendekker's permit application at a public meeting, denying the request without referring the matter to the State Office of Administrative Hearings for a contested case hearing. *See* 30 Tex. Admin. Code §§ 55.209(g), 55.211(b). In its order, the Commission stated that it had evaluated the request "under the requirements in the applicable statutes and Commission rules, including 30 Texas Administrative Code Chapter 55," and considered "all other timely filings in this matter, including the responses to the Coalition's hearing request filed by the Executive Director and the Office of Public Interest Counsel and the Coalition's reply." In the same order, the Commission revised and then adopted as revised the executive director's response to public comment, approved the permit amendment, and issued the permit as recommended by the executive director.

The Coalition sought judicial review of the Commission's order in Travis County district court, after its motion for rehearing was overruled by operation of law. *See* TEX. WATER CODE §§ 5.351, 5.354. The district court affirmed the Commission's order, and the Coalition appealed to the court of appeals. *See id.* § 5.355. Relying on its earlier decision in *Texas Commission on*

Environmental Quality v. City of Waco, 346 S.W.3d 781 (Tex. App.–Austin, 2011, pet. granted), the court of appeals reversed the Commission's order and remanded the case to the Commission for further proceedings. 347 S.W.3d at 381. The court held that "to the extent the Commission denied the Coalition's hearing request based on the premise that the amended Leyendekker 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 Coalition's standing to obtain a hearing." *Id.* at 377. In *City of Waco*, however, we disagreed that replacing an existing water-quality permit with a more protective amendment was irrelevant to the Commission's determination of an interested party's statutory right to a contested case hearing. *See City of Waco*, ___ S.W.3d at ___.

II

The Coalition's claim of right to a contested case hearing is grounded in chapter 26 of the Water Code. Section 26.028(c) of that chapter generally extends the right to a public hearing in a permit application proceeding to a commissioner, the commission's executive director, or an "affected person," upon request. TEX. WATER CODE § 26.028(c); *see also id*. § 5.115(a) (defining affected person). Exempted from this general grant, however, are certain applications to renew or amend existing permits that do not seek either to increase the quantity of waste discharged or change materially the place or pattern of discharge and that maintain the quality of the waste to be discharged. *Id*. § 26.028(d). The Water Code expresses this right and exemption as follows:

> (c) Except as otherwise provided by this section, the commission, on the motion of a commissioner, or on the request of the executive director or any affected person, shall hold a public hearing on the application for a permit, permit amendment, or renewal of a permit.

> (d) Notwithstanding any other provision of this chapter, the commission, at a regular meeting without the necessity of holding a public hearing, may approve an application to renew or amend a permit if:
> (1) the applicant is not applying to:
> (A) increase significantly the quantity of waste authorized to be discharged; or
> (B) change materially the pattern or place of discharge;
> (2) the activities to be authorized by the renewed or amended permit will maintain or improve the quality of waste authorized to be discharged;
> (3) for NPDES permits, notice and the opportunity to request a public meeting shall be given in compliance with NPDES program requirements, and the commission shall consider and respond to all timely received and significant public comment; and
> (4) the commission determines that an applicant's compliance history under the method for using compliance history developed by the commission under Section 5.754 raises no issues regarding the applicant's ability to comply with a material term of its permit.

TEX. WATER CODE § 26.028(c), (d). Thus, under the statute, the Commission is to hold a public hearing on a permit application at the request of an affected person, but may approve an application to renew or amend a permit "at a regular meeting without the necessity of a public hearing" if (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) the applicant's compliance history raises no additional concerns. *Id*. As we noted in *City of Waco*, the public hearing referenced in chapter 26 is, in the context of a permit application, "a contested case hearing under the Texas Administrative Procedure Act." *City of Waco,* ___ S.W.3d at ___ (citing TEX. WATER CODE § 5.551).

III

The Coalition argues that, as an affected person, it had the right to a contested case hearing because the Leyendekker Dairy sought a major amendment to its existing permit. Agency rules define a major amendment as "an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit." 30 Tex. Admin. Code § 305.62(c)(1). In contrast, a minor amendment is one that "improve[s] or maintain[s] the permitted quality or method of disposal of waste" without significantly increasing the quantity of waste or materially changing the pattern or place of the waste's discharge. *Id*. § 305.62(c)(2). The Coalition submits that the Commission should have classified the dairy's application as a minor amendment, rather than a major amendment, to be consistent with its present position—that the additional restrictions and requirements imposed by the amended permit are more protective and will actually improve water quality despite the authorized increase in the dairy's herd. The Coalition concludes, however, that the Commission correctly labeled the permit application as a major amendment, thereby entitling it to a contested case hearing because it is also an affected person.

The Commission responds that its classification of the Leyendekker application as a major amendment is not a concession that the Coalition is entitled to a contested case hearing because the terms major and minor amendment are not mutually exclusive. The Commission submits that an application to amend may fit both definitions as in this case. The distinction between the two is primarily significant because a contested case hearing is generally not available for minor amendments. Tex. Admin. Code § 55.201(i)(1). But the classification of an amendment as major does not conversely establish the right to contested case hearing, the Commission submits, even

though a classification as minor may foreclose the right. In *City of Waco*, we agreed that there was "no express right to a contested case hearing merely because the applicant seeks a major amendment." *See City of Waco*, ___ S.W.3d at___ (citing 30 Tex. Admin Code § 55.201(i)).

The Coalition nevertheless asserts that the Commission abused its discretion by denying it the opportunity to intervene and participate in a contested case hearing on Leyendekker's amended permit application. But that opportunity depends on whether the proposed amendment is excepted from the Water Code's public hearing requirement. *See* TEX. WATER CODE § 26.028(c), (d). *In City of Waco*, we concluded that the application of the statute's exception to the public hearing requirement did not itself require a contested case hearing, but could instead be determined through a less formal, less expensive, and less time-consuming proceeding before the Commission. *See City of Waco*, ___ S.W.3d at ___ (citing *Collins v. Tex. Natural Res. Conservation Comm'n,* 94 S.W.3d 876, 884-85 (Tex. App.–Austin 2002, no pet). As in that case, the Coalition here had the comment period, the executive director's response, the request for a contested case hearing, and a public meeting in which to express its dissatisfaction with the proposed amendment. The Commission's executive director recognized four areas in which the Coalition disputed the effectiveness of the amended permit: (1) whether the compaction testing specifications comply with the applicable CAFO rules; (2) whether waste sampling requirements comply with CAFO rules; (3) whether buffer zone requirements would be met; and (4) whether the location and timing of soil sampling complies with the applicable protocol of the Natural Resource Conservation Service. There is no indication that the Commission refused to consider any evidence tendered to substantiate these asserted deficiencies.

The proposed amendment purports to conform to the numerous regulatory changes imposed on Texas dairy CAFOs in the North Bosque watershed since the issuance of the dairy's previous water-quality permit. It adds several new measures to strengthen the overall water-quality protections at the dairy, including reducing the possibility of discharges from the dairy's retention control structures by doubling their storage capacity and improving monitoring of sludge and water levels. New restrictions also aim to reduce the risk of runoff from waste application fields by expanding buffer zones and strictly managing nutrients applied to the soil.

The proposed amended permit does not seek to significantly increase or materially change the authorized discharge of waste. Neither does the Coalition argue any other factor to foreclose the Commission's 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 Coalition's request for a contested case hearing on Leyendekker's application for an amended permit.

The court of appeals' judgment remanding the matter to the Commission for further proceedings is accordingly reversed and judgment is rendered affirming the Commission's decision to deny the request for a contested case hearing.

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John P. Devine
Justice

Opinion Delivered: September 20, 2013

IN THE SUPREME COURT OF TEXAS

NO. 11-0773

BIODERM SKIN CARE, LLC AND QUAN NGUYEN, M.D., PETITIONERS,

v.

VEASNA "SANDEE" SOK, RESPONDENT

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

Argued September 9, 2013

JUSTICE GUZMAN delivered the opinion of the Court.

This Court has addressed the scope of the Texas Medical Liability Act on a number of occasions since its enactment in 2003. The Act requires claimants asserting health care liability claims to substantiate their claims with an expert report. Today, we determine whether claims arising out of allegedly improper laser hair removal constitute health care liability claims, and thus fall within the purview of the Act.

We recently established a rebuttable presumption that claims against physicians or health care providers based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement are health care liability claims.[1] Here, the claimant alleges that too high

[1] *Loaisiga v. Cerda*, 379 S.W.3d 248, 256 (Tex. 2012).

an intensity setting caused burns and scars on her legs during the course of her laser hair removal treatment. We conclude the health care liability claim presumption applies in this case.

Further, we hold the claimant has failed to rebut this presumption because expert health care testimony is necessary to prove or refute her claim. Two primary factors guide our conclusion that such testimony is required. First, under federal regulations, the laser used by the defendants in this case may only be purchased by a licensed medical practitioner for supervised use in her medical practice.[2] Testimony concerning whether its operation departed from accepted standards of health care must therefore come from a licensed physician. Second, we have long held that the use of a "medical instrument which requires extensive training and experience for proper use" is not a matter plainly within the common knowledge of laymen.[3] Here, the defendant physician trained laser operators for at least six months on the variables associated with patients and equipment. Moreover, he determined the laser's intensity setting for the specific treatment at issue in this appeal. Accordingly, expert health care testimony is needed to prove or refute the claim.

Because the claimant has not rebutted the presumption that her claim is a health care liability claim, her failure to serve an expert report precludes her suit against a physician and a health care provider. Because the trial court denied the defendants' motion to dismiss and the court of appeals affirmed, we therefore reverse the court of appeals' judgment and remand for the trial court to dismiss the claim.

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[2] *See* 21 C.F.R. §§ 801.109(a)(2), 878.4810(b)(1).

[3] *Haddock v. Arnspiger*, 793 S.W.2d 948, 954 (Tex. 1990).

I. Background

In October 2006, Veasna "Sandee" Sok purchased seven laser hair removal treatments from Bioderm Skin Care, LLC (Bioderm). At the beginning of her fifth treatment, administered in July 2007, Sok expressed dissatisfaction with the results of her previous treatments to the laser operator. The operator relayed Sok's concerns to Dr. Quan Nguyen, who—after reviewing Sok's medical file—instructed the operator to increase the laser's intensity by one setting (from level five to level six) for Sok's fifth treatment. That treatment allegedly burned and scarred Sok's legs, the severity of which the parties dispute.[4] Sok met with Dr. Nguyen shortly after the burns occurred, and he prescribed a topical burn cream to treat the area. Dr. Nguyen instructed Sok to return for reevaluation in one week, but she did not return.

In July 2009, Sok sued Bioderm, claiming it was vicariously liable for the laser operator's negligence, and Dr. Nguyen, claiming he was liable for Bioderm's negligence because Bioderm was his agent. In their answer, Bioderm and Dr. Nguyen responded that Sok's claim was a health care liability claim under section 74.001(a)(13) of the Texas Medical Liability Act. Thus, when Sok did not serve an expert report within 120 days of filing her original petition, Bioderm and Dr. Nguyen moved to dismiss Sok's claim. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). The trial court denied the motion to dismiss, and Bioderm and Dr. Nguyen filed an interlocutory appeal. The court

[4] Sok's original petition alleged she suffered third-degree burns, while her second amended petition alleged her burns were second degree. Dr. Nguyen's affidavit, submitted with Bioderm and Dr. Nguyen's motion to dismiss, stated he observed first-degree burns on Sok's legs.

of appeals affirmed the trial court's denial after determining that laser hair removal did not constitute "treatment."[5] We granted Bioderm and Dr. Nguyen's petition for review.

II. Jurisdiction

As an initial matter, we must determine whether we have jurisdiction over this interlocutory appeal. Interlocutory orders denying all or part of the relief sought in a motion to dismiss pursuant to the Medical Liability Act are appealable. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9). We may consider an interlocutory appeal when the court of appeals' decision conflicts with a previous decision of another court of appeals or this Court on an issue of law material to the disposition of the case. TEX. GOV'T CODE §§ 22.001(a)(2), (e); *id*. § 22.225(c). To date, three courts of appeals have concluded claims arising from laser hair removal treatment are not health care liability claims;[6] three others have concluded they are health care liability claims.[7] Because the court of appeals' opinion conflicts with three prior court of appeals' opinions on an issue of law material to the disposition of this appeal, we have jurisdiction over this interlocutory appeal. *See* TEX. GOV'T CODE §§ 22.001(a)(2), (e); *id*. § 22.225(c).

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[5] 345 S.W.3d 189, 192. The court of appeals relied primarily on a definition of treatment found in a medical dictionary selected by that court as "the care and management of a patient to combat, ameliorate, or prevent a disease, disorder, or injury." *Id*. (quoting MOSBY'S MEDICAL DICTIONARY 1880 (8th ed. 2009)).

[6] *See Cosmetic Procedures Clinic of N. Dallas v. Ayub*, 369 S.W.3d 928, 931 (Tex. App.—Dallas 2012, pet. dism'd by agr.); 345 S.W.3d at 192; *Ghazali v. Brown*, 307 S.W.3d 499, 505 (Tex. App.—Fort Worth 2010, pet. dism'd); *Tesoro v. Alvarez*, 281 S.W.3d 654, 666 (Tex. App.—Corpus Christi 2009, no pet.).

[7] *See Stanford v. Cannon*, No. 06–11–00011–CV, 2011 WL 2518856, at *8 (Tex. App.—Texarkana June 8, 2011, no pet.) (mem. op.); *Kanase v. Dodson*, 303 S.W.3d 846, 850 (Tex. App.—Amarillo 2009, no pet.); *Sarwal v. Hill*, No. 14–01–01112–CV, 2002 WL 31769295, at *3 (Tex. App.—Houston [14th Dist.] Dec. 12, 2002, no pet.) (mem. op.). All three of these opinions issued before the instant opinion.

III. Discussion

Whether Sok's claim is a health care liability claim is a question of law we review de novo. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012). When construing a statute, we give it the effect the Legislature intended. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). The best expression of the Legislature's intent is the plain meaning of the statute's text. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). More particularly, the broad language of the Medical Liability Act evinces legislative intent for the statute to have expansive application. *Loaisiga v. Cerda*, 379 S.W.3d 248, 256 (Tex. 2012). In determining whether Sok's claim is a health care liability claim, we focus on the underlying nature of the cause of action and are not bound by the pleadings. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005).

The Medical Liability Act defines a health care liability claim as:

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety 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). In *Texas West Oaks*, we observed that this statutory definition contains three 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. No one element, occurring independent of the other two, will recast a claim into a health care liability claim.

The parties here do not contest causation. Rather, their disputes center around two primary questions: whether Bioderm is a physician or health care provider and whether Sok's claim is for medical care or health care. To answer these questions, we first reiterate our recent holding that the Medical Liability Act "creates a rebuttable presumption that a patient's claims against a physician or health care provider based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement" are health care liability claims. *Loaisiga*, 379 S.W.3d at 252. As explained below, we conclude Dr. Nguyen is a physician and Bioderm, as an affiliate of a physician, is a health care provider. We further hold the rebuttable health care liability claim presumption applies and Sok has not rebutted that presumption.

A. Physician or Health Care Provider

Dr. Nguyen and Bioderm must be physicians or health care providers for the rebuttable presumption to apply. *Id.*; *Tex. W. Oaks*, 371 S.W.3d at 179–80. No party disputes that Dr. Nguyen is a physician as defined by the Medical Liability Act. Rather, the crux of the parties' disagreement on this question is whether Bioderm qualifies as a health care provider. Because Bioderm is an affiliate of a physician, we conclude it is a health care provider under the Medical Liability Act.

The Medical Liability Act defines a health care provider to include, *inter alia*, an affiliate of a physician. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12)(B)(i). The statute defines "affiliate" as "a person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with a specified person, including any direct or indirect

parent or subsidiary." *Id.* § 74.001(a)(1). And the statute defines control as "the possession of the power to direct the management and policies of the person" through ownership. *Id.* § 74.001(a)(3). Therefore, if we determine Dr. Nguyen directly or indirectly controls Bioderm, then we must conclude Bioderm is Dr. Nguyen's affiliate and is a health care provider under the Act. *Id.* §§ 74.001(a)(1), (a)(12)(B)(i).

The record establishes that Dr. Nguyen is the sole owner of Bioderm and possesses the power to direct its management and policies. A physician's assistant originally formed Bioderm as a limited liability company in 2005. Dr. Nguyen acquired total ownership of Bioderm in 2006, becoming its sole member. Moreover, Dr. Nguyen is responsible for the clinic's operations and supervises patient evaluations, diagnoses, and treatments. In addition, Dr. Nguyen implemented training procedures for new employees, including attendance at a medical lecture, an observation period, clinical practice, morning rounds, and a written examination. Thus, because Dr. Nguyen is the sole owner of Bioderm and "possess[es] the power to direct the management and policies" of Bioderm, we conclude Bioderm is an affiliate of a physician and is a healthcare provider under the Medical Liability Act.[8] *Id.* § 74.001(a)(3).

B. Rebuttable Presumption

Having determined that Dr. Nguyen is a physician and Bioderm is a health care provider, we next examine whether Sok's claim is based on facts implicating either Dr. Nguyen or Bioderm's conduct during her care, treatment, or confinement. If it is, then we apply the rebuttable

[8] The parties also dispute whether Bioderm is a physician and whether it is also a health care provider as an agent of a physician. Because we conclude Bioderm is a health care provider as an affiliate of a physician, we need not reach these issues.

presumption that the claim is a health care liability claim. *See Loaisiga*, 379 S.W.3d at 252. Sok alleges her injury was caused by the care or treatment for laser hair removal she obtained from Bioderm. Her medical records indicate Sok was Dr. Nguyen's patient, as she signed a "consent to treatment" form, agreeing to "grant permission to the Medical Professional and their assistants, to perform such medical treatment(s) during my visit as are prescribed by my Medical Professional."[9] Because Sok asserts she was injured while receiving care or treatment from a health care provider, the rebuttable presumption that Sok's claim is a health care liability claim must apply. *Id.*

C. Claimed Departure from Accepted Standards of Health Care

We next determine whether Sok has rebutted the presumption. If she has not, her claim must be dismissed for failure to serve an expert report as required by the Medical Liability Act. We have already determined Sok's claim satisfies the first element of a health care liability claim because Dr. Nguyen is a physician and Bioderm is a health care provider. And the parties agree that the third element of a health care liability claim (causation of the injury) is met. Thus, Sok may only rebut the presumption that her claim is a health care liability claim by proving her claim does not constitute an alleged "departure[] from accepted standards of medical care or health care."[10] TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Tex. W. Oaks*, 371 S.W.3d at 179–80. As explained

[9] Sok asserts she was not a patient of Dr. Nguyen because she did not meet with him until he examined her burns after the fifth treatment. But as we have previously explained, "[t]he fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship." *St. John v. Pope*, 901 S.W.2d 420, 424 (Tex. 1995).

[10] Though the statute also includes treatment, lack of treatment, safety, professional services, or administrative services directly related to health care as other forms of health care liability claims, TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13), neither party asserts that these provisions control in this case.

below, Sok has not rebutted this presumption because expert health care testimony is needed to prove or refute the merits of her claim.

The Medical Liability Act defines health care as "any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10). In *Texas West Oaks*, we considered whether a claim alleged a departure from accepted standards of health care and held that "if expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider, the claim is a health care liability claim." 371 S.W.3d at 182. Accordingly, in considering whether a claim alleges a departure from accepted standards of medical or health care, a court should first determine whether expert medical or health care testimony is needed to establish the requisite standard of care and breach.[11] *See id.* And only if expert testimony is not needed should a court proceed to consider the totality of the circumstances, as a claim may still be a health care liability claim despite that "in the final analysis, expert testimony may not be necessary to support a verdict." *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005).[12] Therefore, we address whether expert health care testimony is needed to prove or refute the merits of Sok's claim.

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[11] Treatment and a physician-patient relationship are also elements of a claimed departure from accepted standards of health care. *Id.* § 74.001(a)(10); *Tex. W. Oaks*, 371 S.W.3d at 180. But in assessing the application of the rebuttable presumption, we have already determined Sok was a patient receiving treatment. *See supra* Part II.B.

[12] *See also Tex. W. Oaks*, 371 S.W.3d at 182; *Haddock*, 793 S.W.2d at 951 (recognizing that when the nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen, no expert testimony may be required).

Two of our precedents—*Texas West Oaks* and *Haddock v. Arnspiger*[13]—offer guidance on when expert health care testimony is needed to prove a claim such as Sok's. In *Texas West Oaks*, Williams—a mental health hospital employee—brought a negligence claim against his employer for injuries sustained in an altercation with a patient. 371 S.W.3d at 175–76. Williams sued the hospital, alleging negligence in training, supervising, failing to warn, and inadequately equipping employees to address such a circumstance. *Id*. at 182. But the crux of the allegation concerned the appropriate standards of care owed to employees, including the services, protocols, supervision, monitoring, and equipment necessary to satisfy that standard, and whether such specialized standards were breached. *Id.* Because the underlying basis of the claim concerned the appropriate standards of care owed to employees of a mental health hospital and whether those standards were breached, we held the plaintiff could not establish those elements without expert testimony in the health care field. *Id.* at 182–83. Simply stated, "[i]t would blink reality to conclude that no professional . . . health judgment is required to decide what [the required protocols and standards] should be, and whether they were in place at the time of Williams' injury." *Id*. at 182.

Moreover, our opinion in *Haddock* illuminates the question concerning the necessity of expert medical or health care testimony when the claim, as here, involves the use of a medical device. In *Haddock*, the patient sued his physician for negligence when the physician perforated the patient's colon during a routine proctological examination. 793 S.W.2d at 949, 951. The examination involved the use of a flexible colonoscope, which the record established was a medical device requiring extensive training and experience for proper use. *Id.* at 954. We concluded that

[13] 793 S.W.2d at 951.

expert testimony was required because "[o]bviously, the use of a flexible colonoscope for a proctological examination is not a matter plainly within the common knowledge of laymen." *Id.; see also Chambers v. Conaway*, 883 S.W.2d 156, 158 (Tex. 1993) ("[U]nless the mode or form of treatment is a matter of common knowledge or is within the experience of the layman, the patient must tender expert testimony" to prove the claim.).

Guided by these precedents, we conclude expert health care testimony is needed to prove or refute Sok's claim for two primary reasons. First, federal regulations provide the laser used in this case may only be acquired by a licensed medical professional for supervised use in her medical practice. We note the Legislature began regulating laser hair removal facilities and technicians in 2009. Under the 2009 statute, laser hair removal constitutes the practice of medicine under the Texas Health and Safety Code.[14] *See* TEX. HEALTH & SAFETY CODE § 401.521. But because Sok filed suit before this state law took effect, it is inapplicable to her claim.[15] Importantly, however, even before the enactment of this state regulation, the United States Food and Drug Administration classified Bioderm's pulsed dye laser as a Class II surgical device. 21 C.F.R. § 878.4810(b)(1) (categorizing carbon dioxide lasers intended to cut, destroy, or remove tissue as Class II surgical devices). Federal regulations restrict Class II surgical devices as being "not safe except under the supervision of a practitioner licensed by law to direct the use of such device, and . . . [are] to be sold

[14] Pursuant to the 2009 legislation, laser hair removal may only be performed by a physician, a person acting under a physician's order, or a person otherwise authorized by law to practice medicine. TEX. HEALTH & SAFETY CODE § 401.521. Additionally, every laser hair removal facility must have a written contract with a consulting physician to: (1) establish proper protocols for the services provided at the facility; (2) audit the facility's protocols and operations; and (3) be available for emergency consultation and appointments. *Id.* § 401.519.

[15] The Legislation was enacted in May 2009, before Sok filed this suit. Act of May 23, 2009, 81st Leg., R.S., ch. 303, § 1, secs. 401.501–.522, 2009 Tex. Gen. Laws 822, 822–25.

only to or on the prescription or other order of such practitioner for use in the course of his professional practice."[16] *Id*. § 801.109(a)(2).[17] Sok's live pleading asserted the laser device in this dispute is "controlled and restricted to those holding a qualified license, such as the medical license held by Defendant Nguyen . . . ." Because Bioderm's laser is a regulated surgical device, which may only be acquired by a licensed medical practitioner for supervised use in her medical practice, we conclude the testimony of a licensed medical practitioner is required to prove or refute Sok's claim that use of the device departed from accepted standards of health care.

Second, the proper operation and use of this regulated surgical device requires extensive training and experience, which indicates that such matters are not within the common knowledge of laypersons. As we have observed here, Dr. Nguyen established and maintained a six-month training program to instruct laser operators how to properly perform treatments by taking into account the variables associated with patients (such as skin type) and equipment (such as intensity settings and attachments). This training requires attendance at a medical lecture, an observation period, clinical practice, morning rounds, and a written examination. When operators begin administering treatments, Dr. Nguyen reviews each scheduled procedure. His rounds include a discussion of previous treatment settings, complications or tolerance of previous treatments, and the planned treatment details to be executed that day. And Dr. Nguyen makes the final decision regarding the intensity settings of the laser. Bioderm's policy requires all operators, even those with

[16] The provision indicates that practitioners are individuals "such as physicians, dentists, and veterinarians, licensed by law to use or order the use of such device." 21 C.F.R. § 801.109(a)(1)(ii).

[17] *See* 21 C.F.R. § 860.3(c) (providing Class II devices are subject to special controls).

previous experience, to undergo and satisfactorily complete Dr. Nguyen's training. Dr. Nguyen trained the operator who performed Sok's treatment. And significantly, Dr. Nguyen determined the specific laser intensity setting for each of her treatments, including the one Sok alleges caused her burns and scarring.

This extensive training compels the conclusion that expert health care testimony is needed to prove or refute Sok's claim concerning the improper use of the device. Sok suffered no burns or scarring in four previous treatments to the leg area at an intensity identified as "level five." Laypersons cannot be expected to understand whether Dr. Nguyen should have known that use of the device on the same area would cause burns in a single treatment at the higher intensity of "level six." We therefore hold expert health care testimony is required to prove or refute Sok's claim, and Sok has not rebutted the presumption that her claim is a health care liability claim. *See Loaisiga*, 379 S.W.3d at 252; *Tex. W. Oaks*, 371 S.W.3d at 182–83; *Haddock*, 793 S.W.2d at 954.

Sok argues that any required expert testimony could be elicited from a technician trained in the use of laser hair removal devices, thus rendering expert testimony from a physician unnecessary. As an initial matter, we note expert testimony does not necessarily have to be proffered by a licensed physician to constitute expert health care testimony. *See* TEX. CIV. PRAC. & REM. CODE § 74.402 (requiring an expert to be practicing health care in the same field as the defendant). But, we disagree with Sok's contention that the testimony of a trained laser technician would suffice on these particular facts. Allowing a technician who could not legally acquire or supervise use of the device to testify that a physician's use of the device violated accepted standards of health care is not a procedure the Medical Liability Act allows. *See id.* (expert must be licensed in the area of health

care related to the claim, practice in the same field as the defendant, and have knowledge of accepted standards of care). Because expert health care testimony is needed to prove or refute Sok's claim against a physician and a health care provider, her claim is a health care liability claim.

III. Conclusion

In sum, we conclude the rebuttable presumption we established in *Loaisiga*—that the claim is a health care liability claim—applies here. Further, expert health care testimony is needed to prove or refute Sok's claim that Bioderm and Dr. Nguyen breached the appropriate standard of care, and therefore Sok has not rebutted the presumption. Because Sok filed a health care liability claim but failed to serve an expert report as required by the Medical Liability Act, we conclude the court of appeals erred in affirming the trial court's denial of the motion to dismiss. Additionally, Bioderm and Dr. Nguyen requested attorney's fees and costs in the trial court pursuant to section 74.351(b)(1) of the Medical Liability Act. Accordingly, we remand to that court to dismiss Sok's claim against Bioderm and Dr. Nguyen and consider their request for attorney's fees and costs.

Eva M. Guzman
Justice

OPINION DELIVERED: March 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-0810

LAN/STV, A JOINT VENTURE OF LOCKWOOD, ANDREWS & NEWMAN, INC. AND STV INCORPORATED, PETITIONER,

v.

MARTIN K. EBY CONSTRUCTION COMPANY, INC., RESPONDENT

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

Argued October 8, 2013

CHIEF JUSTICE HECHT delivered the opinion of the Court.

In actions for unintentional torts, the common law has long restricted recovery of purely economic damages unaccompanied by injury to the plaintiff or his property[1] — a doctrine we have referred to as the economic loss rule.[2] The rule serves to provide a more definite limitation on liability than foreseeability can and reflects a preference for allocating some economic risks by

[1] *See*, *e.g.*, Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 43 (1972) ("Under the prevailing rule in America, a plaintiff may not recover for his economic loss resulting from bodily harm to another or from physical damage to property in which he has no proprietary interest.").

[2] *See, e.g.*, *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 415 (Tex. 2011) ("[P]arties may be barred from recovering in negligence or strict liability for purely economic losses. This is often referred to as 'the economic loss rule.'" (citations omitted)).

contract rather than by law.[3] But the rule is not generally applicable in every situation; it allows recovery of economic damages in tort, or not, according to its underlying principles.[4] The issue in this case is whether the rule permits a general contractor to recover the increased costs of performing its construction contract with the owner in a tort action against the project architect for negligent misrepresentations — errors — in the plans and specifications. We conclude that the economic loss rule does not allow recovery and accordingly reverse the judgment of the court of appeals[5] and render judgment for the architect.

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[3] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1 cmt. c (Tentative Draft No. 1, 2012) ("RESTATEMENT, T.D. 1"). Sections 1 through 5 of this draft were approved by the membership of the American Law Institute at the 2012 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative. Proceedings at 89th Annual Meeting: American Law Institute, 89 A.L.I. Proc. 46-47 (2012). According to the Institute: "Once it is approved by the membership at an Annual Meeting, a Tentative Draft or a Proposed Final Draft represents the most current statement of the American Law Institute's position on the subject and may be cited in opinions or briefs . . . until the official text is published." *Overview, Project Development*, AMERICAN LAW INSTITUTE, http://www.ali.org/-index.cfm?fuseaction=projects.main (last visited June 18, 2014). A second draft, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (Tentative Draft No. 2, 2014) ("RESTATEMENT, T.D. 2"), was approved at the 2014 Annual Meeting. Proceedings at 91st Annual Meeting: American Law Institute, 91 A.L.I. Proc. ___ (2014); *see also Actions Taken at the 91st Annual Meeting,* ALI'S 91ST ANNUAL MEETING, http://2014annualmeeting.org/actions-taken/ (last visited June 18, 2014). Tentative Draft No. 2 covers the last three sections bearing on the unintentional infliction of economic loss, sections 6 through 8, and seven sections on the law of fraudulent misrepresentation; as the Reporter notes, section 6, on "Negligent Performance of Services", refers to and "is complementary to" section 5, on "Negligent Misrepresentation". RESTATEMENT, T.D. 2, Reporter's Memorandum, at xvii.

[4] *Sharyland*, 354 S.W.3d at 415 ("'[T]here is not one economic loss rule broadly applicable throughout the field of torts, but rather several more limited rules that govern recovery of economic losses in selected areas of the law.'") (quoting Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 534–535 (2009)); *see* RESTATEMENT, T.D. 1, § 1 cmt. b ("[D]uties of care with respect to economic loss are not general in character; they are recognized in specific circumstances according to the principles stated in Comment *c*."). Another scholar also thought there was no single "economic loss rule" but instead a "constellation of somewhat similar doctrines that tend to limit liability" that seemed to work in different ways in different contexts, for not necessarily identical reasons, "with exceptions where the reasons for limiting liability were absent." Oscar S. Gray, *Some Thoughts on "The Economic Loss Rule" and Apportionment*, 48 ARIZ. L. REV. 897, 898 (2006) ("The core concept of this constellation, not quite a 'rule', seems to me to be an inhibition against liability in negligence for economic harm not resulting from bodily injury to the claimant or physical damage to property in which the claimant has a proprietary interest.") (footnotes omitted).

[5] 350 S.W.3d 675 (Tex. App.—Dallas 2011).

I

The Dallas Area Rapid Transportation Authority ("DART") contracted with LAN/STV to prepare plans, drawings, and specifications for the construction of a light rail transit line from Dallas's downtown West End to the American Airlines Center about a mile away. LAN/STV agreed to "be responsible for the professional quality, technical accuracy, and . . . coordination of all designs, drawings, specifications, and other services furnished", and to be "liable to the Authority . . . for all damages to the Authority caused by [LAN/STV's] negligent performance of any of the services furnished". DART incorporated LAN/STV's plans into a solicitation for competitive bids to construct the project. Martin K. Eby Construction Company, which had built two other DART light rail projects, one of which was designed by LAN/STV, submitted the low bid on this project, just under $25 million, and was awarded the contract. The contract provided an administrative procedure for Eby to assert contract disputes with DART, including complaints about design problems. Eby and LAN/STV had no contract with each other. Thus, LAN/STV was contractually responsible to DART for the accuracy of the plans, as was DART to Eby, but LAN/STV owed Eby no contractual obligation.[6]

Days after beginning construction, Eby discovered that LAN/STV's plans were full of errors — about bridge structures, manhole and utility line locations, subsurface soil conditions, an existing retaining wall, and many other aspects of the proposed construction. While Eby expected that, as on any project, 10% of the plans would be changed, it found that 80% of LAN/STV's drawings had

[6] Eby does not contend that it was a third-party beneficiary of the LAN/STV–DART contract.

to be changed. This disrupted Eby's construction schedule and required additional labor and materials. In all, Eby now calculates it lost nearly $14 million on the project.

Only seven months into what would turn out to be a 25-month job, Eby sued DART for breach of contract in the United States District Court.[7] The court dismissed the case because Eby had not exhausted its administrative remedies against DART under their contract and Texas law.[8] Eby then invoked DART's contract dispute procedures, claiming $21 million. The hearing officer not only rejected Eby's claim in its entirety, he concluded that DART was entitled to $2.4 million in liquidated damages from Eby. Eby filed an administrative appeal, but, before it was resolved, settled with DART for $4.7 million.

Meanwhile, Eby filed this tort suit against LAN/STV, asserting causes of action for negligence and negligent misrepresentation. After Eby and DART settled, this case proceeded to

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[7] Eby alleged:

> In providing voluminous and detailed plans and specifications for Eby's use in preparing a bid price for this competitive bid project, DART was obliged to provide accurate and adequate information which could be reasonably relied upon for developing a competitive bid price. The information provided by DART, and upon which Eby relied, was in fact materially inaccurate and inadequate for performing the work resulting in extraordinary excess costs for performance and denying Eby the ability to perform the work in a productive and profitable fashion.
>
> * * *
>
> DART's failure, through LAN/STV, to provide Eby with adequate and accurate plans and specifications upon which to bid and perform this project, together with the lack of direction and cooperation in resolving the problems encountered due to these inadequacies and refusal to compensate Eby for these inadequacies, constitutes a material breach of contract . . . .

Eby also asserted a claim for misrepresentation, which was determined on appeal to be "just a subset of its breach-of-contract claim." *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 472 (5th Cir. 2004).

[8] The dismissal was affirmed on appeal. *Id.* at 465.

trial,[9] but only on Eby's claim that LAN/STV negligently misrepresented the work to be done in its error-ridden plans.[10] The jury agreed and assessed Eby's damages for its losses on the project at $5 million, but they also found that the damages were caused by Eby's and DART's negligence as well, and apportioned responsibility 45% to LAN/STV, 40% to DART, and 15% to Eby. The trial court concluded that Eby's $4.7 million settlement with DART should not be credited against the damages found by the jury, but that LAN/STV should be liable only for its apportioned share of the damages. Accordingly, the trial court rendered judgment for Eby for $2.25 million plus interest.

Both LAN/STV and Eby appealed, and following the court of appeals' affirmance,[11] both petitioned for review. We granted both petitions,[12] but as we view the case, we need only address LAN/STV's argument that Eby's recovery for negligent misrepresentation is barred by the economic loss rule.[13] We begin by surveying the development of the rule in American law and its status in Texas. We then turn to its application in this case.

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[9] The trial court initially granted LAN/STV summary judgment on its claim of derivative immunity under TEX. TRANSP. CODE § 452.056(d), but the court of appeals reversed. *Martin K. Eby Constr. Co. v. LAN/STV*, 205 S.W.3d 16, 21 (Tex. App.—Dallas 2006, pet. denied).

[10] Eby alleged: "In the course of providing the referenced plans, drawings and specifications, LAN/STV made representations, in a transaction for which it was compensated, where those representations were false, misleading and/or inaccurate and were made with the knowledge that contractors such as Eby would rely upon them."

[11] 350 S.W.3d 675 (Tex. App.—Dallas 2011).

[12] 56 Tex. Sup. Ct. J. 277 (Feb. 15, 2013).

[13] LAN/STV and Eby each complain of the damage award: LAN/STV contends that it is entitled to a credit for Eby's $4.7 million settlement with DART, and Eby argues that the damages found by the jury should not have been reduced by the percentage of responsibility apportioned to DART. LAN/STV also argues that Eby's claim is barred by derivative immunity, that Eby's measure of damages is improper, and that Eby failed to prove all the elements of its negligent misrepresentation claim.

II

A

The law has long limited the recovery of purely economic damages in an action for negligence. An early example, oft-cited, is Justice Holmes's opinion in *Robins Dry Dock & Repair Co. v. Flint*,[14] a suit by the charterers of a steamship against a dry dock for damages for loss of the use of the vessel from a delay in repairs due to the dry dock's negligence. The Supreme Court held that the charterers could not recover their economic damages from the dry dock, either as third-party beneficiaries of the contract between the owners and the dry dock,[15] or for the dry dock's negligence. Justice Holmes explained:

> Of course the contract of the [dry dock] with the owners imposed no immediate obligation upon the [dry dock] to third persons [the charterers] as we already have said, and whether the [dry dock] performed it promptly or with negligent delay was the business of the owners and of nobody else. . . . [The charterers'] loss arose only through their contract with the owners . . . . [N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. . . . The law does not spread its protection so far.[16]

Nearly sixty years later, Judge Higginbotham observed in *State of Louisiana v. M/V Testbank* that "*Robins* broke no new ground . . . . [T]he prevailing rule [in the United States and England] denied a plaintiff recovery for economic loss if that loss resulted from physical damage to property in which

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[14] 275 U.S. 303 (1927).

[15] *Id.* at 307-308.

[16] *Id.* at 308-309 (citations omitted).

he had no proprietary interest."[17] Judge Higginbotham cited Professor James's 1972 article, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*:

> Under the prevailing rule in America, a plaintiff may not recover for his economic loss resulting from bodily harm to another or from physical damage to property in which he has no proprietary interest. Similarly, a plaintiff may not recover for economic loss caused by his reliance on a negligent misrepresentation that was not made directly to him or specifically on his behalf.[18]

"The reasons for this difference in treatment of indirect economic loss and physical damage," Professor James continued, "do not derive from the theory or the logic of tort law".[19] Economic loss may be no less real than physical injury and just as foreseeable. In *Robins*, for example, the charterers' loss of business from the dry dock's negligent delay in repairing the steamship was readily foreseeable, but so would have been the charterers' clients' loss of business, and so on. Justice Holmes' abrupt curtailment of this rippling liability — "[t]he law does not spread its protection so far"[20] — could have been achieved by taking a more restrictive view of foreseeability. But, wrote Professor James,

> judges who have been unwilling to accept narrow and unrealistic views of what is foreseeable — or of what a jury may find to be unforeseeable — remain generally unwilling to allow recovery for indirect economic loss. The explanation for this reluctance, repeated in decisions over the years, is a pragmatic one: the physical

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[17] 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc).

[18] 25 VAND. L. REV. 43, 43 (1972) (footnotes omitted).

[19] *Id.* at 44. *See also* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Boston, Little Brown & Co., 1881) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

[20] *Robins*, 275 U.S. at 309.

> consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended. As Cardozo put it in a passage often quoted, liability for these consequences would be "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[21]

Liability for economic loss directly resulting from physical injury to the claimant or his property — such as lost wages or medical bills — is limited by the scope of the injury. Liability for a stand-alone economic loss is not.[22]

Often, a more appropriate remedy for the victim is to allocate the risk of loss by contract or to cover it through insurance.[23] In Judge Posner's view:

> This is simply generalizing to tort law the contract-law rule of *Hadley v. Baxendale* . . . . The point in *Hadley* . . . was that the carrier could not estimate the loss that the customer would incur from a delay in the delivery of the repaired mill shaft to the customer, but the customer could estimate this cost and, therefore, was in a better position to avoid the loss by taking appropriate precautions or by buying insurance.[24]

Thus, for example, "when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss", protection from that kind of harm, the United States Supreme Court has held (in an admiralty case), should be "left entirely to the law

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[21] James, *supra* note 18, at 45 (footnotes omitted) (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931)).

[22] *See* William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 TEX. TECH L. REV. 477, 481 (1992) ("One rationale for precluding recovery of pure economic loss in these cases is a fear that the purely economic consequences of a defendant's negligence are not limited by the normal tort limit on the scope of a negligent defendant's liability, foreseeability on a case-by-case basis.").

[23] *See id.* at 481-482 ("Another rationale is that plaintiffs are in a better position than defendants to evaluate their own susceptibility to pure economic loss and protect against the economic loss through first-party insurance.").

[24] Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 739 (2006) (citing *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

of contracts" because "the parties may set the terms of their own agreements."[25] Determining whether a provision for recovery of economic loss is better left to contract helps delineate between tort and contract claims. As one commentator has explained:

> If there is a convincing rationale for the economic loss rule, it is that the rule performs a critical boundary-line function, separating the law of torts from the law of contracts. More specifically, "[t]he underlying purpose of the economic loss rule is to preserve the distinction between contract and tort theories in circumstances where both theories could apply."[26]

Since Professor James's seminal article, much has been written on the development of the rule limiting recovery of economic damages in tort actions.[27] From our review of the cases and commentary on the subject, we think the principal rationales for the rule are well-summarized by Dean Farnsworth in the recently approved *Restatement (Third) of Torts: Liability for Economic Harm*, which we quote at length:

> Economic injuries may be no less important than injuries of other kinds; a pure but severe economic loss might well be worse for a plaintiff than a more modest personal injury, and the difference between economic loss in itself and economic loss resulting from property damage may be negligible from the victim's standpoint. For several reasons, however, courts impose tort liability for economic loss more selectively than liability for other types of harms.

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[25] *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 859, 872-873 (1986).

[26] Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 546 (2009) (footnotes omitted) (quoting Stewart I. Edelstein, *Beware the Economic Loss Rule*, TRIAL, June 2006, at 42, 43 (2006)).

[27] *See*, *e.g.*, Symposium, *Dan B. Dobbs Conference on Economic Tort Law*, 48 ARIZ. L. REV. 687 (2006); Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 778 (2006) (citing James, *supra* note 18, at 45-46); Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749, 764 (2006) (citing James, *supra* note 18, at 44-45); *see also* Jim Wren, *Applying the Economic Loss Rule in Texas*, 64 BAYLOR L. REV. 204, 229 (2012) (citing James, *supra* note 18, at 45).

(1). *Indeterminate and disproportionate liability.* Economic losses proliferate more easily than losses of other kinds. Physical forces that cause injury ordinarily spend themselves in predictable ways; their exact courses may be hard to predict, but their lifespan and power to harm are limited. A badly driven car threatens physical harm only to others nearby. Economic harm is not self-limiting in this way. A single negligent utterance can cause economic loss to thousands of people who rely on it, those losses may produce additional losses to those who were relying on the first round of victims, and so on. Consequences of this sort may be at least generally foreseeable to the person who commits the negligent act. Defendants in such cases thus might face liabilities that are indeterminate and out of proportion to their culpability. Those liabilities may in turn create an exaggerated pressure to avoid an activity altogether.

(2). *Deference to contract.* Risks of economic loss tend to be especially well suited to allocation by contract. First, economic injuries caused by negligence often result from a decision by the victim to rely on a defendant's words or acts when entering some sort of transaction — an investment in a company, the purchase of a house, and so forth. A potential plaintiff making such a decision has a full chance to consider how to manage the risks involved, whether by inspecting the item or investment, obtaining insurance against the risk of disappointment, or making a contract that assigns the risk of loss to someone else. Second, money is a complete remedy for an economic injury. Insurance benefits, indemnification by agreement, or other replacements of money payments are just as good as the money lost in a transaction that turns out badly. This fungibility makes those other ways of managing risk — insurance, indemnity, and the like — more attractive than they might be to a party facing a prospect of personal injury.

Those same points often will make it hard for a court to know what allocation of responsibility for economic loss would best serve the interests of the parties to a risky situation. A contract that settles responsibility for such a risk will therefore be preferable in most cases to a judicial assignment of liability after harm is done. The contract will better reflect the preferences of the parties and help prevent the need for speculation and litigation later. Contracts also are governed by a body of commercial law that has been developed to address economic loss, and thus will often be better suited for that task than the law of torts. In short, contracts to manage the risk of economic loss are more often possible, and more often desirable, than contracts to manage risks of other types of injury. As a result, courts generally do not recognize tort liability for economic losses caused by the breach of a contract between the

> parties, and often restrict the role of tort law in other circumstances in which protection by contract is available.[28]

Thus, the *Restatement* concludes, while there is "no general duty to avoid the unintentional infliction of economic loss",[29] the duty may exist when the rationales just stated for limiting recovery are "weak or absent"[30] — *cessante ratione legis cessat et ipsa lex.*[31]

B

The absence of a bright-line rule, and the failure to analyze whether denying tort recovery for an economic loss in a particular kind of situation is justified by the rationales for limiting recovery of such losses, has led to some confusion. In a 1992 article, then-Professor Powers called Texas law on the subject "murky".[32] One thing certain was that the damage caused by a defective product to itself cannot be recovered in an action for strict products liability,[33] even if there is also

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[28] *See* RESTATEMENT, T.D. 1, § 1 cmt. c.

[29] *Id.* § 1.

[30] *Id.* § 1 cmt. d.

[31] "When the reason of the law ceases, the law itself also ceases." BLACK'S LAW DICTIONARY App. A 1622 (7th ed. 1999).

[32] Powers, *supra* note 22, at 477. In fairness, Texas does not have a monopoly on the confusion. *See* Johnson, *supra* note 26, at 546 ("The confusing mass of precedent relating to tort liability for economic loss has yet to be disentangled and expressed with the clarity commonly found with respect to other tort law topics.").

[33] This rule was first stated in *Nobility Homes of Texas, Inc. v. Shivers*: "strict liability does not apply to economic losses." 557 S.W.2d 77, 80 (Tex. 1977). The plaintiff suffered only economic damages — the difference between what he paid for a rickety mobile home and what it was worth. *Id.* at 78. But his strict products liability claim also failed because the mobile home, though defective, was not unreasonably dangerous. *Id.* at 79-80; *see also McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 788, 788-789 (Tex. 1967) (adopting the strict liability action defined in section 402A of the *Restatement (Second) of Torts*, which provides for damages caused by a defective product that is unreasonably dangerous). Less than a year after the Court issued its unanimous opinion in *Nobility Homes*, the Court could not agree on what had been the basis for that decision. In *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, the Court held that the decision in *Nobility Homes* had been based on the economic loss rule: "In transactions between a commercial seller and commercial buyer, when no physical injury has occurred to persons or other property, injury to

personal injury or injury to other property.[34] Recovery of such damages must be for breach of contract or warranty. It was also fairly clear that one party to a contract cannot recover from another party, in an action for negligence, an economic loss to the subject of the contract.[35]

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the defective product itself is an economic loss governed by the Uniform Commercial Code." 572 S.W.2d 308, 313 (Tex. 1978). Justice Pope, the author of the Court's opinion in *Nobility Homes*, disagreed: "We did not hold that damages to the product itself defeated an action for strict liability. . . . The reason that *Nobility* . . . held there was no strict liability case for the product itself was the absence of proof and findings that there was a defect that was unreasonably dangerous that produced the accident." *Id.* at 314-315 (Pope, J., dissenting). In a case decided the same day as *Mid Continent*, the Court reiterated its view of *Nobility Homes*, that when "only the product itself is damaged, such damage constitutes economic loss recoverable only as damages for breach of an implied warranty under the [UCC]." *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 325 (Tex. 1978). We have since reaffirmed: "The economic loss rule applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself." *Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007) (citations omitted) (the Court, however, did not reach the court of appeals' application of the economic loss rule).

[34] In *Signal Oil*, a defective reactor charge heater installed in a refinery's isomax unit ruptured, causing an explosion and fire that damaged the heater itself as well as other property; the refinery company sued for property damage and economic loss based on, *inter alia,* strict liability and implied warranty theories. 572 S.W.2d at 322-323. The Court remanded the breach-of-warranty claim for retrial, but concluded that the strict liability claim failed for failure to obtain a matching causation finding. *Id.* at 324-329, 331. In so doing, however, the Court noted that plaintiff, in alleging that the explosion and fire damaged not only the reactor heater, but also the catalyst, refinery product, other equipment in the unit, and other property in the area, "properly alleged a cause of action in strict liability" — the Court explained: "Where such collateral property damage exists in addition to damage to the product itself, recovery for such damages are recoverable under Section 402A of the Restatement (Second) of Torts as damage to property or under the Texas Business and Commerce Code, Section 2.715, as consequential damages for a breach of an implied warranty. To the extent that the product itself has become part of the accident risk or the tort by causing collateral property damage, it is properly considered as part of the property damages, rather than as economic loss." *Id.* at 325 (footnote omitted). This language, in context, recognizes only that collateral property damage may be recoverable, and cannot be read as permitting recovery based on a products liability theory for damages to a defective product itself if there is also personal injury or injury to other property. *Cf. Equistar*, 240 S.W.3d at 868 (noting, in holding that Dresser's no-evidence objections failed to preserve a complaint about the jury charge, that "[e]ven if there had been no evidence of a tort duty, there was still no question that Dresser sold the compressor and impellers to Equistar and that implied warranties of merchantability existed at some point as to both"; the damages questions existed in the suit independent of the tort issues). The damage to the product is an economic loss recoverable in an action for breach of contract or breach of warranty. *See Murray v. Ford Motor Co.*, 97 S.W.3d 888, 892 (Tex. App.—Dallas 2003, pet. denied) (stating that "[n]o Texas court has applied the *Signal Oil & Gas Co. dicta* [to permit recovery of damages to the product in a strict liability action when accompanied by other injury]").

[35] This Court had held in *Jim Walter Homes, Inc. v. Reed*: "When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone." 711 S.W.2d 617, 618 (Tex. 1986). *See also Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) ("When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract."). We have repeatedly reaffirmed this rule. *Wansey v. Hole*, 379 S.W.3d 246, 248 (Tex. 2012) (per curiam) ("[A] duty in tort does not lie when the only injury claimed is one for economic damages recoverable under a breach of contract claim."); *1/2 Price Checks Cashed v. United Auto. Ins. Co.*,

The *Restatement* now concludes generally that "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties."[36] It was less clear twenty years ago, and still is today, the extent to which Texas precludes recovery of economic damages in a negligence suit between contractual strangers, notwithstanding the rule's genesis in such cases, like *Robins*. As Professor Powers observed, "[a]lthough cases between contractual strangers are the paradigm of the traditional 'economic loss' rule, no Texas case involving 'strangers' expressly addresses the economic loss rule."[37] Professor Powers noted that this Court had suggested in dicta that purely economic damages are recoverable in a negligence action between contractual strangers but later appeared to have rejected that possibility.[38]

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344 S.W.3d 378, 387 (Tex. 2011) ("[U]nder the economic loss rule, we have held that a claim sounds in contract when the only injury is economic loss to the subject of the contract itself."); *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61 (Tex. 2008) ("'When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract.'" (quoting *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 282 (Tex. 1990), and *Jim Walter Homes,* 711 S.W.2d at 618)); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007) ("The economic-loss rule . . . generally precludes recovery in tort for economic losses resulting from the failure of a party to perform under a contract."). These cases have effectively limited *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947); *see Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 45 (Tex. 1998) (explaining and distinguishing, in a fraudulent inducement suit, *DeLanney* and *Jim Walter Homes*); *DeLanney*, 809 S.W.2d at 494-495 (in *Scharrenbeck*, the defendant agreed to repair a water heater; in failing to repair the water heater properly, the defendant breached its contract, and, "[i]n burning down plaintiff's home, the defendant breached a common-law duty as well, thereby providing a basis for plaintiff's recovery in tort") (citing *Jim Walter Homes*); *Jim Walter Homes*, 711 S.W.2d at 618 ("The acts of a party may breach duties in tort or contract alone or simultaneously in both." (citing *Scharrenbeck*)).

[36] *See* RESTATEMENT, T.D. 1, § 3.

[37] Powers, *supra* note 22, at 482.

[38] *Id.* at 486-487. In *Nobility Homes*, the Court stated: "Consumers have other remedies for economic loss against persons with whom they are not in privity. One of these remedies is a cause in negligence." 557 S.W.2d at 83. Professor Powers discounted the statement because the Court cited no authority, and because the defendant had not challenged its liability in negligence in this Court, hence the statement was unnecessary for the judgment. Powers, *supra* note 22, at 486-487. In any event, Professor Powers concluded, *Jim Walter Homes* had "laid to rest" any confusion, *id.* at 487, by stating that "[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone", 711 S.W.2d at 618. In *Sharyland Water Supply Corp. v. City of Alton*, we agreed, despite the fact that the parties in *Jim Walter Homes* were in privity. 354 S.W.3d 407, 416 n.10 (Tex. 2011).

Since then, Texas courts of appeals have uniformly applied the economic loss rule to deny recovery of purely economic losses in actions for negligent performance of services.[39] Professional malpractice cases are an exception. A client can recover purely economic losses from a negligent lawyer, regardless of whether the lawyer and client have a contract.[40] Lawyer malpractice is actionable as negligence no doubt because agreements regarding legal representation are not required in Texas, except for contingent fees,[41] and until relatively recently have not been the norm. Also, the standards governing legal representation are deeply developed and their application uniform and well-settled. These factors also support negligence actions against other professionals.[42]

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[39] *Equistar Chems., L.P. v. Dresser-Rand Co.*, 123 S.W.3d 584, 587 (Tex. App.—Houston [14th Dist.] 2003) ("[a]ssuming the compressors themselves are the product, any claim for damage to them had to be brought in a contract or warranty action . . ."), *overruled on other grounds*, 240 S.W.3d 864, 867 n.2, 868 (Tex. 2007) (because the Court held that Dresser failed to preserve any complaint that the jury charge improperly allowed the jury to find both tort and contract damages by a single answer, the Court "express[ed] no opinion" on the court of appeals' discussion and application of the economic loss rule); *Murray v. Ford Motor Co.*, 97 S.W.3d at 891 (recovery denied for fire damage to negligently constructed vehicle) ("The economic loss rule applies to negligence claims as well as claims for strict liability."); *Trans-Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex. App.—Eastland 2002, no pet.) (recovery denied for negligent repairs to a plane) ("Simply stated, a duty in tort does not lie under the economic loss rule when the only injury claimed is one for economic damages."); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 286, 289-290 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (gas lines operator not liable, for negligently marking and placing its lines, to company excavating for electrical conduits in the absence of a contractual relationship or a claim for personal injury or property damages); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (seismic survey software developer not liable for negligence to a third-party oil and gas company that suffered only economic loss of drilling a dry well); *Indelco, Inc. v. Hanson Indus. N. Am.-Grove Worldwide*, 967 S.W.2d 931, 932-933 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (recovery denied for fire damage to negligently designed crane); *see also Hininger v. Case Corp.*, 23 F.3d 124, 127 (5th Cir. 1994) (recovery denied for lost business due to negligently designed combine).

[40] *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006) ("Legal malpractice claims sound in tort."); *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989) ("An attorney malpractice action in Texas is based on negligence."); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988) ("A cause of action for legal malpractice is in the nature of a tort . . . .").

[41] TEX. DISCIP. R. OF PROF'L CONDUCT 1.04(d).

[42] *See*, *e.g.*, *Murphy v. Campbell*, 964 S.W.2d 265, 269 (Tex. 1997) ("A plaintiff may obtain full redress [for accounting malpractice] in an action for negligence or breach of contract."); TEX. CIV. PRAC. & REM. CODE § 150.001-.003 (governing negligence suits against "licensed or registered professionals", defined to include "a licensed architect,

Although Texas courts have repeatedly invoked the economic loss rule to disallow recovery of purely economic losses in actions for negligent services not involving professionals, this Court, without citing the rule, has allowed recovery of such losses in an action for negligent misrepresentation, the cause of action in the present case. We first recognized the action, defined by section 552 of the *Restatement (Second) of Torts*,[43] in *Federal Land Bank Association of Tyler v. Sloane*, where we held that prospective borrowers could recover the costs they incurred (but not lost profits) in relying on their lender's negligent misrepresentation to them that their loan application would be approved.[44] Later, in *McCamish, Martin, Brown & Loeffler v. F.E. Appling*

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licensed professional engineer, registered professional land surveyor, registered landscape architect, or any firm in which such licensed or registered professional practices, including but not limited to a corporation, professional corporation, limited liability corporation, partnership, limited liability partnership, sole proprietorship, joint venture, or any other business entity", *id.* § 150.001(1-a)).

[43] Section 552, entitled "Information Negligently Supplied for the Guidance of Others", states:

"(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

"(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

"(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

"(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

"(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them."

RESTATEMENT (SECOND) OF TORTS § 552 (1977). Section 5 of the *Restatement (Third) of Torts: Liability for Economic Harm* "repeats § 552 with small changes." RESTATEMENT, T.D. 1, § 5 cmt. a.

[44] 825 S.W.2d 439, 442-443 (Tex. 1991).

Interests, we held that while a non-client cannot recover against a lawyer for negligence,[45] a lawyer may be liable for negligent misrepresentation to a non-client, but only in narrow circumstances, "when information is transferred by an attorney to a known party for a known purpose", liability is not expressly limited or disclaimed but invited, and the claimant has "justifiably rel[ied] on a lawyer's representation of material fact", which cannot ordinarily occur in an adversarial context.[46] Most recently, in *Grant Thornton LLP v. Prospect High Income Fund, Ltd.*, we held that an accountant may be liable to a strictly limited group of investors who justifiably rely on negligent misrepresentations in a corporate audit report.[47] But we denied the claims in that case because the plaintiffs were merely potential investors with no special relationship to the audited corporation, and given their knowledge of the corporation and the marketplace, their reliance was not justified.[48]

These cases should not be read to suggest that recovery of economic loss is broader for negligent misrepresentation than for negligent performance of services. We agree with the *Restatement* that "[t]he general theory of liability is the same" for both torts, which is that

> [a] plaintiff's reliance alone, even if foreseeable, is not a sufficient basis for recovery; under either [tort] a defendant generally must act with the apparent purpose of providing a basis for the reliance. It may be useful to say that a defendant held liable under either [tort] must "invite reliance" by the plaintiff, so long as the expression is understood to refer to the defendant's apparent purpose and not to a temptation incidentally created by the defendant's words or acts.[49]

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[45] *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996).

[46] 991 S.W.2d 787, 794 (Tex. 1999).

[47] 314 S.W.3d 913, 920 (Tex. 2010).

[48] *Id.* at 921, 923-926.

[49] *See* RESTATEMENT, T.D. 1, § 5 cmt. a.

And for both torts, whether and how to apply the economic loss rule "does not lend itself to easy answers or broad pronouncements."[50] Rather, as we have already observed, the application of the rule depends on an analysis of its rationales in a particular situation.

III

Eby argues that the economic rule should not apply in this case when it did not bar recovery in our other negligent misrepresentation cases, *Sloane*, *McCamish*, and *Grant Thornton*. LAN/STV counters that to allow such recovery on construction projects, where relationships are contractual and certainty and predictability in risk allocation are crucial, would be disruptive.

Construction projects operate by agreements among the participants. Typically, those agreements are vertical: the owner contracts with an architect and with a general contractor, the general contractor contracts with subcontractors, a subcontractor may contract with a sub-subcontractor, and so on. The architect does not contract with the general contractor, and the subcontractors do not contract with the architect, the owner, or each other.

We think it beyond argument that one participant on a construction project cannot recover from another — setting aside the architect for the moment — for economic loss caused by negligence. If the roofing subcontractor could recover from the foundation subcontractor damages for extra costs incurred or business lost due to the latter's negligent delay of construction, the risk of liability to everyone on the project would be magnified and indeterminate — the same result

[50] *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 419 (Tex. 2011).

Justice Holmes rejected in *Robins*. As the *Restatement* explains:

> There is no liability in tort . . . when the owner of a construction project sues a subcontractor for negligence resulting in economic loss; nor is liability found when one subcontractor is sued by another because the negligence of the first drives up the costs of the second. A subcontractor's negligence in either case is viewed just as a failure in the performance of its obligations to its contractual partner, not as the breach of a duty in tort to other subcontractors on the same job, or to the owner of the project. This way of describing the subcontractor's role is not inevitable in all cases. General rules are favored in this area of the law, however, because their clarity allows parties to do business on a surer footing. In this setting, a rule of no liability is made especially attractive by the number and intricacy of the contracts that define the responsibilities of subcontractors on many construction projects. That web of contracts would be disrupted by tort suits between subcontractors or suits brought against them by a project's owner.[51]

The issues are whether to treat the architect differently and whether to distinguish between an action for negligent performance of services and an action for negligent misrepresentations. On the latter issue, we agree with the *Restatement*: "[b]oth [torts] are based on the [same] logic" and "[t]he general theory of liability is the same".[52] The economic loss rule should not apply differently to these two tort theories in the same situation.

On the former issue, we diverge from the *Restatement*. We agree that

> [t]he plans drawn by the architect are intended to serve as a basis for reliance by the contractor who forms a bid on the basis of them and is then hired to carry them out. The architect's plans are analogous to the audit report that an accountant supplies to a client for distribution to potential investors — a standard case of liability [for negligent misrepresentation].[53]

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[51] RESTATEMENT, T.D. 2, § 6 cmt. b (the comment adds: "Allowing a suit against the architect of a project by a party who made a bid in reliance on a defective plan does not create comparable problems.").

[52] RESTATEMENT, T.D. 1, § 5 cmt. a.

[53] RESTATEMENT, T.D. 2, § 6 cmt. b.

But we think the contractor's principal reliance must be on the presentation of the plans by the owner, with whom the contractor is to reach an agreement, not the architect, a contractual stranger. The contractor does not choose the architect, or instruct it, or pay it. Under *McCamish*, the contractor could not recover economic damages from the owner's lawyer's negligent drafting of the construction contract. And while there is some analogy between the architect's plans and an accountant's audit report, under *Grant Thornton*, the latter is not an invitation to all investors to rely, but only those to whom it is more specifically directed. Here, the architect's plans are no more an invitation to all potential bidders to rely.

The *Restatement* adds that if allowing recovery against the architect in negligence "is not congenial to the parties, they are free to change it in the contracts that link them."[54] But the parties are just as free to provide for liability by contract that the law does not allow in tort. The *Restatement* acknowledges this, noting that if the architect is contractually liable to the owner for defects in the plans, and the owner in turn has the same liability to the contractor, the contractor is protected.[55] But the *Restatement* concludes that while this assignment of risk by contract should be

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[54] *Id.*

[55] The *Restatement* posits the following situation in illustration 8 to section 3, borrowed from illustration 9 to section 552 of the *Restatement (Second)*:

> City hires Engineer to test soil conditions at a site where it plans to erect a large building. City explains that Engineer's report will be distributed to prospective building contractors for use in estimating their costs. Engineer negligently submits an inaccurate report. Contractor wins the right to perform the construction, having relied on Engineer's report in preparing its bid. Engineer's errors cause Contractor to suffer losses in performing its contract with City. The contracts between Contractor and City, and between City and Engineer, do not preclude a claim by Contractor against Engineer [for negligent performance of services or negligent misrepresentation]. Engineer remains potentially liable to Contractor under either of those [torts].

RESTATEMENT, T.D. 1, § 3 cmt. f. But the *Restatement* adds:

encouraged, it jeopardizes unsophisticated parties:

> Forbidding tort claims between parties who are indirectly linked by contract would put pressure on them to specify their rights carefully in advance, thus sparing courts the need to inquire into them later. But that incentive is most likely to be noticed by sophisticated parties negotiating large projects, and for them the rule is unlikely to be of great importance. They will negotiate allocations of risk that look similar in the end notwithstanding the rule of tort law in the background. Meanwhile, less sophisticated parties would stand a good chance of being tripped up by a broad rule, as when they fail to provide for indemnification in some direction and inadvertently leave a party who has been wronged with no remedy.[56]

We think it more probable that a contractor will assume it must look to its agreement with the owner for damages if the project is not as represented or for any other breach.

Though there remains the possibility that a contractor may not do so, we think the availability of contractual remedies must preclude tort recovery in the situation generally because, as stated above, "clarity allows parties to do business on a surer footing".[57] "Where contracts might readily have been used to allocate the risk of a loss," the *Restatement* observes, "a duty to avoid the loss is unlikely to be recognized in tort — not because the economic loss rule applies, but simply because courts prefer, in general, that economic losses be allocated by contract where feasible."[58] We see no reason not to apply the economic loss rule to achieve this end.

> Contractor could have insisted that City guarantee the soundness of Engineer's report, and City could have insisted that Engineer indemnify City for claims brought against it by Contractor. In effect, those contracts would have protected Contractor against the risk of errors by Engineer, and would have ensured that Engineer would bear the costs of its negligence.

Id.

[56] *Id*. § 3, reporter's note to cmt. f.

[57] RESTATEMENT, T.D. 2, § 6 cmt. b.

[58] RESTATEMENT, T.D. 1, § 3 cmt. f.

Analyzing the economics of the construction site, Professor Powers proposed this result more than twenty years ago, and we quote his analysis at length:

> In fact, construction disputes . . . are good candidates for precluding recovery under the "economic loss" rule, because the parties are in a position to protect themselves through bargaining. Though the parties do not necessarily have contracts with each other, they typically all have contracts with the owner, or subcontracts with someone who does have a contract with the owner. If contractors want to be protected, they can insist on that protection from the owner who will get protection from the architect. The contractors can take less compensation from the owner, so that the owner can in turn compensate the architect for the added risk.
>
> The issue is who will buy business protection insurance. It makes sense to let the parties bargain about this rather than impose a "legal" solution. . . .
>
> There are two additional reasons to decline imposing a general tort duty on architects and engineers. First, imposing the risk of economic loss on the architect requires the architect to pass the cost along to the owner. The owner will then pass the cost along to the various contractors and subcontractors. Different contractors and subcontractors have different susceptibilities to economic loss, but the owner has no way of distinguishing among the various contractors and subcontractors. Some contractors and subcontractors will benefit greatly, some will not. Yet all will pay the price for this protection, not in proportion to their benefit from the protection, but roughly in proportion to the dollar value of their services. This will lead to a cross-subsidization. Contractors and subcontractors who are not subject to losses from delays effectively "pay" for protection that they do not need. In effect, they subsidize other contractors and subcontractors who are more susceptible to this type of loss.
>
> This inequity could be remedied if the owner could determine which contractors and subcontractors benefit most and then charge them more by paying them less. But this would require the owner to be in the business of evaluating contractors' susceptibility to economic loss, which would effectively put the owner in the insurance evaluation business. Individual contractors and subcontractors are in a better position to evaluate their own susceptibility to economic loss and determine whether to buy insurance. Thus, fairness and efficiency support leaving these losses on the contractors and subcontractors, who can decide for themselves whether and for how much to insure. I assume this is part of the explanation why current contractual practice does not shift these obligations to the architect.

> Second, . . . contracts between owners and supervising architects can vary. Sometimes the supervising architect might be hired for the benefit of the contractors and subcontractors. However, in most cases, the architect is hired either as a neutral arbitrator or, most often, as the agent of the owner. . . . If the architect is supposed to be neutral or to operate as the agent of the owner, negligence principles — which would be decided by the jury after the fact — would create a chilling effect on the architect's neutrality or fiduciary duty to the owner.
>
> This analysis suggests that each situation is different and that courts should use contract principles[,] not tort principles, to determine whether the architect has "contractual" obligations to the contractors and subcontractors.[59]

Finally, the courts are fairly evenly divided over whether to apply the economic loss rule in this situation.[60] We side with those who do.

DART was contractually responsible to Eby for providing accurate plans for the job. Eby agreed to specified remedies for disputes, pursued those remedies (when the federal court would not allow it to sue), and settled its claims for $4.7 million. Had DART chosen to do so, it could have

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[59] Powers, *supra* note 22, at 521 n.205 (citation omitted).

[60] The following cases apply the economic loss rule: *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004); *Hercules & Co., Ltd. v. Shama Restaurant Corp.*, 566 A.2d 31 (D.C. 1989); *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 679 N.E.2d 1197 (1997); *Terracon Consultants Western, Inc. v. Mandalay Resort Grp.*, 206 P.3d 81 (Nev. 2009); *Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen. Hosp. Ass'n*, 560 N.E.2d 206 (Ohio 1990); *SME Indus., Inc. v. Thompson, Ventulett, Stainback and Assoc., Inc.*, 28 P.3d 669 (Utah 2001); *Blake Constr. Co., Inc. v. Alley*, 353 S.E.2d 724 (Va. 1987); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.*, 881 P.2d 986 (Wash. 1994); *Excel Constr., Inc. v. HKM Eng'g, Inc.*, 228 P.3d 40 (Wyo. 2010).

The following do not: *Sullivan v. Pulte Home Corp.*, 306 P.3d 1 (Ariz. 2013) (noting that *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292 (Ariz. 1984), correctly implied that the economic loss doctrine would not apply to negligence claims by a plaintiff who has no contractual relationship with the defendant (citation omitted)); *A. R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973) (though this case was limited to its facts, the economic loss doctrine was thereafter limited to products liability cases; *see Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013)); *Craig v. Everett M. Brooks Co.*, 222 N.E.2d 752 (Mass. 1967); *Prichard Bros., Inc. v. Grady Co.*, 428 N.W.2d 391 (Minn. 1988); *Bilt–Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270 (Pa. 2005); *Forte Bros., Inc. v. Nat'l Amusement, Inc.*, 525 A.2d 1301 (R.I. 1987); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 463 S.E.2d 85 (S.C. 1995); *Eastern Steel v. City of Salem*, 549 S.E.2d 266 (W. Va. 2001).

For a survey of case law both ways, *see* Marc Schneier, Annotation, *Tort Liability of Project Architect or Engineer for Economic Damages Suffered by Contractor or Subcontractor*, 61 A.L.R.6th 445 (2011).

sued LAN/STV for breach of their contract to provide accurate plans. But Eby had no agreement with LAN/STV and was not party to LAN/STV's agreement with DART. Clearly, the economic loss rule barred Eby's subcontractors from recovering their own delay damages in negligence claims against LAN/STV. We think Eby should not be treated differently.

* * * * *

The reasons for the economic loss rule support its application in this case to preclude a general contractor from recovering delay damages from the owner's architect. Accordingly, we reverse the judgment of the court of appeals and render judgment that Eby take nothing from LAN/STV.

Nathan L. Hecht
Chief Justice

Opinion issued: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-1015

TIFFANY STINSON, PETITIONER,

v.

STEPHEN FONTENOT, RESPONDENT

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

PER CURIAM

The outcome of this case is controlled by our contemporaneously issued opinion in *Alexander v. Walker*, ___ S.W.3d ___ (Tex. 2014) (per curiam). Though the court of appeals correctly held that the respondent was entitled to dismissal of the tort claims asserted against him, the court's reasoning is incongruous with *Alexander*. Accordingly, we affirm the court of appeals' judgment, but for reasons different than those stated in its opinion.

The claims in the underlying suit stem from an incident in which Tiffany Stinson was arrested at her home following a traffic stop. Stinson filed suit in Harris County District Court against Harris County Sheriff's Deputy Stephen Fontenot, asserting various intentional tort claims including slander, trespass, assault and battery, intentional infliction of emotional distress, wrongful arrest, false imprisonment, and malicious prosecution. Several weeks later, Stinson filed an action in federal court arising out of the same incident against Harris County and former Harris County

Sheriff Tommy Thomas. The underlying case was removed to federal court and consolidated for pretrial purposes with the federal suit. Following dismissal of the federal claims against Harris County and the Sheriff, the federal district court remanded the tort claims against Fontenot. Fontenot moved for summary judgment, asserting that he was entitled to dismissal pursuant to subsections (a), (e), and (f) of the Texas Tort Claims Act's (TTCA) election-of-remedies provision. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(a), (e), (f). The trial court denied the motion, and Fontenot appealed the order.

The court of appeals reversed, 369 S.W.3d 268, holding that Stinson's suit against the County in federal court entitled Fontenot to dismissal under subsection 101.106(a), which provides that "[t]he 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." TEX. CIV. PRAC. & REM. CODE § 101.106(a). We agree that Fontenot is entitled to dismissal, but not pursuant to subsection (a). Instead, we hold, in accordance with our decisions in *Alexander* and *Texas Adjutant General's Office v. Ngakoue* (*TAGO*), 408 S.W.3d 350 (Tex. 2013), that Stinson's claims against Fontenot should have been dismissed under subsection (f) of the TTCA's election-of-remedies provision.

In *Alexander*, we explained that subsection (f) is the appropriate avenue for dismissing a government employee considered to have been sued in his official capacity, while subsection (a) bars suit against an employee in his individual capacity. ___ S.W.3d at ___ (citing *TAGO*, 408 S.W.3d at 357–58). For purposes of the TTCA, an employee is considered to have been sued in his

official capacity when the suit (1) is based on conduct within the general scope of his employment, and (2) could have been brought under the TTCA against the government. TEX. CIV. PRAC. & REM. CODE § 101.106(f). On that employee's motion, he is entitled to dismissal by the court unless the plaintiff amends her pleadings to substitute the government as a defendant within thirty days. *Id.* Because the plaintiff in *Alexander* sued the defendants in their official capacities, we held that the suit was not barred by subsection (a), but that the defendants were entitled to dismissal under subsection (f). ___ S.W.3d at ___.

In the case at bar, Stinson does not dispute that her suit against Deputy Fontenot is based on conduct within the general scope of his employment. Further, as in *Alexander*, the suit could have been brought under the TTCA against the County. ___ S.W.3d at ___ (citing *Franka v. Velasquez*, 332 S.W.3d 367, 379–80 (Tex. 2011) (holding that, barring an independent statutory waiver of immunity, tort claims against the government are brought under the TTCA for subsection (f) purposes even when the TTCA does not waive immunity for those claims)). Consequently, Fontenot was considered to have been sued in his official capacity only. For this reason, subsection (a) does not bar the suit, but Fontenot was entitled to dismissal under subsection (f). *Alexander*, ___ S.W.3d at ___.

Accordingly, the trial court erred in denying Fontenot's motion for summary judgment, and the court of appeals correctly reversed. We grant Stinson's petition for review, and, without hearing oral argument, affirm the judgment of the court of appeals. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 6, 2014

IN THE SUPREME COURT OF TEXAS

NO. 11-1021

LARRY T. LONG, L. ALLAN LONG, AND B. VIRGINIA LONG, IN THEIR CAPACITIES AS TRUSTEES OF THE LAWRENCE ALLAN LONG TRUST, THE CHARLES EDWARD LONG TRUST, THE LARRY THOMAS LONG TRUST AND THE JOHN STEPHEN LONG TRUST D/B/A THE LONG TRUSTS, PETITIONERS,

v.

ROBERT M. GRIFFIN, ROBERT M. GRIFFIN, JR., CHARLES W. CONRAD, MARVIN OGILVIE, AND MARIE OGILVIE, RESPONDENTS

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

PER CURIAM

This appeal involves the evidence required to prove the reasonableness and necessity of attorney's fees under the lodestar method. The parties raise an additional issue regarding postjudgment interest we do not reach. This Court has made clear that a party choosing the lodestar method of proving attorney's fees must provide evidence of the time expended on specific tasks to enable the fact finder to meaningfully review the fee application. Here, the affidavit supporting the fee application generally stated the categories of tasks performed, but the application failed to include any evidence containing the requisite specificity. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for a redetermination of attorney's fees.

Robert M. Griffin, Robert M. Griffin, Jr., Marvin and Marie Ogilvie, and Charles Conrad (collectively the "Griffins") sued Larry T. Long, L. Allan Long, and B. Virginia Long in their capacities as trustees of the Lawrence Allan Long Trust, the Charles Edward Long Trust, the Larry Thomas Long Trust, and the John Stephen Long Trust (collectively the "Long Trusts"). The Griffins' suit included several claims relating to their participation with the Long Trusts in certain oil and gas ventures. The key claim at issue here is the Griffins' assignment claim, which involved an agreement between the Griffins and the Long Trusts for the Griffins to pay a portion of drilling and operating costs in exchange for an assignment of a partial working interest in producing wells. The Griffins allege that the Long Trusts failed to assign the working interest due them under the assignment agreements. In 2001, the Griffins' attorney filed an affidavit supporting the Griffins' request for attorney's fees. The affidavit indicated the Griffins' two attorneys spent 644.5 hours on the suit for a total fee of $100,000 based upon their hourly rates. Further, the affidavit segregated the time spent on each claim, with 30% spent on the assignment claim. But the affidavit indicated the assignment issue was inextricably intertwined with claims on which the attorneys spent 95% of their time.

Following a bench trial in 2003, the trial court largely ruled for the Griffins and awarded them $35,000 in attorney's fees. The court of appeals modified the judgment in several respects and affirmed it. 144 S.W.3d 99, 112. We reversed the court of appeals' judgment in part. 222 S.W.3d 412, 417 (Tex. 2006). We held that (1) under the assignment claim, because the assignment agreements did not comply with the Statute of Frauds, the agreements could not be enforced for future wells, and (2) the Griffins were not entitled to prevail on a separate claim involving a

litigation agreement with the Long Trusts. *Id*. at 416–17. Because we modified the Griffins' recovery on appeal, we remanded for the trial court to redetermine the attorney's fee award. *Id*. at 417.

On remand, the trial court considered the affidavit on file and awarded the Griffins $30,000 in attorney's fees, with postjudgment interest to accrue from the date of that final judgment in 2009. The court of appeals found legally and factually sufficient evidence supporting the attorney's fee award but modified the judgment to accrue interest from the original, erroneous trial court judgment in 2003. __ S.W.3d __, __.

The Long Trusts petitioned this Court for review, asserting that (1) no legally sufficient evidence supports the amount of the attorney's fee award, and (2) postjudgment interest should accrue from the final judgment in 2009. Because we agree that no legally sufficient evidence supports the amount of the attorney's fee award, we do not reach the postjudgment interest issue. We remand for the trial court to redetermine the attorney's fee award.

Because the Griffins did not ultimately prevail on all of their assignment claim, the Long Trusts assert that no evidence supports the amount of the attorney's fee award. The Griffins respond that the assignment issue was inextricably intertwined with other issues in the case and that, even though it did not prevail on its declaratory judgment claim, the attorney's fee award was equitable and just under the Declaratory Judgment Act. Because the Griffins offered no evidence of the time expended on particular tasks, as we have required when a claimant elects to prove attorney's fees via the lodestar method, we agree with the Long Trusts that the Griffins did not provide the trial court with legally sufficient evidence to calculate a reasonable fee.

The Griffins brought two claims that could ultimately support an attorney's fee award. The Griffins' assignment issue included a claim for breach of an agreement, for which reasonable and necessary attorney's fees are recoverable under Texas Civil Practice and Remedies Code Chapter 38, subject to additional limitations. TEX. CIV. PRAC. & REM. CODE § 38.001(8). Also, the Griffins brought a claim under the Texas Uniform Declaratory Judgment Act, which allows trial courts to "award costs and reasonable and necessary attorney's fees as are equitable and just." *Id.* § 37.009; *see Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). Thus, under either their contract or declaratory judgment claim, the Griffins were required to prove the reasonableness and necessity of the attorney's fees the trial court awarded. TEX. CIV. PRAC. & REM. CODE §§ 37.009, 38.001(8).

The affidavit supporting the Griffins' request for attorney's fees used the lodestar method by relating the hours worked for each of the two attorneys multiplied by their hourly rates for a total fee. We explained in *El Apple I, Ltd. v. Olivas* that generalities about tasks performed provide insufficient information for the fact finder to meaningfully review whether the tasks and hours were reasonable and necessary under the lodestar method. 370 S.W.3d 757, 763 (Tex. 2012). Sufficient evidence includes, at a minimum, evidence "of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id*. at 764. Because the testimony in *El Apple* only included the total number of hours worked and generalities about discovery and the length of trial, we remanded for a redetermination of attorney's fees. *Id*. at 765. We noted that contemporaneous records might be unavailable on remand and advised the attorneys to reconstruct their work to provide the trial court with the information to meaningfully review the fee request. *Id*. at 764.

Likewise, in *City of Laredo v. Montano*, we reversed and remanded to redetermine attorney's fees when the attorney testified to the time expended and the hourly rate but failed to provide evidence of the time devoted to specific tasks. 414 S.W.3d 731, 736–37 (Tex. 2013).

Here, as in *El Apple* and *Montano*, the affidavit supporting the request for attorney's fees only offers generalities. It indicates that one attorney spent 300 hours on the case, another expended 344.50 hours, and the attorneys' respective hourly rates. The affidavit posits that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions, and a four and one-half day trial, and that litigating the matter required understanding a related suit that settled after ten years of litigation. But no evidence accompanied the affidavit to inform the trial court the time spent on specific tasks. *See El Apple*, 370 S.W.3d at 763. The affidavit does claim that 30% of the aggregate time was expended on the assignment claim (part of which the Griffins prevailed on) and that the assignment issue was inextricably intertwined with matters that consumed 95% of the two attorneys' time on the matter. But without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request. *Montano*, 414 S.W.3d at 736–37; *El Apple*, 370 S.W.3d at 764. We note that here, as in *El Apple*, contemporaneous evidence may not exist. But the attorneys may reconstruct their work to provide the trial court with sufficient information to allow the court to perform a meaningful review of the fee application. *El Apple*, 370 S.W.3d at 764.

In addition to the lodestar method, the attorney's fee affidavit also indicates the Griffins and their attorneys agreed to a 35% contingency fee arrangement, which the affidavit claims is reasonable and customary for such a suit. Even if supporting evidence is not required for the

contingency fee method of proof (as it is for the lodestar method), the contingency fee method cannot support the trial court's fee award here because the final judgment awarded no monetary relief except for attorney's fees. Because the contingency fee method cannot support the trial court's fee award, and no legally sufficient evidence supports the award under the lodestar method, we remand to redetermine attorney's fees.

The Long Trusts also complain that the court of appeals erred in awarding postjudgment interest from the original, erroneous trial court judgment. Because we are remanding for the trial court to consider additional evidence of attorney's fees, we need not reach this issue. We are confident that, on remand, the lower courts will apply the principles we clarified in *Long v. Castle Texas Production Limited Partnership*, __ S.W.3d __ (Tex. 2014), to properly assess the date from which postjudgment interest accrues.

In sum, under the lodestar method, no legally sufficient evidence supports the amount of attorney's fees the trial court awarded because no evidence indicates the time expended on the specific tasks for which attorney's fees may be recovered. Accordingly, pursuant to Texas Rule of Appellate Procedure 59.1, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand to the trial court for a redetermination of attorney's fees consistent with this opinion.

OPINION DELIVERED: April 25, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0102

TEXAS COAST UTILITIES COALITION, PETITIONER,

v.

RAILROAD COMMISSION OF TEXAS AND CENTERPOINT ENERGY RESOURCES CORP. D/B/A CENTERPOINT ENERGY ENTEX AND CENTERPOINT ENERGY TEXAS GAS, RESPONDENTS

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

Argued September 10, 2013

JUSTICE BOYD delivered the opinion of the Court.

The sole issue in this appeal is whether the Railroad Commission of Texas had authority to adopt a gas utility rate schedule that provided for automatic annual adjustments based on increases or decreases in the utility's cost of service. We agree with the court of appeals that the Commission acted within its authority, and affirm.

I.
Background

CenterPoint Energy Resources Corporation is a gas utility[1] that distributes natural gas to customers located within the Texas Coast Division.[2] In 2008, CenterPoint filed a "statement of

[1] Generally, a "gas utility" is an individual or entity that transmits or distributes natural gas for compensation within the state. *See* TEX. UTIL. CODE § 101.003(7).

[2] The Texas Coast Division is a service region that includes parts of Waller, Austin, Fort Bend, Wharton, Matagorda, Brazoria, Galveston, Harris, and Chambers counties.

intent" to raise its rates with each of the Division's forty-seven municipalities, which have original jurisdiction to set rates within their respective boundaries, and with the Commission, which has original jurisdiction to set rates in the Division's areas that are not within any municipal boundaries.[3] Thirty-eight of the municipalities approved the proposed rate schedule, but the remaining nine cities[4] denied it. CenterPoint appealed the denials to the Commission, which consolidated the appeals with its own related case covering the areas outside of municipal boundaries. The nine cities formed the Texas Coast Utilities Coalition, through which they jointly appeared in the consolidated rate case. A group of state agencies that are CenterPoint customers also intervened, joining the Coalition's opposition to the proposed rate increase. After a three-day contested case hearing, the Commission rejected some aspects of the proposed rate schedule and accepted others, ultimately approving a rate increase to allow CenterPoint to generate $1.2 million in additional annual revenue, but not the $2.9 million that CenterPoint had proposed.

CenterPoint's proposed rate schedule included a "cost of service adjustment" (COSA) clause, which permitted the rate to increase or decrease annually without the necessity of an additional full rate case. The Commission concluded that CenterPoint's original proposed COSA clause was "not reasonable," but accepted a revised COSA clause as part of the final rate schedule. Under the revised COSA clause, the amount of the annual adjustment is calculated by adding the amounts of CenterPoint's operating expenses, return on investment, and Texas franchise tax liability from the

[3] *See* TEX. UTIL. CODE § 104.102 (requiring utility to file a statement of intent with each affected regulatory authority). CenterPoint also published a notice of intent to increase its rates in various newspapers distributed within the Texas Coast Division.

[4] The nine cities are Angleton, Baytown, Clute, Freeport, League City, Pearland, Shoreacres, West Columbia, and Wharton. Generally, the term "municipality" includes towns and villages as well as cities. See *Edinburg Hosp. Auth. v. Treviño*, 991 S.W.2d 76, 84 (Tex. 1997) (citing TEX. LOCAL GOV'T CODE § 1.005(3) and TEX. GOV'T CODE 29.001). Although not every "municipality" is a "city," the distinction is not material in this case, and we will use the terms interchangeably.

preceding calendar year, subtracting the amount of CenterPoint's non-gas and other revenues, and then dividing the result by the Texas franchise tax statutory rate.[5] The quotient is then converted to a per-customer adjustment by dividing it by the average number of customers in each customer class (residential customers, general service-small volume customers, and general service-large volume customers). CenterPoint then divides the amount of the per-customer adjustment by twelve and either adds the result to or subtracts it from each customer's monthly gas bill. Any resulting increase or decrease, however, is capped at 5% of the customer charge that was in effect at the end of the preceding calendar year.

To effectuate the annual adjustment, the COSA clause requires CenterPoint to file with the Commission and each affected municipality, by May 1 of each year, sworn statements and schedules containing the information necessary to calculate the adjustments to be applied to customer bills on or after August 1 of that year. The Commission and municipalities would thus have at least ninety days to review and object to the schedules and proposed adjustments, and CenterPoint must reimburse "their reasonable expenses for such review in an aggregate amount not to exceed $100,000." Meanwhile, within forty-five days after filing the schedules, CenterPoint is required to publish a notice of the proposed adjustments in the Houston Chronicle describing the proposed rate revision, the effect that the revision is expected to have on each customer class and on average customer bills within that class, the service areas where the adjustments will apply, and the means by which customers can obtain additional information.

[5] The "return on investment" component of this calculation is a fixed amount that the Commission set through the rate case proceeding to ensure that CenterPoint receives a return that is reasonable but not greater than reasonable. Here, the Commission set the amount based on an 11.8% return. The Coalition and state agencies do not contest the reasonableness of this figure. The Texas franchise tax rate is set by the State.

The COSA clause includes several provisions intended to ensure that the Commission and municipalities retain the ability to review and object to the automatic adjustments. First, the clause provides that the Commission and any municipality that objects to the adjustment by the end of the ninety-day review period can "take action to deny such adjustment, and [CenterPoint] shall have the right to appeal" the denial. Second, the clause provided that the COSA is effective only for an initial implementation period of three years, after which CenterPoint, the Commission, or an affected municipality can object to its renewal.[6] Third, the clause provides that it "does not limit the legal rights and duties" of the Commission or any municipality, and "[n]othing herein shall abrogate the jurisdiction of [the Commission or a municipality] to initiate a proceeding at any time to review whether rates charged are just and reasonable." Finally, the clause provides that its provisions "are to be implemented in harmony with the Gas Utility Regulatory Act."

In its final order approving the new rate schedule, the Commission expressly found that "it is reasonable to allow CenterPoint to implement the revised cost of service adjustment clause." In support of this finding, the Commission found that, under the COSA clause, the Commission and municipalities can "examine the prudence of additions made to rate base as part of the annual COSA filing," will "ultimately determine[] the reasonableness and necessity of expenses to be recovered in the COSA," are permitted to "conduct a hearing on the COSA filing," and can "grant in part and deny in part the utility's request to implement a COSA adjustment." In its conclusions of law, the Commission determined that approval of a COSA tariff "lies within the Commission's jurisdiction, . . . does not conflict with the rate-setting provisions of [the Gas Utility Regulatory Act], . . . [and]

[6] Due to the Coalition cities' objections, the COSA clause was effective only for the first three years (2008–2011) and was not renewed.

does not prevent a utility or a regulatory authority from exercising the statutory right to initiate a rate case."

The Coalition and the state agencies that had intervened filed this action for judicial review of the Commission's order, challenging the Commission's authority to adopt the COSA clause as part of CenterPoint's rate schedule.[7] The district court held that the Commission "did not have statutory authority" to adopt the COSA clause and remanded the matter to the Commission. The Commission and CenterPoint appealed, and the Austin Court of Appeals reversed, concluding that the Commission did not exceed its statutory authority. *See R.R. Comm'n of Tex. v. Tex. Coast Utils. Coal.*, 357 S.W.3d 731 (Tex. App.—Austin 2011, pet. granted). The Coalition and the state agencies petitioned this Court for review, which we granted.

II.
Statutory and Regulatory Framework

The Coalition and state agencies raise both procedural and jurisdictional challenges to the Commission's authority to adopt the COSA clause. Before addressing their specific arguments, we will provide context to the issues by briefly addressing the source of the Commission's authority, the purpose of the Gas Utility Regulatory Act, the jurisdiction that Act grants to the Commission and to municipalities, the procedures that they must follow when approving rates, the substantive requirements that those rates must meet, and the Commission's historical practices and rules relating to COSA clauses.

A. The Source of Commission Authority

Although the Texas Constitution specifically mentions the Railroad Commission, *see* TEX. CONST. art. XVI sec. 30(b), it does not create the agency but instead merely authorizes the

[7] Other issues raised in the trial court are not at issue here.

Legislature to do so. *City of Denison v. Mun. Gas Co.*, 3 S.W.2d 794, 798 (Tex. 1928). Based on this constitutional authority, the Legislature has established the Commission through chapter 81 of the Natural Resources Code. TEX. NAT. RES. CODE §§ 81.001–.156. As a statutorily created body, the Commission has no inherent authority, and instead has only the authority that the Legislature confers upon it. *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001). Its authority includes the powers that a statute expressly grants (express authority) and also the powers "reasonably necessary to carry out the express responsibilities given to it by the Legislature" (implied authority). *Id.* But "reasonably necessary" does not mean merely "expedient." The Commission "may not . . . exercise what is effectively a new power, or a power contradictory to the statute," even if it "is expedient for administrative purposes." *Id.* at 316; *see also Pub. Util. Comm'n of Tex. v. GTE-SW., Inc.*, 901 S.W.2d 401, 407 (Tex. 1995).

B. The Express Purpose of GURA

One statute through which the Legislature has granted authority to the Commission is the Gas Utility Regulation Act (GURA). TEX. UTIL. CODE §§ 101.001–105.051. Through GURA, Texas "to date has continued to impose a comprehensive regime of traditional rate regulation on gas utilities." *CenterPoint Energy Entex v. R.R. Comm'n of Tex.*, 208 S.W.3d 608, 616 (Tex. App.—Austin 2006, pet. dism'd). As a result, gas utilities in Texas "are by definition monopolies in the areas they serve" and are thus immune from "the normal forces of competition that regulate prices" in the open market. TEX. UTIL. CODE § 101.002(b). To protect the public from harms often associated with monopolies, the Legislature enacted GURA to authorize governmental entities to act "as a substitute for competition." *Id.* The express purpose of GURA is to "establish a comprehensive and adequate regulatory system for gas utilities to assure rates, operations, and

services that are just and reasonable to the consumers and to the utilities." *Id.* § 101.002(a). The Legislature has instructed courts to construe GURA "liberally to promote the effectiveness and efficiency of regulation of gas utilities," except to the extent a liberal construction would render the statute invalid. *Id.* § 101.007.

C. Regulatory Jurisdiction Under GURA

In GURA, the Legislature broadly granted the Commission "all the authority and power of this state to ensure compliance with the obligations of gas utilities in this subtitle." *Id.* § 104.001(a). Regarding the utilities' "rates and services," however, GURA grants authority to municipalities as well as to the Commission. Specifically, municipalities have exclusive original jurisdiction over the rates and services of gas utilities that distribute gas within their municipal boundaries, *id.* § 103.001, while the Commission has exclusive original jurisdiction over rates and services in areas that are near municipalities but outside of municipal boundaries, commonly referred to as the "environs." *Id.* § 102.001(a)(1).[8] GURA expressly authorizes municipalities and the Commission (which it refers to collectively as "regulatory authorities," *see id.* § 101.003(13)) to "establish and regulate" rates within their respective jurisdictions. *Id.* § 104.001(b). The municipalities' original jurisdiction, however, is subject to the Commission's jurisdiction over appeals from the municipalities' rate orders. *Id.* § 102.001(b). When a party appeals a municipality's order to the Commission, the Commission reviews the decision de novo and must enter a final order establishing the rates the municipality should have set. *Id.* § 103.055(a), (c).

[8] By Commission rule, "environs" are "unincorporated areas adjacent to or near incorporated cities and towns." 16 TEX. ADMIN. CODE § 7.115(14).

D. Rate Case Proceedings Under GURA

GURA sets forth specific procedures that a gas utility must follow before it can increase its rate. The utility must first file a statement of intent to increase its rate with each regulatory authority that has original jurisdiction over the rate at issue, and must publish notice to its customers of the proposed increase. *Id.* §§ 104.102, 104.103. The regulatory authority may hold a hearing to assess the propriety of the proposed increase, and must do so if an affected person complains or if the new rate would increase the utility's revenues by the greater of $100,000 or 2-1/2 percent (which GURA calls a "major change"). *Id.* §§ 104.101, 104.105. At the hearing, the utility has the burden of proving that its proposed new rate meets GURA's substantive requirements. *Id.* § 104.008(1).[9]

Generally, a municipality may postpone the effective date of the proposed new rate until it completes the hearing and renders its decision, but only for ninety days from the utility's proposed effective date. *Id.* § 104.107(a)(1). Similarly, the Commission may postpone the effective date for a period of 150 days. *Id.* § 104.107(a)(2). If the regulatory authority fails to render a final decision by the postponed effective date, it is considered to have approved the proposed new rate. *Id.* § 104.107(c). If the regulatory authority rejects the utility's proposed rate, it must enter an order establishing the rate the utility must charge. *Id.* § 104.110(a)(1). Any party to the proceeding may seek judicial review of the Commission's final order, and the courts will review the order under the substantial evidence rule. *Id.* § 105.001.[10]

[9] If a party initiates the proceeding with a proposal to reduce the existing rate, the utility has the burden to prove that the existing rate is just and reasonable and should not be reduced. TEX. UTIL. CODE § 104.008(2).

[10] Because the issue in the case is whether the statute authorizes the Commission's decision, not whether the evidence supports it, the substantial evidence rule is not implicated.

E. Computation of Rates Under GURA

GURA sets forth detailed substantive requirements that a gas utility's rates must meet. Ultimately, the regulatory authority must "ensure" that the rate "is just and reasonable." *Id*. § 104.003(a). More specifically, the rate must be calculated to "establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital used and useful in providing service to the public in excess of its reasonable and necessary operating expenses." *Id*. § 104.051. Rates must "not be unreasonably preferential, prejudicial, or discriminatory but must be sufficient, equitable, and consistent in application to each class of consumer." *Id*. § 104.003(a).

A rate calculation begins with the utility's "rate base," which essentially reflects the amount of the utility's investment in its gas distribution system. *See id.* § 104.053.[11] The rate base is then adjusted for the cost of capital (i.e., the cost of borrowing money or selling equity) and the utility's operating costs, to determine the rate needed to produce a "fair return" on the utility's investment. *See id.* §§ 104.052, 104.055(a); *see also id.* §§ 104.051–.059. The final rate schedule may consist of several components. The schedule approved here, for example, sets CenterPoint's rate as the sum of three figures: (1) a base rate (not to be confused with the "rate base"), which is a specified amount per customer plus a volumetric charge that varies from month to month based on the customer's usage; (2) a "tax adjustment" tariff, which passes through to customers the cost of CenterPoint's

[11] The "adjusted value of invested capital used and useful to the utility in providing service" is "computed on the basis of a reasonable balance between . . . (1) original cost, less depreciation" and "(2) current cost, less depreciation." *Id.* § 105.053(a)(1), (2).

municipal franchise tax liabilities;[12] and (3) a "purchased gas adjustment" (PGA) tariff, which passes through to customers fluctuations in CenterPoint's cost to purchase the gas it distributes to customers.[13] The COSA clause that the Coalition and state agencies challenge in this case affects the base rate component, by increasing or decreasing the specified amount billed per customer.

F. The Commission and COSA Clauses

The inclusion of a COSA clause in a gas utility rate schedule is not uncommon in Texas. The Commission appears to have first approved such a clause in 1978, more than thirty-five years ago. *See* Railroad Commission Order, Docket Nos. 1144, 1145 (April 3, 1978). Like the COSA clause at issue in this case, the 1978 COSA clause provided for automatic annual adjustments based on increases or decreases in the utility's costs during the previous calendar year,[14] required the utility to provide advance notice of the amount of the proposed adjustments, and preserved the Commission's "right to accept, reject or suspend" the proposed adjustments. For at least the past twenty years, hundreds of municipalities have also approved rate schedules that include COSA

[12] Under Rate Schedule No. FFA-1, applicable to CenterPoint under the Commission's order, CenterPoint is to "adjust Customer's bill each month in an amount equal to the municipal franchise fee payable for the Gas Service provided to Customer by [CenterPoint]." For a discussion of franchise taxes imposed on gas utilities and passed on to customers, see *S. Union Co. v. Cty. of Edinburg*, 129 S.W.3d 74 (Tex. 2003).

[13] Under Rate Schedule No. PGA-7, applicable to CenterPoint under the Commission's order, the "Monthly Rate contained in [CenterPoint's] total billing to residential and general service customers shall include the cost of natural gas purchased for resale hereunder," which is calculated for each rate period as: (CenterPoint's best estimate of the cost of natural gas to be purchased for resale) x (the percentage of the amount of gas purchased for resale that was actually sold to customers) ± (any surcharge or surcredit for previous over- or under-recovery of gas purchase costs), rounded to the nearest $0.0001. CenterPoint may propose a new PGA factor in a PGA filing, without filing a notice of intent to increase rates, and the proposed PGA rate will become effective the next month unless the regulatory authority takes action to oppose it.

[14] The 1978 COSA clause was not as detailed as the COSA clause at issue here, but similarly adjusted rates based on fluctuations in the utility's "costs of providing gas service (including depreciation but excluding cost of gas, gross receipts taxes, income taxes and return)."

clauses, just as the thirty-eight cities that approved CenterPoint's original proposed rate did in this case.

Consistent with and indicative of the common usage of COSA clauses in Texas, the Commission has adopted rules addressing such provisions. In one rule, the Commission has defined a COSA clause as "any rate provision other than a purchased gas adjustment clause provided for in § 7.5519 of this title (relating to Gas Cost Recovery), which operates to increase or decrease rates without prior consent or authority of the appropriate regulatory authority." 16 TEX. ADMIN. CODE § 7.115(10). In a separate rule, the Commission has required utilities that propose a rate change in the environs based on a COSA clause effective in an adjacent municipality to submit with their proposal a copy of the COSA clause, "all calculations used to derive the cost of service adjustment," and information describing "the effect of the proposed rates on each affected customer class." *Id.* § 7.210(b)(1), (2). And in yet another rule, the Commission has provided that a COSA clause effective in an adjacent municipality "shall not be applicable or put into effect for the affected environs area, although the utility may request the same rates that are in effect in the adjacent municipality for the affected environs area." *Id.* § 7.220(c). In spite of these rules and the longstanding common usage of COSA clauses,[15] the Coalition and state agencies contend that the Legislature has not granted the Commission authority to include COSA clauses in Texas gas utility rate schedules. We now address their arguments in support of this contention.

[15] Although we need not rely on the doctrine of legislative acceptance in this case, we note that during these thirty-five years the Legislature has not amended GURA or taken other action to prohibit the Commission or municipalities from including COSA clauses in utilities' rate schedules. *Cf. Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) (discussing the doctrine of legislative acceptance).

III.
Discussion

As mentioned, the rate schedule the Commission approved for CenterPoint includes three main components—a base rate, a tax adjustment, and a PGA tariff—and the COSA clause is included as part of the base rate. The Coalition and state agencies do not challenge the tax adjustment or the PGA tariff. They also do not contend that CenterPoint failed to provide a timely statement of intent or otherwise failed to comply with GURA's procedural requirements in the rate case that resulted in the Commission's final order. Instead, they contend that (1) GURA does not expressly or impliedly authorize the Commission to include the COSA clause as a component of CenterPoint's base rate, and (2) the COSA clause violates GURA by allowing Centerpoint to avoid GURA's procedural requirements for future rate increases and by depriving municipalities of their original jurisdiction over those proceedings. Based on the language of GURA,[16] we disagree with both arguments.

A. GURA Expressly Authorizes the Commission to Establish "Rates," Including COSA Clauses.

[16] Because the Legislature determines and declares the Commission's authority, we resolve this case by construing and applying Texas statutes to determine whether the Legislature intended to give the Commission authority to adopt a COSA clause. The construction of a statute is a question of law that we review de novo. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). "Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on." *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006).

"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." *Tex. Citizens*, 336 S.W.3d at 624. Relying on these holdings, the court of appeals in this case decided to "defer" to the Commission's construction that GURA authorizes the inclusion of COSA clauses. *Tex. Coast Util. Coal.*, 357 S.W.3d at 745. The parties and certain amici disagree whether such deference was appropriate in this case, and some urge that we use this case as an opportunity to add clarity to the so-called agency deference doctrine. Because we independently conclude that GURA grants the Commission authority to adopt the COSA clause, we need not "defer to" the Commission's construction or give it "serious consideration," and we do not agree that this is an appropriate case to provide any clarity that may be needed.

GURA expressly grants the Commission the authority to "establish and regulate rates of a gas utility," TEX. UTIL. CODE § 104.001(a); to "determine the propriety of [an] increase [in rates]," *id.* § 104.105(a); to "enter an order establishing the rates [a utility] shall charge or apply for [its services]" in areas outside of municipal boundaries, *id.* § 104.110(a)(1); and on appeal from a municipality's rate order, to "enter a final order establishing the rates [the Commission] determines the municipality should have set," *id.* § 103.055(b). The Legislature has thus expressly granted the Commission authority to establish gas utility rates. The question, then, is whether the COSA clause constitutes a "rate."

GURA defines a "rate" as:

> (A) any compensation, tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charged, or collected by a gas utility for a service, product, or commodity described in the definition of gas utility in this section; and
>
> (B) a rule, regulation, practice, or contract affecting the compensation, tariff, charge, fare, toll, rental, or classification.

Id. § 101.003(12). Considering both subsections of this definition, and reading them in conjunction with the express authority to "establish rates," we conclude that GURA expressly authorizes the Commission to establish both that which a utility "demand[s], observe[s], charge[s], or collect[s]" for distributing gas and that which "affect[s]" that which the utility "demand[s], observe[s], charge[s], or collect[s]."

The Austin Court of Appeals has concluded that, through subsection (B) of this definition, the Legislature "has recognized that a rate may consist not merely of a fixed dollar amount but may instead be a rule 'affecting' the charge, a term contemplating the use of variables." *CenterPoint Energy Entex v. R.R. Comm'n of Tex.*, 208 S.W.3d 608, 618 (Tex. App.—Austin 2006, pet. dism'd).

We generally agree. The rate schedule establishes Centerpoint's "charges" and "compensation," and the COSA clause provides that the charges and compensation will adjust annually to account for differences between CenterPoint's estimated and recorded expenses. By including the COSA clause in the rate schedule, the Commission has "established" a "practice"[17] that "affects" CenterPoint's charges and compensation. We thus conclude that the COSA clause constitutes a "rate" under subsection (B),[18] and GURA expressly authorizes the Commission to establish it.

The Coalition and state agencies raise a number of arguments against this construction of the statute. For the reasons explained below, we do not find them convincing.

1. The Role of a Definition

Citing to our decision in *State v. Public Utilities Commission*, 344 S.W.3d 349 (Tex. 2011), the state agencies argue that a statutory definition cannot serve as a source or basis of agency authority. In that case, the court of appeals had concluded that the Texas Public Utility Commission (PUC) did not exceed its authority when it relied on the Utility Code's definition of "market value" as an alternative basis for determining the market value of stranded costs. *See CenterPoint Energy Houston Elec., LLC. v. Gulf Coast Coal. of Cities*, 252 S.W.3d 1, 27 (Tex. App.—Austin 2008), *rev'd in part and aff'd in part sub nom, State v. Pub. Util. Comm'n*, 344 S.W.3d 349, 356 (Tex. 2011). We disagreed and held that the PUC could not rely on the statutory definition as an alternative basis when the Utility Code's substantive provision expressly "specifies the permitted

[17] Because we conclude that the COSA clause is a "practice," we need not decide whether it is a "rule" or "regulation."

[18] We also note, without deciding, that the COSA clause could also constitute a "rate" under subsection (A). *See* TEX. UTIL. CODE § 101.003(12)(A). No one disputes that the COSA is a "tariff." The clause expressly identifies itself as such, and the Commission refers to it as a "tariff" throughout its order. And at least when the adjustment is positive—i.e., when it increases the amount customers must pay—it results in a "charge" to CenterPoint's customers and "compensation" to CenterPoint for a "service, product, or commodity." The language of subsection (A) does not limit that prong of the definition to fixed amounts. *See id.*

methods for determining market value." 344 S.W.3d at 360. The state agencies contend that, like the PUC in that case, the Commission in this case cannot "derive authority from a statutory definition in abrogation of the substantive law." But the Commission does not contend, and we do not hold, that the statutory definition of "rate" grants authority to the Commission; rather, the Commission contends, and we hold, that GURA's substantive provisions grant the Commission the power to "establish rates." The definition of "rates" gives meaning to this substantive grant of authority.

2. The GRIP Statute

The Coalition and state agencies also argue that our construction ignores other provisions of GURA and thus ignores the context of the provisions that grant authority to establish rates and that define the term "rate." *See, e.g.*, *Zanchi v. Lane*, 408 S.W.3d 373, 376 (Tex. 2013) ("A word's meaning cannot be determined in isolation, but must be drawn from the context in which it is used."). Specifically, they point to section 104.301 of GURA, commonly known as the "GRIP" (Gas Reliability Infrastructure Program) statute, which the Legislature enacted in 2003. TEX. UTIL. CODE § 104.301. The GRIP statute authorizes a gas utility that has filed a rate case within the preceding two years to "file with the regulatory authority a tariff or rate schedule that provides for an interim adjustment in the utility's monthly customer charge or initial block rate to recover the cost of changes in the investment in service for gas utility service," without initiating a rate case. *Id.* § 104.301(a). The legislative purpose behind the GRIP statute was to provide utilities with a five-year window in which to increase their rates to account for new capital investments in infrastructure without having to file a rate case, thus encouraging utilities to invest in Texas's gas pipeline infrastructure in the face of "continuing growth in the state" and a desire to "enhance safety

by replacing aging facilities." *Atmos Energy Corp. v. Cities of Allen*, 353 S.W.3d 156, 157–58 (Tex. 2011).

The Coalition argues that the GRIP statute demonstrates that the Legislature "knows perfectly well how to adopt provisions that streamline the ratemaking process," and would have adopted a similar provision for COSA clauses if it intended to authorize the Commission to use such clauses. They also argue that there would have been no need for the GRIP statute if the Commission's authority to "establish rates" already included the authority to adopt variable, formulaic rates. But these arguments incorrectly assume that the GRIP statute provides the same kind of authority as the provisions that authorize the Commission to "establish rates." To the contrary, the GRIP statute does not authorize *the Commission* (or a municipality) to approve and include an adjustment mechanism in a rate schedule. Rather, it authorizes *the gas utility* to file a tariff adjusting its own rates without obtaining the regulatory authority's approval, including any approval in the utility's original rate schedule. *Atmos Energy*, 353 S.W.3d at 157 (explaining that the GRIP statute "permits a gas utility to file a new tariff adjusting its base rates to recover the costs of new capital investment made in the preceding calendar year, without the necessity of filing a rate case"). Thus, unlike COSA clause adjustments, the GRIP statute permits adjustments that the Commission has not approved through a full rate case. *See id.* at 158 (recognizing that the GRIP statute allows a utility to "begin recovering the costs of new investment *not already covered by a final rate*" (emphasis added)). The GRIP statute thus authorizes adjustments that are outside of, and materially different from, the Commission's general authority to "establish rates." The Legislature's decision to enact the GRIP statute thus does not contradict its prior grant of authority to the Commission to establish practices like COSA clauses.

3. PGA Tariffs

The Coalition and state agencies also contend that our construction of the Commission's statutory authorization to "establish rates" ignores our prior constructions of GURA, and that of Texas courts of appeals, particularly those concerning PGA tariffs. A PGA tariff is a common component of a rate schedule that provides for automatic adjustments in customer charges based on fluctuations in a utility's cost to purchase the gas it distributes. *See CenterPoint Energy Entex v. R.R. Comm'n of Tex.*, 208 S.W.3d 608, 612 (Tex. App.—Austin 2006, pet. dism'd) (describing PGA tariffs as "an automatic escalator mechanism devised by utility regulators to deal with rapid fluctuations in the cost of natural gas[, which] operates to increase or decrease the revenue of the gas company by exactly the amount of its increased or decreased costs of gas charged the gas company by its suppliers"). As we have noted, the CenterPoint rate schedule at issue here includes a PGA tariff, and the Coalition and state agencies do not contest this aspect of the Commission's order.[19] Instead, they contend that Texas courts have authorized PGA tariffs only "as a matter of agency policy and common law," not based on the language of the statute. From that contention, they reason that judicial approval of PGA tariffs on policy and common law grounds would have

[19] Although they do not challenge the use of the PGA, the Coalition does point out that GURA does not specifically reference the use of fuel cost adjustments, whereas the Public Utility Regulatory Act (PURA) does. *See* TEX. UTIL. CODE §§ 36.201, 36.203 (providing for "the timely adjustment of a utility's fuel factors, with or without a hearing"). The Austin Court of Appeals has addressed this point:

> [T]he legislature enacted the provision granting the [PUC] authority to review and reconcile the prudence of fuel costs at a time when it had prohibited the PUC from allowing electric utilities to use automatic fuel cost adjustment clauses like PGAs. By contrast, Texas courts by that time had approved the use of PGA clauses by gas utilities. Against this legal backdrop, the legislature understandably provided a method for timely review and adjustment of an electric utility's fuel costs as an alternative for fuel factor adjustment clauses while including no such provision regarding gas utilities.

CenterPoint Energy Entex, 208 S.W.3d at 620 (citations omitted).

been unnecessary if, as we hold today, the statutory authority to "establish rates" already includes the authority to approve clauses that provide for automatic adjustments based on cost fluctuations.

We disagree with this argument because we disagree with its foundational contention that courts have approved PGA tariffs based only on policy reasons and not on the language of the statute. To the contrary, when this Court addressed PGA tariffs nearly forty years ago, we characterized the tariff as "a charge" and as "a component of the rate" that the statute authorized. *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 266 (Tex. 1976). Quoting from an earlier Attorney General opinion, we described a PGA tariff as "a lawful exercise of the municipality's rate regulation power" to "establish[] a rate schedule." *Id.* at 266–67 (quoting Attorney General Op. H-741 (Nov. 20, 1975)). A few years later, we recognized that PGA tariffs are justified based on the statute's "mandate[] that the Commission structure a system that will permit the utility to recover all of its operating expenses." *R.R. Comm'n of Tex. v. High Plains Natural Gas Co.*, 628 S.W.2d 753, 753 (Tex. 1981). More recently, and similar to the construction we adopt today, the Austin Court of Appeals held that a PGA tariff included as part of the base rate in a rate schedule constitutes a "'rule' [that] fits squarely within [subsection B of] the statutory definition of 'rate,'" and thus the "gas rate consists of its entire rate schedule, which may result in differing customer charges month-to-month." *CenterPoint Energy Entex*, 208 S.W.3d at 619.[20] As

[20] The Austin court concluded that a PGA tariff included within a rate schedule constitutes a "rule" under subsection B of the statutory definition of rate. *CenterPoint Energy Entex*, 208 S.W.3d at 619. We have concluded that the COSA clause constitutes a "practice" under subsection (B), and have thus declined to determine whether it is also a "rule" or "regulation." *See supra* note 17. Also, as the Coalition and state agencies point out, the Austin court stated that "Texas has never expressly addressed the use of PGA clauses in a statute." *CenterPoint Energy Entex*, 208 S.W.3d at 613. We agree that the statute does not "expressly" address PGA clauses, but that is different than holding that the statute does not "expressly" authorize the Commission to adopt such clauses by authorizing it to regulate and establish rules and practices that affect compensation and charges. By concluding that the inclusion of a PGA tariff in a rate schedule "fits squarely within" the statute's definition of a rate, the Austin court found that such clauses are authorized by statute, and not merely by common law based on judicial policy choices. *See id.*

we read these cases, Texas courts have long held that the statutory language authorizes the inclusion of PGA tariffs in rate schedules.

It is true, as the Coalition and state agencies point out, that the courts have explained and discussed the policy reasons that justify PGA tariffs. This Court has noted, for example, that PGA tariffs were first "enacted at a time of rapid and enormous increases in the cost of fuel," *San Antonio Indep. Sch. Dist.*, 550 S.W.2d at 266, and the Austin court has noted that "fuel costs are particularly subject to dramatic and unforeseeable changes" and "constitute such a large proportion of a utility's total costs that any substantial regulatory lag in approving rate increases to reflect fuel cost increases can cause the rapid financial ruin of an otherwise healthy utility." *CenterPoint Energy Entex*, 208 S.W.3d at 617. But the courts have not cited—indeed, they could not cite—these policy concerns as justification for a judicial grant of authority to an executive branch agency. As we have explained, statutorily created agencies like the Commission have only the authority that the Legislature confers upon them by statute. *Pub. Util. Comm'n of Tex.*, 53 S.W.3d at 315. It is thus irrelevant to our analysis whether the same policy concerns that justify a PGA tariff also justify COSA clauses. Even if, as the Coalition and state agencies contend, they do not, our task is simply to determine whether the statute authorizes the Commission to include such clauses in a gas utility's rate schedule.[21] Our conclusion that it does is not inconsistent with our state courts' prior discussions of PGA tariffs.

[21] *See, e.g.*, *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 629 (Tex. 2013) ("[W]e 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."); *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 139 (Tex. 2013) ("In Texas, however, the Legislature must make this policy determination. Our role in statutory construction is merely to give effect to the Legislature's intent by examining the plain meaning of the statute." (citations omitted)).

4. Commission Rules

Finally, the Coalition and state agencies argue that the Commission's own rules conflict with our construction of GURA. Specifically, as we have noted, the Commission has adopted three rules regarding COSA clauses: one defining a COSA clause, one requiring additional filings when a utility proposes a rate change in the environs based on a COSA clause effective in an adjacent municipality, and a third providing that a COSA clause effective in an adjacent municipality "shall not be applicable or put into effect for the affected environs area, although the utility may request the same rates that are in effect in the adjacent municipality for the affected environs area." 16 TEX. ADMIN. CODE §§ 7.115(10), 7.210(b), 7.220(c). The Coalition contends that the third rule, 7.220(c), prohibits the use of a municipality-approved COSA clause in adjacent environs, and instead "requires the Commission to review increases in base rates for customers in the environs using the traditional cost of service basis."

Disagreeing with the Coalition's construction of rule 7.220(c), the court of appeals held that, "rather than prohibiting the use of cost-of-service adjustment clauses for environs rates, this section simply provides that such clauses are subject to review by the Railroad Commission and will not be automatically applicable as adjacent municipality rates." *Tex. Coast Util. Coal.*, 357 S.W.3d at 746 (emphasis in original). We agree. Although, as the Coalition notes, the terms "shall not" are typically prohibitive, we cannot read the terms in such a manner within the context of this rule. The rule first provides that when a utility proposes an increase in an environs rate pursuant to a COSA clause in effect in an adjacent municipality, the Commission "shall review" that increase "on a cost of service basis." 16 TEX. ADMIN. CODE § 7.220(c). It then provides that the COSA "in effect in the adjacent municipality shall not be applicable or put into effect for the affected environs area,

although the utility may request the same rates that are in effect in the adjacent municipality for the environs area." We read the rule to mean that the municipality-approved COSA clause will not be automatically effective in the environs but will be subject to the Commission's own independent review to ensure that the cost of service justifies the clause. The rule expressly provides that the utility "may request the same rates that are in effect in the adjacent municipality," and those rates would include any COSA clause. We agree with the Commission and the Austin court that this rule does not prohibit the Commission from adopting a COSA clause as part of the rate applicable to the environs, but instead ensures that such a clause will be permitted only after the Commission has determined that including it in the rate is appropriate.

We thus reject the Coalition's and state agencies' arguments that our construction of GURA finds a grant of authority in a statutory definition or is inconsistent with the GRIP statute, prior court holdings regarding PGA tariffs, or the Commission's rule 7.220(c). We conclude that, by granting the Commission the authority to establish "rates," and defining "rates" to include "practices" that affect a utility's compensation and charges, GURA expressly grants the Commission authority to include a COSA clause in a gas utility's rate schedule.

B. The COSA Complies with GURA's Mandates.

Although GURA expressly authorizes the Commission to establish practices that, like a COSA, affect a utility's compensation and charges, both the Commission and the COSA must still comply with all of GURA's procedural, substantive, and jurisdictional mandates. *See, e.g., Pub. Util. Comm'n of Tex.*, 53 S.W.3d at 323 (holding that PUC had authority to establish rates for investor-owned utilities' use of each other's transmission facilities, but the "access fee" portion of rate was inconsistent with Public Utility Regulatory Act and therefore exceeded the PUC's statutory

authority); *R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685, 688 (Tex. 1992) (observing that Commission must exercise its authority "consistent with the laws of this state" and "consistent with its statutory authority"). Thus, in addition to granting authority to the Commission, GURA also limits the exercise of that authority to practices and rates that satisfy GURA's requirements. The Commission may not, for example, establish a practice that does not ensure that the rate is "just and reasonable," *see* TEX. UTIL. CODE § 104.003(a), or that is not calculated to "establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital used and useful in providing service to the public in excess of its reasonable and necessary operating expenses," *id.* § 104.051.

The Coalition and state agencies argue that the CenterPoint COSA clause violates the purpose and provisions of GURA in two ways. First, they contend that the COSA clause allows CenterPoint to change its rates without complying with GURA's notice and hearing procedures. *See id.* §§ 104.101–.112. Second, they contend that the COSA clause usurps the municipalities' exclusive original jurisdiction over CenterPoint's rates within municipal borders. *See id.* § 103.001. We disagree with both contentions.[22]

1. Rate Changes Must Be Approved, But They Need Only Be Approved Once.

Under GURA, a utility that wishes to increase its rate must timely file a statement of intent, and the regulatory authority or any affected person may initiate a full rate case by contesting the proposed increase. *See id.* §§ 104.102(a), 104.105. The Coalition and state agencies contend that

[22] No party contends that the COSA clause constitutes an improper delegation of the Commission's authority to CenterPoint. *Cf. Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 653–54 (Tex. 2004) (considering whether Texas Worker's Compensation Commission's dispute and audit rules constituted improper delegation of its authority to private entities); *San Antonio Ind. Sch. Dist.*, 550 S.W.2d at 266–67 (rejecting contention that fuel adjustment charge constituted an improper delegation of ratemaking power to city).

the COSA clause allows CenterPoint to increase its rate without complying with these procedures. Noting that GURA's definition of "rate" includes both (A) "any compensation [or] charge" that the utility demands, charges, or collects, and (B) a practice that affects the compensation or charge, *see id.* § 101.003(12), the Coalition and state agencies contend that *both* the charge *and* the practice are a "rate," and thus GURA requires that the utility comply with the procedural requirements before it can increase *either*.[23] "Thus," the Coalition argues, "to increase a 'charge' the utility must abide by the same criteria that apply to increasing a 'rate.'"

Generally, we agree with the Coalition that a "charge" is a "rate"—the statute expressly says so—and when a utility wishes to change its rate (whether the rate is a "charge" or a "practice" or some other term that falls within the statutory definition of a "rate") the utility must comply with the statutory notice and rate case procedures. But we disagree with the Coalition's conclusion. Once a rate is approved pursuant to a proper rate proceeding, it need not be re-approved each time it is applied. This is true whether the "rate" approved by the Commission is a fixed dollar amount (like a flat, per-customer fee) or a formula with fixed inputs (like a charge calculated by multiplying a fixed dollar amount by a customer's units of usage) or a formula with variable inputs (like a COSA or a PGA or pass-through tax tariffs). The total amount of money billed to a utility's customers and collected by the utility changes on a month-to-month basis because even if all other factors were constant, customer usage generally varies from month to month. So we disagree with the Coalition to the extent it construes the terms "compensation" and "charge" (as used in subsection (A) of the definition of "rate") to mean the amount that a customer is required to pay (that is, the amount the

[23] The Coalition argues: "In other words, in the court [of appeal]'s view, it is possible to have a 'rate' that allows for increases in the amount of money the utility collects through 'charges,' but which does not constitute an increase in a 'rate.' This result does not withstand scrutiny."

customer is billed) in any given month. Gas bills routinely change from month to month based on the amount of gas the customer uses, because the "charge" is typically a specified amount per hundred cubic feet that the customer uses. The "compensation" and "charge," in other words, are not the amount a customer must pay each month, but the basis by which that amount is determined.

More importantly, although we agree that the COSA clause may change the basis by which the amount of a customer's bill is determined (i.e., it may change the "charge,"), and that change may result in an increase in the amount of the customer's bill, we do not agree that the change results in an increase in the "rate." The Commission's rate-making authority includes the authority to establish "practice[s]" that "affect[]" the basis by which the amount of a customer's bill is determined, and it is not possible for such a practice to "affect" the basis without changing it in some way. Application of a "practice" that "affect[s]" a "charge" necessarily changes the charge in some manner; if every application of a previously approved "practice" required new rate case proceedings, approval of the practice itself would be meaningless. The inclusion of subsection (B) in the definition of "rate" would be meaningless if the effect of subsection (A) were to require notice and a rate case to validate each application of the rule or practice that "affects" the basis by which the amount of a customer's bill is determined. We cannot construe GURA in a manner that renders subsection (B) superfluous. *See Atmos Energy*, 353 S.W.3d at 162 ("We presume that every word of a statute has been included or excluded for a reason.").

The Coalition and state agencies, however, contend that our construction renders subsection (A) superfluous. We disagree. As we read the statute, a rule or practice that affects a charge is simply a part (generally, a formulaic part, rather than a fixed or volumetric part) of the basis by which the amount of a customer's bill is determined. If the rate schedule does not include a COSA

clause or other such rule or practice that affects the charge, the fixed or volumetric basis by which the amount of the bill is determined is still the "rate," because it is the "compensation" or "charge" under subsection (A). But when the Commission adopts a rule or practice that "affects" the compensation or charge, it has established not two rates (each of which must be approved through separate rate proceedings), but one. Both the charge and the practice are part of the one "rate," and together they establish the basis by which the amount of the customer's bill is to be determined. CenterPoint and the Commission complied with GURA's procedural requirements in connection with the rate case that resulted in the order establishing CenterPoint's rate, which includes the COSA clause. By definition, the COSA clause "affects" the compensation and charges that CenterPoint can demand, charge, and collect, and GURA does not require a new rate case each time it does so.

2. Municipal Jurisdiction

Finally, the Coalition argues that the COSA clause violates GURA by usurping municipalities' exclusive original jurisdiction to establish rates within their borders. GURA expressly "does not authorize the railroad commission to . . . affect the jurisdiction, power, or duty of a municipality" that has not ceded its original jurisdiction to the Commission, except as otherwise provided in GURA. *See id.* § 102.002(2). The Coalition contends that the COSA clause affects the municipalities' exclusive original jurisdiction by allowing CenterPoint's compensation and charges to change without allowing the municipalities to review the change as GURA provides.

For example, the Coalition complains that the COSA clause alters GURA's requirements regarding which test year serves as the basis of the rate calculations. "Ratemaking begins with an historic test year," from which data regarding the utility's expenses and revenues is gathered and then "adjusted to more accurately reflect costs [that] will be incurred in the future." *Pub. Util.*

Comm'n v. GTE-Southwest, 901 S.W.2d 401, 411 (Tex. 1995). GURA defines a test year as "the most recent 12 months [prior to the rate case proceeding] . . . for which operating data for a gas utility are available." TEX. UTIL. CODE § 101.003(16). An appeal from a municipality's rate order is "based on the test year presented to the municipality adjusted for known changes and conditions that are measurable with reasonable accuracy." *Id.* § 103.055(a). Thus, under GURA, the utility's rate is typically based on costs incurred during the year prior to the rate case. By contrast, under the COSA clause, CenterPoint's rate could be adjusted each year, based on the preceding calendar year's cost data. By adjusting the rate based on more recent cost data, the COSA clause may reduce "regulatory lag,"[24] *see Tex. Coast Util. Coal.*, 357 S.W.3d at 738 (discussing the COSA clause's effect of allowing CenterPoint's rates "to 'self-correct' without the cost and regulatory lag of a conventional rate case"), and allow the utility's actual revenues to more closely match the rate of return that the Commission set at the ratemaking hearing. But, as the Coalition points out, by incorporating data regarding costs incurred in successive years, the COSA clause permits adjustments based on data that has not been subjected to the municipality's review through a full rate

[24] This Court has previously recognized the Commission's discretion in dealing with "regulatory lag" when acting within the authority the Legislature has delegated to it. *See R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 656 S.W.2d 421, 425 (Tex. 1983). In *Lone Star Gas*, the Commission entered an order setting new rates and making them effective from a date approximately one year before the order was entered. *Id.* at 423. Lone Star sought judicial review, asking the courts to require an even earlier effective date. *See id.* Reversing the court of appeals' judgment, which "created a judicial requirement that agencies make orders effective within sixty days of [the] hearing," we stated that, "[a]lthough we believe that agencies should conduct their business in a prompt manner, any mandatory requirement should come from the legislature." *Id.* at 424. We held that utilities did not have an absolute right to be compensated for losses due to regulatory lag, and that "[a]ny change in protection for the utility against undue regulatory lag should come from the legislature." *Id.* at 427. Relying on this holding, the Coalition contends that the Commission lacks authority to adopt a COSA because the Legislature has not specifically authorized COSAs as a means of addressing regulatory lag. We have noted that some degree of regulatory lag is "inherent in the process," *see Lone Star Gas*, 656 S.W.2d at 425, and we agree with the Coalition that regulatory lag is a risk generally born by utility investors. But our holding in *Lone Star Gas* rejected judicial interference with the Commission's discretion over its rate-setting responsibilities, so long as the Commission exercises its discretion within the bounds of its statutory authority. *See id.* As we have already held that GURA expressly authorizes the Commission to include COSA clauses in rate schedules, *Lone Star Gas* provides no basis to reject that authority simply because the clauses may reduce regulatory lag.

case. The Coalition argues that this prohibits municipalities from fulfilling their statutory duty as regulators under GURA, and "could easily lead to a rate design that is no longer fair and equitable to all customer classes."

Similarly, the Coalition complains that the COSA clause (1) requires a municipality to conduct its review of proposed adjustments contemporaneously with, instead of prior to, the Commission's review; (2) deprives the municipality of its statutory right to postpone the effective date of a new rate for up to ninety days to complete the hearing and render its decision;[25] (3) deprives the municipality of its right under GURA to stay the effect of the new rate pending an appeal;[26] and (4) arbitrarily caps the amount of recoverable review expenses at $100,000 for all regulatory authorities that the adjustment affects.[27] Although we have briefly noted responses to

[25] *See* TEX. UTIL. CODE § 104.107(a)(1).

[26] In a rate case, a utility seeking to increase its rates may put the proposed rate into effect "by filing a bond with the regulatory authority if the regulatory authority fails to make a final determination within 90 days from the date the proposed increase would otherwise be effective." *See* TEX. UTIL. CODE § 104.109(a). PURA has a similar provision authorizing electric utilities to "bond-in" proposed rates: section 36.110. *See id.* § 36.110. The Coalition relies on *Ark. La. Gas Co. v. R.R. Comm'n of Tex.*, 586 S.W.2d 643, 644 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.), in which the Austin Court of Appeals addressed a predecessor of section 36.110, Tex. Rev. Civ. Stat. art. 1446c, § 43(e). The court construed section 43(e) to authorize utilities to "bond-in" their proposed rate if the municipality with original jurisdiction failed to issue an order on their proposed rate increase within ninety days but did not authorize utilities to "bond-in" their proposed rate during the time period after the municipality issued an order, while the order was pending on appeal before the Public Utility Commission. *Id.* at 646. But the Austin court abandoned that construction of section 43(e) after the Legislature amended PURA in 1983, holding that the amended version permitted utilities to implement bonded rates during the pendency of an appeal before the Commission. *See Tex. Util. Elec. Co. v. Pub. Util. Comm'n*, 881 S.W.2d 387, 401–02 (Tex. App.—Austin 1994) *aff'd in part, rev'd in part per curiam, Pub. Util. Comm'n of Tex. v. Tex. Util. Elec. Co.*, 935 S.W.2d 109 (Tex. 1996). This Court affirmed that holding. *See Texas Util. Elec.*, 935 S.W.2d at 110 (affirming in all respects except one issue relating to tax expenses).

[27] Under the COSA clause, CenterPoint is required to reimburse municipalities for their "reasonable expenses" in conducting a review of its annual rate adjustment "in an aggregate amount not to exceed $100,000," which aggregate amount includes the reasonable expenses of all regulatory authorities conducting such a review. The Coalition complains that this cap is "arbitrary," but it provides no elaboration or legal authority in support of this assertion. To the extent the Coalition intended to argue that the Commission lacks authority to place a limitation on municipalities' reimbursable expenses, we note that the Austin Court of Appeals has held that, in a full rate case, the Commission has authority to review rate-case-expenses for which a municipality seeks reimbursement and to decline reimbursement for any expenses beyond what it determines to be reasonable. *Cities of Port Arthur, Port Neches, Nederland & Groves v. R.R. Comm'n of Tex.*, 886 S.W.2d 266, 269 (Tex. App.—Austin 1994, no writ). After-the-fact review of the reasonableness of expenses is different, of course, from a before-the-fact cap on expenses, and the Commission may have authority to engage in one

some of the Coalition's complaints, the conclusive response to all of these complaints is that the COSA clause need not provide for a full GURA rate case prior to an annual adjustment in CenterPoint's rate because the COSA clause and the adjustment are the product of a full rate case, in which the municipalities were afforded all of the jurisdiction, powers, and duties that GURA grants to them.

We note that, under the COSA clause, municipalities retain the authority to deny an annual adjustment (just as it could deny a proposed rate increase) and to participate in any appeal of that decision to the Commission (just as it could in a rate case). *See id.* §§ 103.051–.056. Similarly, the COSA clause expressly provides that the municipalities and the Commission retain their authority to initiate a ratemaking proceeding to decrease CenterPoint's rate if they determine that the adjustment results in a rate that is not "just and reasonable" or a return on investment in excess of what is "reasonable."[28] *See id.* §§ 104.003, 105.051. Absent a denial or the initiation of a ratemaking proceeding, the adjustment will occur in accordance with a rate that is already the result of a full rate case. Although that rate allows the municipalities to review the adjustment, the review does not require a full rate case, and thus GURA does not require that the review afford municipalities jurisdiction, powers, and duties as if it did.

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but not the other. But the review of a utility's proposed rate increase is also different from a review of a utility's reporting of financial data to be considered in a previously approved rate formula. The Coalition provides no analysis or authority addressing these differences or how they relate to any provision of GURA—the sole source of the Commission's authority. To the extent the $100,000 cap may have been arbitrary and unreasonable as applied in this particular case, the issue raised before the Court is not whether the Commission abused its discretion in approving this particular COSA, but rather whether the Commission lacked authority to approve a COSA at all.

[28] CenterPoint concedes that the COSA does not insulate it from the municipalities' original ratemaking jurisdiction, as "[n]othing in the COSA tariff deprives cities of their right under GURA to initiate a full, general rate case any time they believe it does not result in rates that are just and reasonable." The Commission agrees that cities may initiate a full rate case at any time and all of the requirements of a full rate case will apply. The COSA itself states that "[n]othing herein shall abrogate the jurisdiction of the regulatory authority to initiate a proceeding at any time to review whether rates charged are just and reasonable."

Ultimately, we reject the Coalition's jurisdictional argument because, as we concluded in the preceding section, GURA's requirements do not apply each time a "practice" that the Commission approved through a full rate case "affects" the utility's compensation or charge. The "compensation" and "charge" and the practice that affects them, as we have said, are all part of the one rate. The COSA clause does not "affect" municipalities' jurisdiction, powers, and duties related to rate changes because it does not cause a rate change. Rather, it is a "practice" that "affects" the utility's "compensation" and "charge," and GURA expressly authorizes the Commission to establish such a rate.

IV.
Conclusion

On the sole issue before us, we conclude that GURA granted the Commission authority to enter the final order in this case, including the COSA clause, to establish the rate CenterPoint may charge its customers in the applicable areas of the Texas Coast Division. The Commission and CenterPoint did not challenge the district court's judgment "on the alternative ground relating to the Commission's findings regarding payments to affiliates," and thus the court of appeals reversed the district court's judgment concerning the Commission's authority but remanded the case to the district court. Having affirmed the court of appeals judgment, we remand the case to the trial court for further proceedings consistent with this opinion.

Jeffrey S. Boyd
Justice

Opinion delivered: January 17, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0163

IN RE MARK FISHER AND REECE BOUDREAUX, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued October 10, 2013

JUSTICE JOHNSON delivered the opinion of the Court.

After Nighthawk Oilfield Services, Ltd. acquired Richey Oilfield Construction, Inc. from Mike Richey, the business did not go as well as the parties had hoped and Richey filed suit in Wise County against two Nighthawk executives. In this mandamus proceeding we consider whether the trial court abused its discretion by failing to enforce venue selection clauses in the acquisition documents. Concluding that it did, we conditionally grant relief.

I. Background

On May 3, 2007, Mike Richey sold his interest in Richey Oilfield Construction, Inc. (Richey Oil), an oilfield services company that he founded and operated, to Nighthawk Oilfield Services, Ltd. (Nighthawk) for $33 million. NOSGP, L.L.C. was Nighthawk's general partner and Mark Fisher and Reece Boudreaux were limited partners. The transaction resulted in Richey Oil becoming a wholly-owned Nighthawk subsidiary, with Richey remaining employed as president of Richey Oil and becoming a limited partner in Nighthawk.

The primary agreements regarding the transaction were a Stock Purchase Agreement, an agreement for the purchase of Richey Oil's goodwill (the Goodwill Agreement), and a Promissory Note. Each contained a clause naming Tarrant County as the venue for state court actions.

In the Stock Purchase Agreement, NOSROC, Inc.[1] agreed to pay Richey $13 million in cash for Richey Oil's issued and outstanding stock. That agreement contained the following provision:

> Jurisdiction; Service of Process. Any proceeding arising out of or relating to this Agreement may be brought in the courts of the State of Texas, Tarrant County, or if it has or can acquire jurisdiction, in the United States District Court for the Northern District of Texas, and each of the parties irrevocably submits to the non-exclusive jurisdiction of each such court in any such proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the proceeding may be heard and determined in any such court and *agrees not to bring any proceeding arising out of or relating to this Agreement in any other court*. (Emphasis added)

In the Goodwill Agreement, Richey sold his goodwill interest to Nighthawk. That interest was defined as his "right, title and interest in and to all of [Richey's] knowledge, experience and rights relating to the Business, and [Richey's] personal relationships and experience with the customers of the Business and further including the trade name 'Richey' to the extent and as used in conjunction with the Business." The Goodwill Agreement provided that Richey would receive $7 million in cash, a $6.5 million promissory note, and $6.5 million in Nighthawk limited partnership interest units. The Goodwill Agreement contained the same venue selection clause as the Stock Purchase Agreement.

[1] The Stock Purchase Agreement was executed between Richey, as the seller, and NOSROC, INC., as the purchaser. An affidavit executed by Fisher explains that NOSROC, INC. was "a corporation formed for tax reasons, which then immediately conveyed the stock to Nighthawk pursuant to an agreement between the transaction parties."

The $6.5 million promissory note (the Note) was signed by Fisher as president of Nighthawk. It provided that "[Nighthawk]. . . irrevocably agrees that any legal proceedings in respect of this note . . . or other writing relating hereto shall be brought in the district courts of Tarrant County, Texas, or the United States District Court for the Northern District of Texas."

A month after Nighthawk purchased Richey Oil, Nighthawk made a $20 million "special distribution" to its partners. The distribution was contemplated in the Goodwill Agreement, which provided: "[I]t has been represented to [Richey] that a distribution to the owners or holders of all units of [Nighthawk] is anticipated to be made contemporaneously with or subsequent to the Closing and [Richey] shall participate in such distribution on a pro rata basis."

Six months later, Richey paid $1 million to Nighthawk at Fisher's request. According to Richey, Fisher related that he was seeking similar amounts from all the limited partners, Nighthawk would treat the money as loans, and in six months the loans plus ten percent would be paid back. Fisher claims that the other limited partners made similar contributions totaling $3.9 million, but they agreed that those contributions would be treated as equity, not loans.

Richey asserts that when he asked Fisher to repay the $1 million as agreed, Fisher denied his request and claimed the money was a capital contribution for which Richey would receive preferred equity units. Richey has never been repaid the $1 million.

In connection with the acquisition, Nighthawk opened a controlled-disbursement account so Richey Oil could access Nighthawk's revolving line of credit. As part of that process, Richey and Fisher executed a Deposit Account Signature Card at Bank of America that gave Richey check signing authority. In May and June 2009, Fisher authorized Richey to pay Richey Oil vendors from

the account. However, when Richey did so, Bank of America rejected several of the checks for insufficient funds in the account. According to Richey, Fisher told some payees of the rejected checks that Richey created the problem. Several payees referred their returned checks to collection agencies, attorneys, and authorities, who sent demand letters threatening civil and criminal prosecution. Shortly thereafter, Nighthawk and Richey Oil filed for bankruptcy.

Richey soon sued Fisher and Boudreaux in Wise County where Richey resided. He sued both of them for breach of fiduciary duty, common law fraud, statutory fraud, and violations of the Texas Securities Act. He sued Fisher separately for defamation, common law fraud, negligent misrepresentation, and interference with prospective business relations related to the statements Fisher allegedly made to him about availability of money in the Richey Oil account and communications made to third parties regarding the returned checks. He sued Boudreaux separately for aiding and abetting Fisher's breaches of fiduciary duty, acts of fraud, and violations of the Texas Securities Act.

Fisher and Boudreaux responded by moving the trial court to transfer venue to Tarrant County or dismiss the suit pursuant to the mandatory venue selection clauses in the Stock Purchase Agreement and the Goodwill Agreement. They also argued that Richey lacked standing to recover damages to his reputation or goodwill because he had conveyed those rights to Nighthawk in the Goodwill Agreement and many of his other claims belonged to Nighthawk and could only be brought by the Nighthawk bankruptcy trustee.

The trial court denied Fisher's and Boudreaux's motions and pleas to the jurisdiction. They then sought, but were denied, mandamus relief from the court of appeals. ___ S.W.3d ___ (Tex.

App.—Fort Worth 2012, orig. proceeding). In this Court Fisher and Boudreaux (collectively, Relators) argue that Richey lacks standing because his claims actually belong to Richey Oil or Nighthawk and must be brought by the bankruptcy trustee; some of Richey's claims seek recovery of debts owed to him by Nighthawk and must be filed as claims against Nighthawk in bankruptcy court; and the trial court abused its discretion by failing to enforce the mandatory venue agreement under the major transaction statute, Texas Civil Practice and Remedies Code § 15.020. We will address the contentions in turn, beginning with any challenging jurisdiction. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012) (noting that if a court does not have jurisdiction, its opinion addressing any issues other than jurisdiction is advisory).

II. The Standing Challenge

Relators argue that Richey's claims regarding mismanagement of Nighthawk's financial affairs belong to Nighthawk and Richey does not have standing to assert them because the bankruptcy trustee must bring the claims on Nighthawk's behalf so as to preserve assets for the benefit of all partners. Richey counters that mandamus review is not available on the issue of standing because Relators cannot show they lack an adequate remedy by appeal, but even if mandamus review is available, he has standing because he suffered personal damages unique to him.

Relators rely on *Hall v. Douglas*, 380 S.W.3d 860, 873 (Tex. App.—Dallas 2012, no pet.), in which the court of appeals noted that "[a] limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of that partner's interest." But as that court recognized, a partner who is "personally aggrieved" may bring claims for those injuries he suffered directly. *Id.* at 872.

Richey's pleadings asserted that he made a $1 million payment to Nighthawk, the other limited partners failed to make similar payments, and he suffered damages including "loss of earning capacity, lost profits, loss of income, damage to credit reputation, lost investments," and "other losses." He also alleged that he sustained injury to his character and suffered mental anguish.

When a plea to the jurisdiction is based on the pleadings, the pleadings are to be construed liberally in favor of the plaintiff. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Richey's allegations do not affirmatively negate his having been "personally aggrieved." Thus, given his allegations, we need not decide whether mandamus review is available to Relators as to Richey's standing to assert claims based on his $1 million payment because even if it is, the record before us does not demonstrate that Relators are entitled to mandamus relief.

Relators also claim that Richey does not have standing to bring defamation claims based on the bank's refusal to honor Richey Oil checks. They posit that only Richey Oil has standing to bring those claims, and since Richey is not the owner of Richey Oil, he cannot bring the claims on the company's behalf. *See Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013) (noting that a corporate entity may maintain a suit for libel). But Richey's defamation claims are that Fisher made defamatory statements about Richey personally by telling payees of the returned checks that Richey caused the insufficient funds problems. Richey claimed those false statements subjected him to criminal and civil prosecution, financial loss, and injury to his personal reputation. Thus, he alleged injury personal to himself and has standing to bring the claims.

III. Claims Against Nighthawk

Relators next assert that the trial court abused its discretion in refusing to dismiss for lack of subject matter jurisdiction because Richey's claims for deferred consideration and the unpaid $1 million loan are claims for a debt owed by Nighthawk, they must be filed against Nighthawk in bankruptcy court. But the trial court does not lack jurisdiction over Richey's claims against Relators. Whether those claims should have been brought against another party (Nighthawk) is not a question of jurisdiction requiring dismissal, but is a question of liability. Relators did not argue in the trial court that they were the incorrect parties for Richey to bring the claims against. Relators have not shown themselves entitled to mandamus relief on this ground.

Relators also argue that "proceeding with the debt claims against Nighthawk in the Wise County suit violates the automatic stay in bankruptcy." But Nighthawk is not a defendant in the Wise County suit and the automatic bankruptcy stay does not extend to non-debtors. *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) (noting that by its terms, the automatic stay applies only to the debtor); *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 144 (Tex. App.—Texarkana 2000, no pet.) (holding that the bankruptcy stay does not extend "to separate legal entities such as corporate affiliates, partners in debtor partnerships or to codefendants in pending litigation." (quoting *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993)); *see also In re Pegasus Funds*, 345 S.W.3d 175, 176 (Tex. App.—Dallas 2011, orig. proceeding). Relators argue that the bankruptcy stay should extend to them because the stay applies to a non-debtor "when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a

judgment or finding against the debtor." *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986). Relators have not shown that this is the situation here.

IV. The Venue Selection Clauses

We next consider whether the trial court abused its discretion by refusing to transfer Richey's claims pursuant to venue selection clauses in the agreements under Texas Civil Practice and Remedies Code § 15.020. Mandamus relief is specifically authorized to enforce a statutory mandatory venue provision. TEX. CIV. PRAC. & REM. CODE § 15.0642.

A. Section 15.020–Major Transactions

Relators assert that by its plain language —"Notwithstanding any other provisions of this title"—Texas Civil Practice and Remedies Code § 15.020 overrides other venue provisions and required the trial court to enforce the venue agreements. Section 15.020 applies to a "major transaction," which is defined as a transaction evidenced by a written agreement and which involves $1 million or more:

> (c) Notwithstanding any other provision of this title, an action arising from a major transaction may not be brought in a county if:
>
> > (1) the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county, and the action may be brought in another county of this state or in another jurisdiction; or
> >
> > (2) the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county, under this section or otherwise, or in that other jurisdiction.

Id. § 15.020(c). Richey argues that section 15.020 and the venue selection clause in the Goodwill Agreement do not apply for the following reasons: (1) his tort claims do not "arise from" the purchase of Richey Oil; (2) the only agreement that relates to Richey's claims is the Partnership Agreement which has no forum or venue selection clause; (3) the contractual venue selection clause is permissive, not mandatory; and (4) venue is mandatory in Wise County under the statutory provision requiring a suit for libel or slander to be brought in the county where the plaintiff resided at the time of the accrual of the cause of action. *See id.* § 15.017. We address the arguments in turn.

B. Does Section 15.020 Apply?

The parties do not dispute that the Richey Oil acquisition, which included the sale of Richey's goodwill, constitutes a "major transaction" as defined by section 15.020. Richey urges, however, that section 15.020 does not apply because his claims against Relators are not claims "arising from" the purchase of Richey Oil; rather, he asserts, his claims arise from the operation or management of Nighthawk. We have not previously addressed when an action "arises from" a major transaction under section 15.020, but we have previously addressed similar issues as to forum selection agreements.

In *In re International Profit Assocs.*, 274 S.W.3d 672 (Tex. 2009) (per curiam), we analyzed whether a forum selection clause in a contract applied to tort claims between the contracting parties. In determining whether the claims were within the scope of the clauses, we called for a "common-sense" examination of the substance of the claims made to determine if they "arise" from the contract. *Id.* at 677. We explained that a court should consider whether a claimant seeks a direct benefit from a contract and whether the contract or some other general legal obligation establishes

the duty at issue. *Id.* We concluded that no matter how the claimant characterized or pleaded the claims, the tort claims in that case—including fraud and negligent misrepresentation—"arise from the contractual relationship between the parties, not from obligations imposed by law." *Id.* at 678.

In *Lisa Laser*, 310 S.W.3d 880, we applied the same type of analysis to determine the scope of a forum selection clause and whether it applied to the plaintiffs' contract claims. In that case, HealthTronics had a contract with Lisa Laser for exclusive distribution rights of certain medical devices. *Id.* at 882. The agreement also provided HealthTronics with rights of first refusal to distribute new products if certain requirements were met. *Id.* An exhibit to the agreement provided that the terms and conditions that followed, including a California forum selection clause that applied to "any dispute arising out of this agreement," applied to sales by Lisa Laser to HealthTronics. *Id.* HealthTronics sued Lisa Laser in Travis County for breach of contract, alleging that Lisa Laser breached its obligation to afford HealthTronics the first right to distribute new products, and for tortious interference with a contract. *Id.* Lisa Laser sought mandamus relief after the trial court denied its motion to dismiss based on the forum selection clause. *Id.* at 882-83. HealthTronics argued that the forum selection clause only applied to part of the contract, that is, sales transactions between it and Lisa Laser. *Id.* at 884. Applying the reasoning from *International Profit Associates*, we concluded that Lisa Laser's obligation, if any, to inform HealthTronics of new products and to offer it a right of first refusal to distribute those products "only arises from the Distribution Agreement." *Id.* at 884-86. The obligations were not imposed under general law, they would not exist but for the agreement, and therefore they arose out of the agreement. *Id.* at 886. We concluded that the forum selection clause itself applied more broadly than to mere sales transactions

because it applied to "any dispute arising out of" the agreement and the trial court erred in refusing to enforce the forum selection clause. *Id.* at 887.

Turning to the case at hand, we see no reason to deviate from the type of analysis we used in *International Profit Associates* and *Lisa Laser*. Similarly to our method of analysis in those cases, we will use a common-sense examination of the substance of the claims to determine whether the statute applies. *See Int'l Profit Assocs.*, 274 S.W.3d at 677.

Richey alleged in his live pleadings that "[a] substantial part of the acquisition was deferred consideration in the form of a $6,500,000 Promissory Note." He further alleged that he suffered substantial damages caused by Relators' authorization of the $20 million special distribution and that "[t]he effect of the distribution was to severely impair [Nighthawk's] ongoing operations and ultimately to render [Nighthawk] insolvent and incapable of continuing its business and affairs." Richey brought a claim for breach of fiduciary duty related to that $20 million distribution of Nighthawk assets. He alleged that his damages included "benefit of the bargain losses." And in a response to Relators' supplemental motion to dismiss in the trial court, he explained that he sought damages for "the loss of the promissory note issued [to] him individually."

Applying a common-sense analysis, we conclude that Richey in substance is seeking to recover the $6.5 million owed to him under the Note and for actions flowing directly from the acquisition and actions anticipated to flow from it.

First, the Note was consideration for his transfer of goodwill and was specifically provided for under the Goodwill Agreement. His claim for Nighthawk's failure to pay the Note, regardless of whether it is labeled as a breach of fiduciary duty claim or otherwise, arises from that major

transaction. *See id.* (considering the substance of claims such as breach of the duty of good faith and fair dealing to determine whether a forum selection clause applied). Richey's complaint that he lost the benefit of his bargain depends on the Goodwill Agreement and Nighthawk's agreement in it to pay part of the purchase price by means of the $6.5 million note. *See Lisa Laser*, 310 S.W.3d at 886 (holding that a forum selection clause applied to a claim that would have no basis but for the agreement containing the clause). Because Richey's claims substantively arise from commitments in the Goodwill Agreement, we disagree with his claim that the only agreement that relates to his claims is the Partnership Agreement.

Richey asserts that his claims actually arise from Relators' post-acquisition conduct and, therefore, do not "arise from or relate to the Note." Rather, he argues that the Note is merely a source of reference for measuring his damages. He also argues that because he did not sign the Note, he is not bound by the venue selection clause in it. We disagree that these assertions mean section 15.020 is inapplicable. First, section 15.020 does not require that an action arise out of a specific agreement. Rather, it applies to an action "arising from a major *transaction*" if the party bringing the action has agreed in writing that the action will be brought in a certain jurisdiction. TEX. CIV. PRAC. & REM. CODE § 15.020(a) (emphasis added). And as set out above, Richey signed the Goodwill Agreement specifying that claims arising out of or relating to it would be brought in Tarrant County. Richey's claim based on the unpaid note arises out of that major transaction regardless of whether Richey signed the Note or whether his claim "arises" specifically out of the Note.

Second, we disagree with Richey's claim that he merely references the Note to measure his damages. Richey cites *Carr v. Main Carr Development, LLC*, 337 S.W.3d 489, 498 (Tex. App.—Dallas 2011, pet. denied), in which the court held that a non-signatory cannot be compelled to arbitrate when his claims merely "touch matters" covered by a contract containing an arbitration clause, yet the claims do not actually rely on the contractual terms. *Id.* In that case the court of appeals explained that claims must be brought on a contract if liability must be determined by reference to the contract, and the determination of whether a party seeks the benefit of a contract turns on the substance of the claim. *Id.* (citing *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131-32 (Tex. 2005)).

Here, Richey's claims do more than "touch matters" included in the Goodwill Agreement and the Note. Liability for failure to pay him on the Note must be determined by reference to those agreements. *See id.* And when an injury is to the subject matter of a contract, the action is ordinarily "*on the contract*." *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (emphasis added).

C. Is the Venue Selection Clause Mandatory?

Richey next argues that even assuming his claims arise from Nighthawk's purchase of Richey Oil, section 15.020 is inapplicable because he did not agree in writing that an action arising from the transaction "must" be brought in Tarrant County or "may not be brought" in Wise County. He claims that the acquisition documents and the Note include permissive, not mandatory venue selection clauses. He references the Goodwill Agreement's provisions that "any proceeding arising out of or relating to this Agreement *may* be brought in the courts of the State of Texas, Tarrant

County, or if it has or can acquire jurisdiction, in the United States District Court for the Northern District of Texas" and that the parties "submit[] to the *non-exclusive* jurisdiction of each such court," and "the proceeding *may* be heard and determined in any such court." (Emphasis added). Richey argues that this permissive language controls over the mandatory language providing that each of the parties "agrees not to bring any proceeding arising out of or relating to this Agreement in any other court." He asserts that finding the clause mandatory would render all of the permissive language meaningless. Relators counter that the permissive language applies to consent to jurisdiction, but the mandatory language applies to require venue. We agree with Relators.

The beginning of the jurisdiction clause at issue here provides that "[a]ny proceeding arising out of or relating to this Agreement may be brought in the courts of the State of Texas, Tarrant County . . . and each of the parties irrevocably submits to the non-exclusive jurisdiction of each such court in any such proceeding." Objections to personal jurisdiction may be waived, so a litigant may consent to the personal jurisdiction of a court through a variety of legal arrangements. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985). For example, a contractual "consent-to-jurisdiction clause" subjects a party to personal jurisdiction, making an analysis of that party's contacts with the forum for personal jurisdiction purposes unnecessary. *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 704 (Tex. App.—Dallas 2010, no pet.) (concluding a contract provision that claims "may be heard" in Dallas courts was a "consent-to-jurisdiction" clause and the trial court erred by granting the defendant's special appearance); *see Ramsay v. Tex. Trading Co.*, 254 S.W.3d 620, 629 (Tex. App.—Texarkana 2008, pet. denied) (explaining that a permissive forum selection clause is one under which the parties consent to the jurisdiction of a particular forum but do not require suit

to be filed there); *see also Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274 (Fla. 1987) ("Permissive clauses constitute nothing more than a consent to jurisdiction and venue in the named forum.").

The provision here providing that the parties irrevocably submit to the non-exclusive jurisdiction of the courts in Tarrant County is a consent-to-jurisdiction clause. But the parties not only submitted themselves to jurisdiction of the Tarrant County courts, each party also "irrevocably . . . agree[d] not to bring any proceeding arising out of or relating to this Agreement in any other court." Our primary goal in construing this contractual language is to determine the parties' intent as reflected by the language they used. *El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802, 805 (Tex. 2012). The contract reflects intent that the parties submit to the jurisdiction of the state or federal courts in Tarrant County *and* that they will not file suit "arising out of or relating to this Agreement" anywhere else. The requirement that if the parties file suit it will be in Tarrant County is not diluted by their agreement to submit to jurisdiction there, and we disagree with Richey's position that construing the venue selection clause as mandatory would render his agreement to submit to personal jurisdiction in Tarrant County meaningless. Simply put, Richey clearly agreed in the Goodwill Agreement that an action arising from that transaction must be brought in Tarrant County. *See* TEX. CIV. PRAC. & REM. CODE § 15.020(c).

Richey also asserts that when a venue provision such as the one involved here includes the term "non-exclusive," it is not mandatory, even if the provision includes other language reflecting that it is mandatory. Richey cites two cases in support of his assertion that use of the phrase "non-exclusive jurisdiction" makes a venue selection clause only permissive. *See Sauder v. Rayman*, 800

So. 2d 355, 359 (Fla. Dist. Ct. App. 2001); *W. Ref. Yorktown, Inc. v. BP Corp. N. Am. Inc.*, 618 F. Supp. 2d 513, 520-21 (E.D. Va. 2009). But in neither of those cases did the courts' holdings rely exclusively on the phrase "non-exclusive." In *Sauder*, the court held that the phrase "non-exclusive jurisdiction" in a forum selection clause was permissive while the phrase "all actions . . . shall be litigated" in the same clause was mandatory. 800 So. 2d at 359. Because the entire clause did not foreclose multiple interpretations, the court concluded the trial court's order finding the provision permissive was not clearly erroneous. *Id.* And in *Western Refining Yorktown*, the forum selection clause did not contain the phrase non-exclusive jurisdiction. Rather, the clause provided that an action to enforce the contract "shall" be brought in "the federal or state courts located in Cook County in the State of Illinois on a non-exclusive basis." 618 F. Supp. 2d at 519. The phrase "non-exclusive basis," the court held, meant that filing suit in the courts in Cook County was not mandatory. *Id.* at 523.

We do not consider these cases determinative. Rather, we conclude that where the phrase "non-exclusive jurisdiction" is in a venue selection clause that also includes language reflecting intent that the venue choice is mandatory, the non-exclusive language does not necessarily control over the mandatory language. We agree with the court's decision in *Muzumdar v. Wellness International Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006) where the court rejected a party's contention that the phrase "non-exclusive jurisdiction"—which the court noted required the parties to submit to personal jurisdiction—rendered a forum selection clause permissive. There the court concluded that it could not "find that a provision which requires appellants to submit to the 'non-exclusive' jurisdiction of Texas courts somehow undermines a very strongly worded forum

selection clause containing mandatory language: 'SHALL BE PROPER ONLY' or 'SHALL BE PROPER' in Dallas County, Texas." *Id.* Similarly, the phrase "non-exclusive jurisdiction" in the Goodwill Agreement does not control over the plainly worded mandatory language.

D. Venue in Wise County

Finally, Richey argues that venue in Wise County is proper even if it is not mandatory, so the trial court did not err by denying Relators' motion to dismiss. First, Richey points to Texas Civil Practice and Remedies Code § 15.017 which provides that:

> A suit for damages for libel, slander, or invasion of privacy shall be brought and can only be maintained in the county in which the plaintiff resided at the time of the accrual of the cause of action, or in the county in which the defendant resided at the time of filing suit, or in the county of the residence of defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiff.

TEX. CIV. PRAC. & REM. CODE § 15.017. He asserts that because he resided in Wise County at the time his cause of action for defamation accrued, this mandatory provision applies.

We have already concluded that section 15.020 applies, mandating that Richey's actions must be brought in Tarrant County. Venue may be proper in multiple counties under mandatory venue rules, and the plaintiff is generally afforded the right to choose venue when suit is filed. *Wilson v. Tex. Parks & Wildlife Dep't*, 886 S.W.2d 259, 260 (Tex. 1994). But in this case, the language of section 15.020 applies to an action arising from a major transaction "[n]otwithstanding any other provision of this title." TEX. CIV. PRAC. & REM. CODE § 15.020(c). This indicates that the Legislature intended for it to control over other mandatory venue provisions. *See Molinet v. Kimbrell*, 356 S.W.3d 407, 413-14 (Tex. 2011) (holding that the phrase "notwithstanding any other law" indicates a legislative intent that the provision prevail over conflicting law).

Next, Richey alternatively argues that if section 15.017 does not apply, venue is proper in Wise County under the general venue statute because a substantial part of the events giving rise to his claim occurred there. *See* TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1) (providing that a lawsuit shall be brought in various enumerated places including "in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred"). He cites *Acker v. Denton Publishing*, 937 S.W.2d 111, 115 (Tex. App.—Fort Worth 1996, no writ) for the proposition that if a plaintiff's choice of venue is proper, it is reversible error for a trial court to transfer venue even if the county of transfer would also have been proper if chosen by the plaintiff. But *Acker* did not address whether a case should be transferred when a mandatory venue provision for a different county was applicable. And we long ago explained that "[i]f the plaintiff's chosen venue rests on a *permissive* venue statute and the defendant files a meritorious motion to transfer based on a *mandatory* venue provision, the trial court must grant the motion." *Wichita Cnty. v. Hart*, 917 S.W.2d 779, 781 (Tex. 1996) (emphasis added). The permissive venue statute does not control over the mandatory venue provision applicable in this case.

V. The Remainder of Richey's Claims

Having determined that Richey's claims seeking his benefit of the bargain losses arose out of a major transaction, we conclude that all of Richey's claims against Relators must be transferred to Tarrant County because Texas Civil Practice and Remedies Code § 15.004 provides that:

> In a suit in which a plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by the mandatory venue provisions . . ., the suit shall be brought in the county required by the mandatory venue provision.

It is not necessary for us to analyze Richey's claims to determine whether they arise from the same transaction, occurrence, or series of transactions: the parties affirmatively assert that they do.

VI. Inconsistency Among Agreements

Finally, Richey asserts that because Relators argue that this case is also governed by forum selection clauses providing that suit be brought in Chicago, New York, and Illinois, the inconsistency among all the agreements creates an ambiguity so suit should proceed in Richey's choice of venue. We disagree.

In order to finance the acquisition of Richey Oil, Nighthawk entered into credit agreements with LaSalle Business Credit, L.L.C. and D.B. Zwirn Special Opportunities Fund, L.P., which contained clauses requiring suit be brought in Chicago and New York, respectively. Richey acknowledges he was not a party to either of those agreements. Richey also signed a Subordination Agreement in which he agreed that the $6.5 million note was subordinate to the security interests of LaSalle Business Credit and D.B. Zwirn. The Subordination Agreement provided that any litigation in connection with that agreement shall be venued in New York. But Relators were not parties to that agreement.

Relators also argue that a deposit agreement with Bank of America, requiring suits regarding the Richey Oilfield account be brought in Illinois, applies to Richey's claims against them. But Richey did not bring claims against Relators regarding the Richey Oil bank account. He claimed that Fisher made defamatory statements to check payees about Richey's being responsible for the checks not being able to be cashed. Relators do not explain how these claims arise out of the deposit agreement with Bank of America.

We disagree that there is any ambiguity as to which clause should apply to Richey's claims against Relators. Richey's claims arise out of and would not exist but for the acquisition agreements. The venue selection clauses in those agreements apply.

VII. Conclusion

The trial court abused its discretion by failing to enforce the mandatory venue selection clauses in the Stock Purchase Agreement and Goodwill Agreement. We conditionally grant relief. We direct the trial court to vacate its order denying Relators' motion to transfer venue and to grant the motion. The writ will only issue if the trial court fails to comply with our directive.

_____

Phil Johnson
Justice

OPINION DELIVERED: February 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0183

ROSSCER CRAIG TUCKER, II, PETITIONER,

v.

LIZABETH THOMAS, RESPONDENT

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

Argued February 5, 2013

JUSTICE GREEN delivered the opinion of the Court.

JUSTICE GUZMAN filed a concurring opinion in which JUSTICE LEHRMANN joined.

JUSTICE BROWN did not participate in the decision.

In this case, we consider whether a trial court has authority to order a parent to pay attorney's fees as additional child support in a non-enforcement modification suit under Title 5 of the Texas Family Code. The court of appeals held that the trial court in this modification suit under Chapter 156 of the Family Code had discretion to characterize an award of attorney's fees as necessaries and, as necessaries, had discretion to award fees as additional child support. 405 S.W.3d 694, 697 (Tex. App.—Houston [14th Dist.] 2011, pet. granted). We hold that, in the absence of express statutory

authority, a trial court does not have discretion to characterize attorney's fees awarded in non-enforcement modification suits as necessaries or as additional child support. Accordingly, 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

Rosscer Craig Tucker, II and Lizabeth Thomas divorced in 2005. In the divorce decree, the trial court appointed Tucker and Thomas as joint managing conservators of their three children, naming Thomas as the parent with the exclusive right to designate the children's primary residence and granting Tucker visitation rights pursuant to a standard possession order. The trial court also ordered Tucker to pay child support. Three years later, Tucker sought modification of the decree, requesting that the trial court name him as the parent with the exclusive right to designate the children's primary residence. Thomas filed a countersuit, requesting that the trial court modify the decree by naming her as sole managing conservator of the children, modify the possession order, and increase Tucker's child support obligation. The trial court appointed an amicus attorney to assist the court in protecting the best interests of the children.

Following a bench trial, the trial court denied Tucker's requests for modification and granted part of the relief requested by Thomas by increasing Tucker's monthly child support obligation and reducing Tucker's periods of possession. Additionally, the trial court found the amicus attorney's fees and Thomas's attorney's fees to be necessaries expended for the children's benefit. The trial court ordered Tucker and Thomas to each pay half of the amicus attorney's fees as additional child support. The trial court further ordered Tucker to pay Thomas's attorney's fees as additional child

support, plus postjudgment interest. Tucker filed a motion for new trial, challenging the trial court's order requiring him to pay attorney's fees to both the amicus attorney and Thomas as additional child support rather than assessing the attorney's fees as costs. The trial court denied the motion.

Tucker appealed on grounds relating to attorney's fees and the denial of his requests for modification. The court of appeals, hearing the case en banc, considered only the merits of the two attorney's fees issues because Tucker waived his complaint on the modification requests.[1] 405 S.W.3d at 711–14. The court of appeals held that the Family Code gives trial courts authority to order a parent to pay attorney's fees for legal services benefitting the children—whether provided by the amicus attorney or the other parent—as additional child support in non-enforcement modification suits. *Id.* at 712. While acknowledging that other Texas courts of appeals have held that the Family Code does not expressly grant trial courts authority to assess attorney's fees as additional child support when parties seek only modification of an order under Title 5 of the Family Code, the court reasoned that a parent's statutory duty to provide his or her children with necessaries evidences the Legislature's intent to grant trial courts broad discretion to assess attorney's fees as child support. *Id.* at 703–05. The court of appeals further held that there was insufficient evidence to support the trial court's finding that the attorney's fees awarded to Thomas were reasonable, reversing on that issue and remanding the case to the trial court for a determination of reasonable attorney's fees. *Id.* at 714.

[1] The court of appeals held that Tucker failed to preserve error regarding the trial court's denial of his requests for modification. 405 S.W.3d at 713–14. Tucker also argued that the trial court erred by assessing compound interest on the attorney's fees. The court of appeals held that Tucker waived his complaint on that issue. *Id.* at 712–13. We agree and therefore do not address these issues.

In this Court, Tucker has pursued only the issue of whether Thomas's attorney's fees could be awarded as additional child support, and we granted his petition to resolve the disagreement among the courts of appeals.[2] 56 Tex. Sup. Ct. J. 100–01 (Nov. 16, 2012). *Compare* 405 S.W.3d at 714 (holding that attorney's fees incurred in a non-enforcement modification suit can be awarded as additional child support under the Family Code), *with, e.g.*, *In re Moers*, 104 S.W.3d 609, 612 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (holding that attorney's fees and costs may not be awarded as child support when they are incurred in a suit to modify the parent-child relationship that does not involve the enforcement of a child support obligation).

II. Analysis

In this issue of first impression, we must determine whether the Legislature has authorized a trial court to award attorney's fees incurred by a party in a non-enforcement modification suit affecting the parent-child relationship (SAPCR) as additional child support.[3] Because this is an issue of law involving statutory construction, we review it de novo. *See City of Rockwall v. Hughes,* 246 S.W.3d 621, 625 (Tex. 2008). Our primary objective when construing statutes is to give effect to the Legislature's intent. *Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011). We must ascertain this intent

[2] Tucker abandoned his challenge to the trial court's award of the amicus attorney's fees as additional child support. Therefore, our review in this case is limited to whether the trial court had discretion to award attorney's fees incurred by Thomas as additional child support. Additionally, Thomas does not challenge the court of appeals' reversal on the amount of reasonable attorney's fees. We therefore express no opinion as to whether the amicus attorney's fees could be awarded as additional child support or whether the amount of attorney's fees awarded was supported by legally sufficient evidence.

[3] This case involves only actions to modify custody and support orders and does not involve any action for enforcement of child support payments. The concurrence's concerns regarding blended proceedings—those in which the parties seek both modification and enforcement of support orders—are not raised by the facts before us. *See* ___ S.W.3d at ___.

by looking to the entire act. *See Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 549 (Tex. 1981).

Texas has long adhered to the American Rule with respect to awards of attorney's fees, which prohibits the recovery of attorney's fees from an opposing party in legal proceedings unless authorized by statute or contract. *See, e.g.*, *1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 382 (Tex. 2011). Title 5 of the Family Code provides a comprehensive scheme authorizing a trial court to award attorney's fees pursuant to both a general statute and specific statutes. *See, e.g.*, TEX. FAM. CODE § 106.002. The Legislature also provides specific mechanisms for the enforcement attorney's fees awards in SAPCRs. *See, e.g.*, *id.* As discussed below, neither the Legislature nor our case law related to the common law doctrine of necessaries has recognized trial court authority to characterize attorney's fees in non-enforcement modification suits as necessaries or as additional child support. We hold that, in the absence of express statutory authority, a trial court may not award attorney's fees recoverable by a party in a non-enforcement modification suit as necessaries or additional child support.[4]

A. Split Among the Courts of Appeals

The majority of the courts of appeals that have addressed this issue have held that a trial court may not characterize attorney's fees incurred by a party in a non-enforcement modification suit as

[4] We express no opinion as to whether a statute that expressly authorizes a trial court to enforce an award of attorney's fees incurred by a party in a non-enforcement modification suit by any means available for the enforcement of a child support obligation—which necessarily includes the possibility of confinement for contempt—would pass constitutional muster. *Compare* TEX. CONST. art. I, § 18 ("No person shall ever be imprisoned for debt."), *with In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005) (orig. proceeding) (per curiam) ("[T]he obligation to support a child is viewed as a legal duty and not as a debt.").

additional child support. *See, e.g.*, *In re Moers*, 104 S.W.3d at 612; *see also* 405 S.W.3d at 704 n.6 (listing five courts of appeals that have followed *In re Moers*).[5] Those courts of appeals reason that the Legislature has distinguished between attorney's fees awarded in modification suits and attorney's fees awarded in enforcement suits due to the potentially serious consequences that stem from characterizing attorney's fees as child support. *See, e.g.*, *Finley v. May*, 154 S.W.3d 196, 199 (Tex. App.—Austin 2004, no pet.). Specifically, section 157.166 of the Family Code authorizes a trial court to enforce a child support obligation through use of its contempt powers, which includes the possibility of confinement. *See* TEX. FAM. CODE § 157.166.

The court of appeals in this case reached the opposite conclusion, holding that the attorney's fees incurred by Thomas in this non-enforcement modification suit were necessaries, and, as necessaries, the attorney's fees could be awarded as additional child support. 405 S.W.3d at 714. The court of appeals relied on the absence of any prohibition in the Family Code related to the characterization of attorney's fees to reach its conclusion that a trial court has inherent authority to order attorney's fees as additional child support in a non-enforcement modification suit. *Id.* at 704. Only one other court of appeals has upheld a trial court order awarding attorney's fees as child support in a non-enforcement modification suit. *See Daniels v. Allen*, 811 S.W.2d 278, 280 (Tex. App—Tyler 1991, no writ). More recently, however, that same court held that a trial court may not

[5] Six courts of appeals now follow *In re Moers*. *See Underwood, Wilson, Berry, Stein & Johnson, P.C. v. Sperrazza*, No. 07-10-0435-CV, 2012 Tex. App. LEXIS 2923, at *6, *8–10 (Tex. App.—Amarillo Apr. 12, 2012, no pet.) (mem. op.); *In re M.A.F.*, No. 12-08-00231-CV, 2010 Tex. App. LEXIS 4097, at *22–25 (Tex. App.—Tyler May 28, 2010, no pet.) (mem. op.); *In re A.S.Z.*, No. 2-07-259-CV, 2008 Tex. App. LEXIS 6240, at *1–3 (Tex. App.—Fort Worth Aug. 14, 2008, no pet.) (per curiam) (mem. op.); *Naguib v. Naguib*, 183 S.W.3d 546, 547–48 (Tex. App.—Dallas 2006, no pet.); *Finley v. May*, 154 S.W.3d 196, 199 (Tex. App.—Austin 2004, no pet.); *In re J.C.K.*, 143 S.W.3d 131, 143 (Tex. App.—Waco 2004, no pet.).

award attorney's fees as child support in a non-enforcement modification suit. *See In re M.A.F.*, No. 12-08-00231-CV, 2010 Tex. App. LEXIS 4097, at *22–24 (Tex. App.—Tyler May 28, 2010, no pet.) (mem. op.).

B. Attorney's Fees in Suits Affecting the Parent-Child Relationship

Numerous sections in the Family Code authorize a trial court to award attorney's fees in a SAPCR. Section 106.002, applicable to all SAPCRs, invests a trial court with general discretion to render judgment for reasonable attorney's fees to be paid directly to a party's attorney. TEX. FAM. CODE § 106.002(a); *see also Lenz v. Lenz*, 79 S.W.3d 10, 21 (Tex. 2002) ("An attorney's fees award in a suit affecting the parent-child relationship is discretionary with the trial court."). In addition, the Legislature has enacted specific provisions that control awards of attorney's fees in certain types of cases under Title 5, including separate provisions for Chapter 156 modification suits and Chapter 157 enforcement suits. For example, section 156.005 requires that a trial court tax attorney's fees as costs against the offending party in modification suits if the court finds that the suit was "filed frivolously or is designed to harass a party." TEX. FAM. CODE § 156.005. In enforcement suits, section 157.167 generally requires a trial court to award reasonable attorney's fees if it finds that a respondent either failed to make child support payments or failed to comply with the terms of an order providing for possession of or access to a child. *Id.* § 157.167. Similarly, section 154.012 mandates that a trial court order a child support obligee to pay the obligor's attorney's fees if the court finds that the obligee failed to return a child support payment in excess of the support ordered, subject to the trial court's discretion to waive the requirement on a good-cause showing. *Id.* § 154.012(b). Other than the provision regarding frivolously filed modification suits in section

156.005, no provision in Chapter 156 specifically provides trial courts with authority to award attorney's fees in modification suits. Thus, trial courts must derive authority to order attorney's fees in non-enforcement modification suits from Title 5's general attorney's fees provision in section 106.002. *See id.* § 106.002.

The Legislature has provided specific enforcement mechanisms for attorney's fees awarded in a SAPCR. Section 106.002, which applies generally to all SAPCRs, provides that a judgment for attorney's fees may be enforced by any means available for the enforcement of a judgment for debt. *Id.* § 106.002(b). In contrast, attorney's fees ordered in enforcement suits under Chapter 157 "may be enforced by any means available for the enforcement of child support, including contempt." *Id.* § 157.167(a), (b). In addition, the Legislature has given trial courts discretion to characterize attorney's fees awarded to an amicus attorney or attorney ad litem under section 107.023 as "necessaries for the benefit of the child." *Id.* § 107.023(d). Chapter 156 provides only one specific method for enforcement of an award of attorney's fees in modification suits—section 156.005's provision regarding frivolously filed modification suits. *See generally id.* §§ 156.001–.409.

The distinction between a judgment for attorney's fees characterized as a debt and an award of attorney's fees characterized as additional child support is significant. *Compare id.* § 106.002(b) (judgment as debt), *with id.* § 157.167(a), (b) (award as additional child support). The Texas Constitution prohibits a trial court from confining a person under its contempt powers as a means of enforcing a judgment for debt. TEX. CONST. art. I, § 18 ("No person shall ever be imprisoned for debt."). On the other hand, a child support obligation and attorney's fees related to a child support enforcement proceeding are viewed as a legal duty and are not considered a debt. *In re Henry*, 154

S.W.3d 594, 596 (Tex. 2005) (orig. proceeding) (per curiam); *see also Ex parte Helms*, 259 S.W.2d 184, 189 (Tex. 1953) ("The attorney's fee is but a part of the procedural remedy for *enforcing* substantive rights and the fee allowed as well as other costs in the proceeding is incidental to and a part of the payments necessary for the support of the minors." (emphasis added)). Therefore, a trial court may use its contempt power as set forth in Chapter 157—including the possibilities of confinement, garnishment of wages, and suspension of the obligor's driver's license—to ensure that child support obligors pay overdue child support. *See* TEX. FAM. CODE §§ 158.0051, 232.003; *In re Henry*, 154 S.W.3d at 596. In light of these mechanisms available to a trial court to enforce child support obligations, child support collection is, without question, "serious business." *In re Office of Att'y Gen.*, ___ S.W.3d ___, ___ (Tex. 2013).

1. The Legislature's Silence Is Significant

A trial court's authority to award attorney's fees in civil cases may not be inferred; rather, the Legislature must provide authorization through the express terms of the statute in question. *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996) (orig. proceeding) (quoting *First City Bank—Farmer's Branch, Tex. v. Guex*, 677 S.W.2d 25, 30 (Tex. 1984)). Likewise, the authority to assess attorney's fees as additional child support or as necessaries in SAPCRs cannot be inferred. Instead, we must look to the specific statute providing for an award of attorney's fees for this authority—authority that is absent in the context of non-enforcement modification suits.

In 1999, the Legislature granted trial courts with discretion to enforce an award of attorney's fees in enforcement proceedings under Chapter 157 by the same means available for the enforcement

of a child support obligation. *See* Act of May 27, 1999, 76th Leg., R.S., ch. 556, § 18, 1999 Tex. Gen. Laws 3058, 3062 (amending section 157.167 by adding subsection (c), providing that attorney's fees awarded in enforcement proceedings "may be enforced by any means available for the enforcement of child support, including contempt"), *amended by* Acts of May 17, 2005, 79th Leg., R.S., ch. 253, § 1, 2005 Tex. Gen. Laws 452, 452. Today, that language is found in section 157.167(a) and reads:

> If the court finds that the respondent has failed to make child support payments, the court shall order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to the arrearages. Fees and costs ordered under this subsection may be enforced by any means available for the enforcement of child support, including contempt.

TEX. FAM. CODE § 157.167(a). However, the Legislature did not provide a similar provision applicable to modification suits under Chapter 156. Section 106.002, the general attorney's fees provision that grants the trial court authority to award attorney's fees in this modification suit, does not contain language providing for enforcement as child support, like the language in section 157.167. *Compare id.* § 106.002 (providing that a judgment for attorney's fees may be enforced by the same means available for the enforcement of a judgment for debt), *with id.* § 157.167(a) (providing that an award of attorney's fees may be enforced by the same means available for the enforcement of child support). In fact, except in the context of enforcement proceedings, no provision in Title 5 expressly provides a trial court with discretion to enforce an award of attorney's fees by the same means available for the enforcement of child support, including contempt. *But see id.* § 107.023(d) (providing that fees awarded to an amicus attorney, an attorney ad litem for the

child, or a guardian ad litem for the child under Chapter 107, Subchapter B, Part 2 are necessaries for the benefit of the child).

In light of the Family Code's detailed scheme concerning awards of attorney's fees in SAPCRs, we believe it is significant that the Family Code is silent as to whether a trial court may characterize attorney's fees as additional child support in non-enforcement modification suits. *See PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004) ("A statute's silence can be significant."). Since the Legislature expressly authorized the assessment of attorney's fees as additional child support in enforcement suits, but not in modification suits or under Title 5's general attorney's fees provision, we conclude that the Legislature did not intend to grant the trial court authority to characterize Thomas's attorney's fees as part of Tucker's child support obligation. The court of appeals erred in holding otherwise.

2. Section 151.001 Does Not Provide Trial Courts with Authority to Characterize Attorney's Fees as Necessaries in Non-Enforcement Modification Suits

The common law rule that a parent is liable for necessaries furnished to the parent's child by a third person arose in the English courts more than three centuries ago as a means to enforce a husband's duty to support his wife and children. *See* Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1767 (1984); *see also* BLACK'S LAW DICTIONARY 554 (9th ed. 2009) (providing a historical definition of the "doctrine of necessaries"). As we have noted, the doctrine of necessaries implied a contract between a parent and the provider of the necessaries at common law. *See Searcy v. Hunter*, 17 S.W. 372, 373 (Tex. 1891). In 1967, the Legislature amended former Article 4614 of our Civil Statutes to establish a statutory duty in parents for support

of the family, including liability to third parties who provide necessaries to the child upon the parent's failure to provide for the child.[6] *See* Act of May 16, 1967, 60th Leg., R.S., ch. 309, § 1, art. 4614, 1967 Tex. Gen. Laws 735, 736 ("Each spouse has the duty to support his or her children . . . . A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed."). Ultimately, the Legislature codified a parent's common law liability for necessaries provided to his or her children in section 151.001(c) of the Family Code, which provides that "[a] parent who fails to discharge the duty of support is liable to a person who provides necessaries to those to whom support is owed." TEX. FAM. CODE § 151.001(c).

As noted by the court of appeals, we recognized in two cases decided more than a century ago that attorney's fees for services rendered for the benefit of a child may, under some circumstances, be treated as necessaries under the common law. *See Searcy*, 17 S.W. at 373 (holding that attorney's fees are necessaries in a civil suit to recover money or property for the minor); *Askey v. Williams*, 11 S.W. 1101, 1101–02 (Tex. 1889) (holding that attorney's fees are necessaries for the

[6] The Legislature recodified Article 4614 as section 4.02 of the Family Code in 1969 upon adoption of Title 1 of the Family Code. *See* Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 1, 1969 Tex. Gen. Laws 2707, 2725–26. This language imposing on parents the duty to support their children and making parents liable to third parties for necessaries remained in effect in section 4.02 under Title 1, "Husband and Wife," until 1995. *See* Act of May 26, 1995, 74th Leg., R.S., ch. 751, § 4, 1995 Tex. Gen. Laws 3888, 3889. In 1995, the Legislature removed the language regarding children from section 4.02 and added language imposing a liability for necessaries on parents to section 151.003(c), "Rights and Duties of Parent," under Title 5, "The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship." *Compare* Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 151.003(c), 1995 Tex. Gen. Laws 113, 139 (adding the language regarding necessaries for children to section 151.003(c)), *with* Act of May 26, 1995, 74th Leg., R.S., ch. 751, § 4, 1995 Tex. Gen. Laws 3888, 3889 (removing the language regarding parent's duties from section 4.02). In 2001, section 151.003 became section 151.001, and the relevant language is now section 151.001(c). *See* Act of May 25, 2001, 77th Leg., R.S., ch. 821, § 2.13, sec. 151.001, 2001 Tex. Gen. Laws 1610, 1638–39.

criminal defense of a child); *see also In re H.V.*, 252 S.W.3d 319, 327 n.55 (Tex. 2008) (noting that a parent has a duty to pay attorney's fees incurred by the children for their defense of a criminal prosecution under section 151.001(c) of the Family Code). Following these decisions, courts of appeals began awarding attorney's fees as necessaries in non-enforcement custody and modification suits—sometimes as child support—under both the common law and, later, the statutory duty. *See, e.g.*, *Daniels v. Allen*, 811 S.W.2d 278, 280 (Tex. App.—Tyler 1991, no writ); *see also Schwartz v. Jacob*, 394 S.W.2d 15, 20–21 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.). However, this Court has never held that attorney's fees incurred by a parent in a non-enforcement modification suit are necessaries under the common law doctrine of necessaries or its embodiment in section 151.001(c). In light of both the plain language of section 151.001(c) and Title 5's comprehensive scheme related to attorney's fees, we decline to do so today.

The plain language of section 151.001(c) does not support the court of appeals' conclusion that section 151.001(c) may be used as a vehicle for awarding attorney's fees in non-enforcement modification suits as necessaries or as additional child support. Section 151.001(c) conditions a parent's liability for necessaries upon a parent's *failure* to discharge the duty of support. *See* TEX. FAM. CODE § 151.001(c). Failure to support the child is not the basis for a non-enforcement modification suit under Chapter 156. In contrast, the failure to support a child is often the focus of enforcement proceedings under Chapter 157, and consistent with section 151.001(c), the Legislature deliberately provided trial courts with authority to enforce an award of attorney's fees in enforcement suits by the same means available for enforcing a child support order. *See id.* § 157.167(a). Further, the Legislature has specifically provided trial courts with discretion to characterize fees awarded to

an amicus attorney, attorney ad litem, or guardian ad litem appointed under Chapter 107, Subchapter B, Part 2 as necessaries, but it has not done the same for attorney's fees awarded to a party in a Chapter 156 modification suit. *Id.* § 107.023. Because Chapter 156 is devoid of similar authorization, we conclude that the Legislature did not intend to provide trial courts with discretion to characterize attorney's fees incurred by a party in a non-enforcement modification suit as necessaries. *Cf. Quick v. City of Austin*, 7 S.W.3d 109, 122–23 (Tex. 1998) ("[W]hile the Legislature clearly was well-versed in drafting statutes that explicitly provided that a local act was not effective until approved by the Commission, the Legislature chose not to include such an express provision [here]. We presume that this omission has a purpose."); *see also In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) (holding that Chapter 153's statutory presumption that a child's best interest is served by awarding custody to the parent in original custody proceedings does not apply in Chapter 156 modification proceedings in the absence of a similar provision in Chapter 156).

III. Conclusion

The Legislature has provided trial courts with broad discretion to resolve family law matters. In enforcement proceedings, the Legislature expressly provided for mandatory awards of attorney's fees and specific means for enforcing those awards. *See* TEX. FAM. CODE § 157.167(a). Except when a trial court finds that a party filed a non-enforcement modification suit frivolously or with the purpose of harassing the opposing party, no provision in Chapter 156 authorizes an award of attorney's fees in modification suits. *See id.* § 156.005. Thus, trial courts must look to section 106.002—Title 5's general attorney's fee provision—for authority to award attorney's fees in most non-enforcement modification suits. Noticeably absent from section 106.002 is authority for a trial

court to characterize an attorney's fee award as necessaries or as additional child support. In light of this absence of express authorization, we conclude that the Legislature did not intend to provide trial courts with discretion to assess attorney's fees awarded to a party in Chapter 156 modification suits as additional child support. Moreover, neither our precedent nor the plain language of section 151.001(c) supports the court of appeals' conclusion that attorney's fees in non-enforcement modification suits may be characterized as necessaries, enforceable by contempt.

Because this case does not involve enforcement proceedings under Chapter 157, we hold that the trial court lacked discretion to characterize Thomas's attorney's fees as necessaries and as a part of Tucker's child support obligation. The court of appeals erred in holding otherwise. Accordingly, we reverse the court of appeals' judgment in part and remand the case to the trial court for proceedings consistent with this opinion.

Paul W. Green
Justice

OPINION DELIVERED: December 13, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0183

ROSSCER CRAIG TUCKER, II, PETITIONER,

v.

LIZABETH THOMAS, RESPONDENT

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

JUSTICE GUZMAN, joined by JUSTICE LEHRMANN, concurring.

Trial courts have long struggled to protect children from the threat of ill-willed child custody battles that may lead parties to financial ruin. Because of the potential harm to children that accompanies these disputes,[1] there are a number of legislatively enacted approaches to deter parties from pursuing frivolous or harassing custody modification suits.[2] Recent enactments clarify a legislative policy choice to allow trial courts the discretion to award attorney's fees as necessaries or child support in support enforcement proceedings. But the Texas Legislature has remained silent

[1] *See In re Stephanie Lee*, 411 S.W.3d 445, 449 (Tex. 2013) (discussing the emotional and psychological toll that "custody battles" have on children involved in such disputes).

[2] *See, e.g.*, TEX. FAM. CODE § 156.005 ("If the court finds that a suit for modification is filed frivolously or is designed to harass a party, the court shall tax attorney's fees as costs against the offending party.").

as to whether this discretion is also available in modification proceedings, such as the one at issue here.

Although providing trial courts with this authority would further the courts' ability to protect the financial stability of children caught in the middle of acrimonious custody battles, I agree with the Court's holding that the Texas Family Code does not afford a trial court such discretion. But the treatment of attorney's fees in modification and enforcement proceedings has been more complicated than the Court might indicate. I write separately to briefly explain this history and to illuminate why this subject has resulted in a lack of uniformity among the courts of appeals.

I. The Common-Law Doctrine of Necessaries

As the Court notes, the underpinnings of the doctrine of necessaries may be traced back over three centuries to English courts. __ S.W.3d __, __ (citing Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1767 (1984)). The doctrine implied a contract between a husband and a third party who supplied necessaries to the husband's wife and children, providing the third party with a means of holding the husband liable for the support of his family. *Id.*

As early as 1867, this Court expressly recognized a father's liability for necessaries furnished to his child. *Fowlkes v. Baker*, 29 Tex. 135, 137 (1867); *see also Cunningham v. Cunningham*, 40 S.W.2d 46, 48 (Tex. 1931) (noting that a father's liability for necessaries furnished to his minor child "is generally enforced in England, . . . the United States, and always in Texas"). Not long after, this Court recognized attorney's fees incurred as a result of services rendered for the benefit of a minor may be treated as necessaries. *See, e.g.*, *Searcy v. Hunter*, 17 S.W. 372, 373 (Tex. 1891) (holding that attorney's fees are necessaries in a civil suit to recover money or property for the minor); *Askey*

v. Williams, 11 S.W. 1101, 1101–02 (Tex. 1889) (holding that attorney's fees are necessaries for the criminal defense of a child); *see also In re H.V.*, 252 S.W.3d 319, 327 n.55 (Tex. 2008) (noting that a parent has a duty to pay attorney's fees incurred by the children for their defense of a criminal prosecution under section 151.001(c) of the Family Code); __ S.W.3d. at __.

But it was not until 1965 that a Texas court expressly applied the doctrine of necessaries to hold a father liable for attorney's fees specifically incurred in custody modification proceedings. *See Schwartz v. Jacob*, 394 S.W.2d 15, 20 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.). In *Schwartz*, the court was faced with a dispute involving both the enforcement of a child-support judgment and modification of a custody order. *Id.* at 19. The court recognized that under Texas Rule of Civil Procedure 308a it had authority to allow attorney's fees against a person in default on his child-support obligation.[3] *Id*. at 20. But because the case also involved issues of custody modification, the court turned to common law and applied the doctrine of necessaries.[4] *Id.* at 20–21. The *Schwartz* court reasoned:

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[3] Rule 308a gave a court authority to "enforce its judgment by orders as in other cases of civil contempt" against a person in default in paying child support. TEX. R. CIV. P. 308a (West 1989, amended 1990). In *Ex parte Helms*, this Court found Rule 308a provided courts with the authority to hold a parent in contempt for failing to pay attorney's fees incurred in a suit to enforce support orders. 259 S.W.2d 184, 188–89 (Tex. 1953).

[4] Beginning in 1935, the Legislature empowered courts to order either parent to make periodic support payments for the benefit of his or her child in the event of a divorce. Act of Mar. 19, 1935, 44th Leg., R.S., ch. 39, § 1, 1935 Tex. Gen. Laws 111, 112, repealed by Act of May 25, 1973, 63d Leg., R.S., ch. 543, § 3, 1973 Tex. Gen. Laws 1411, 1458. But at the time *Schwartz* was decided, the Legislature had yet to expressly codify the common-law doctrine of necessaries. The Court provides an overview of the codification of this doctrine. __S.W.3d at __. The Legislature codified the common-law doctrine of necessaries by amending former Article 4614 of our Civil Statutes in 1967, providing that each spouse had the duty to support his or her children and may be liable to third parties who provide necessaries to the child should the parent fail to do so. *See* Act of May 27, 1967, 60th Leg., R.S., ch. 309, § 1, art. 4614, 1967 Tex. Gen. Laws 735, 736. Since 1995, this statutory support duty has been part of Title 5 of the Family Code, first under section 151.003(c), and subsequently under section 151.001(c) in 2001. __S.W.3d at __ n.6.

> [T]he kind of home in which the children are reared and the persons with whom they daily associate are most important. Therefore, the matter of their custody is of utmost concern. For there to be full development of matters bearing on these issues it is necessary to employ counsel to look after the children's interest.

Id. at 21. Thus, because the "real parties . . . [are] the children . . . the furnishing of counsel was the furnishing of necessaries to the minor children." *Id.* at 20.

Following this logic, courts ordered attorney's fees, as necessaries furnished to the child, to be paid as child support. *E.g.*, *Daniels v. Allen*, 811 S.W.2d 278, 279–80 (Tex. App.—Tyler 1991, no writ.); *see also In re A.J.L.*, 108 S.W.3d 414, 422 (Tex. App.—Fort Worth 2003, pet. denied) (stating that an order to pay attorney's fees as child support has been interpreted as an order to pay the fees as necessaries for the benefit of the child); *Ex parte Kimsey*, 915 S.W.2d 523, 526 n.1 (Tex. App.—El Paso 1995, no writ) (noting "[i]f a parent has an obligation to support a child . . . , and if the court possesses statutory authority to order the payment of attorney's fees for the safety and welfare of the child, we see no rationale for the conclusion that attorney's fees may not be ordered paid as child support, particularly where the welfare of the child is in issue as it is in a suit affecting the parent-child relationship"). Thus, well before the Legislature amended the Family Code in 1999 to include the provision at issue today, courts had implied a right to recover attorney's fees as necessaries in suits affecting the parent-child relationship (SAPCRs).

II. Evolution of Attorney's Fees in the Family Code

Based upon a parent's common-law (and subsequently statutory) duty to support his or her child, trial courts concluded that attorney's fees may be allowed in custody and support proceedings. Though this Court recognized that a parent may be held in contempt for failure to pay attorney's fees

incurred in a suit for child-support enforcement based upon Rule of Civil Procedure 308a, *see Ex parte Helms*, 259 S.W.2d 184, 188–89 (Tex. 1953), the Family Code did not actually speak to the matter of attorney's fees until 1973 when the Legislature adopted Title 2 of the Family Code governing "The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship." Act of May 25, 1973, 63d Leg., R.S., ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1411. Specifically, the Legislature included section 11.18(a), indicating "[i]n any proceeding under this subtitle, the court may award costs as in other civil cases. Reasonable attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order for fees in his own name." Act of May 25, 1973, 63d Leg., R.S., ch. 543, § 1, sec. 11.18(a), 1973 Tex. Gen. Laws 1411, 1419. The Legislature amended this section in 1981 to clarify that attorney's fees could be awarded as costs in cases "including, but not limited to, habeas corpus, enforcement, and contempt proceedings." Act of May 31, 1981, 67th Leg., R.S., ch. 355, § 3, sec. 11.18(a), 1981 Tex. Gen. Laws 942, 944. Thus, after the enactment of Title 2 in 1973, courts found support in the Family Code for awarding attorney's fees in SAPCRs.

In 1995, the Legislature adopted substantial changes to the Family Code provisions governing SAPCRs. It recodified the Family Code by reenacting Title 2 as simply "Title 2. Child in Relation to the Family" and adding "Title 5. The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship." Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 122. Prior to the 1995 amendments, the provisions governing modification suits and the provisions governing suits for enforcement of support orders were both included in Chapter 14 of Title 2. Notably, the only guidance in the Family Code regarding attorney's fees in all SAPCRs

(modification and enforcement alike) until 1995 was section 11.18, providing generally that "attorney fees may be taxed as costs." Courts interpreted section 11.18 as complementary—rather than contradictory—to the practice of allowing attorney's fees as necessaries. *E.g.*, *Drexel v. McCutcheon*, 604 S.W.2d 430, 434 (Tex. Civ. App.—Waco 1980, no writ) ("[Section] 11.18(a), allowing attorney's fees in suits affecting parent-child relationships, does not purport to abolish the common law rule allowing attorney's fees as necessaries for the child. We hold it did not."). Thus, courts continued the practice of awarding attorney's fees as necessaries for the child. *See, e.g.*, *Roosth v. Roosth*, 889 S.W.2d 445, 456 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("Attorney fees rendered in a suit affecting the parent-child relationship may be awarded as necessaries to the children."); *Uhl v. Uhl*, 524 S.W.2d 534, 538 (Tex. Civ. App.—Fort Worth 1975, no writ) (noting that "attorney's fees for the plaintiff should be held to be 'necessaries' to defendant's minor child").

By enacting Title 5 of the Family Code in 1995, the Legislature decidedly separated the statutory provisions governing suits for modification and suits for enforcement of support orders into Chapters 156 and 157, respectively. Each of these chapters also included more specific guidelines for awarding attorney's fees. With respect to modification suits under Chapter 156, the Legislature specified that the court "shall tax attorney's fees as costs" in those suits frivolously filed or designed to harass a party. Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 156.005, 1995 Tex. Gen. Laws 113, 172.[5] With respect to enforcement suits under Chapter 157, the Legislature provided that

[5] Section 156.005 has not been amended since its original enactment in 1995.

the court may order a respondent to pay "reasonable attorney's fees and all court costs in addition to the arrearages." Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 157.167, 1995 Tex. Gen. Laws 113, 182. The 1995 amendments also elaborated on the statute's general attorney's fees provision, adding that a judgment for attorney's fees may be enforced "by any means available for the enforcement of a judgment for debt." Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 106.002(b), 1995 Tex. Gen. Laws 113, 133. Despite these statutory changes, courts continued the practice of applying the common-law doctrine of necessaries to award attorney's fees in SAPCRs. *See, e.g.*, *Farish v. Farish*, 982 S.W.2d 623, 628 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing section 106.002 for the proposition that "[a]ttorney's fees rendered in . . . a suit affecting the parent-child relationship may be awarded as necessaries to the child").

In 1999, the Legislature amended section 157.167, providing that "[f]ees and costs ordered under this section may be enforced by any means available for the enforcement of child support, including contempt." Act of May 27, 1999, 76th Leg., R.S., ch. 556, § 18, sec. 157.167(c), 1999 Tex. Gen. Laws 3058, 3062.[6] By allowing attorney's fees in enforcement proceedings to be "enforced by any means available . . . including contempt," the amendment expressly provided courts latitude to award attorney's fees as additional child support, not merely as a debt.[7] TEX. FAM. CODE

[6] This section has been amended several times since the addition of this key sentence—twice in 2003 and once in 2005—but each amendment kept the substance of this sentence intact while changing its location within the provision. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 477, § 1, sec. 157.167(d), 2003 Tex. Gen. Laws 1743, 1743; Act of May 31, 2003, 78th Leg., R.S., ch. 1262, § 1, sec. 157.167, 2003 Tex. Gen. Laws 3572, 3572; Act of May 17, 2005, 79th Leg., R.S., ch. 253, § 1, sec. 157.167(a), 2005 Tex. Gen. Laws 452, 452.

[7] Such authority with respect to attorney's fees had previously only been impliedly allowed under the authority conferred to courts in Rule 308a. *See Helms*, 259 S.W.2d at 188–89. As the Court states, the contempt power set forth in Chapter 157 includes the possibility of confinement, garnishment of the obligor's wages, and suspension of an obligor's license. __ S.W.3d at __. The Texas Constitution prohibits a court from using its contempt power to enforce

§ 157.167(a); *see also* TEX. FAM. CODE § 158.0051(a) ("[T]he court may render an order that income be withheld from the disposable earnings of the obligor to be applied towards the satisfaction of any ordered attorney's fees and costs resulting from an action to enforce child support under this title."). Importantly, this statutory addition, though consistent with the common-law practice of awarding attorney's fees as necessaries, appeared only in Chapter 157, which governs suits for enforcement of support orders. No similar provision was made in Chapter 156, governing non-enforcement modification suits. Thus, following the 1999 amendments, attorney's fees in non-enforcement modification proceedings were still governed by the general provision in section 106.002 allowing for fees to be enforced by "any means available for the enforcement of a judgment for debt." TEX. FAM. CODE § 106.002(b).

After the 1999 amendment to section 157.167, a split developed among the courts of appeals. On one hand, some courts had continued to cite the common-law doctrine of necessaries as the basis for awarding attorney's fees even after the Legislature amended section 106.002 in 1995 to specify that attorney's fees may be enforced "by any means available for the enforcement of a judgment for debt." *E.g.*, *Farish*, 982 S.W.2d at 628. Because the 1999 amendments did not expressly alter the relationship between Chapter 156 and Chapter 106, some courts of appeals, bound by precedent, found the doctrine of necessaries still applicable in awarding attorney's fees as child support in SAPCR proceedings. *See, e.g.*, *A.J.L.*, 108 S.W.3d at 422 ("It is settled that attorney's fees rendered in . . . a [SAPCR] may be awarded as necessaries to the child . . . ."). On the other hand, some courts

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a judgment for debt. *Id*. at __ n.4; TEX. CONST. art. I, § 18.

found that by adding section 157.167(c), the Legislature clarified that attorney's fees may only be taxed as child support when incurred during enforcement proceedings. *E.g.*, *In re Moers*, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

III. Separate Statutory Treatment of SAPCRs

By amending section 157.167 to expressly allow courts to enforce attorney's fee awards "by any means available for the enforcement of child support," the Legislature codified the past practice of awarding attorney's fees in SAPCR proceedings under the common-law doctrine of necessaries, but only with respect to enforcement proceedings. TEX. FAM. CODE § 157.167(a). The development of separate and distinct provisions for modification and enforcement suits evinces Legislative intent that such proceedings merit different treatment.

But the development of divergent statutory frameworks for different SAPCR proceedings against a common-law backdrop has understandably led to a lack of uniformity in the courts of appeals. Though the Family Code now provides wholly separate chapters for suits for modification and enforcement, trial courts are often presented with cases in which parties seek both modification and enforcement of support orders. Considering the inextricability of modification and enforcement issues in many SAPCR proceedings, it follows that trial courts placed in such circumstances would maintain similar discretion to award attorney's fees as child support. On the facts of this case the Court need not decide whether attorney's fees can be taxed as child support in these blended proceedings. But such proceedings are likely the source of conflicting case law among the courts of appeals. Now, having explained whether attorney's fees can be awarded as additional child

support in non-enforcement modification proceedings, at least a substantial amount of that confusion should be resolved.

IV. Conclusion

The lack of uniformity in the courts of appeals after the recent statutory changes is attributable to the long history in Texas courts of applying the doctrine of necessaries to award attorney's fees as child support. Permitting trial courts to award such fees as child support, and thus exposing parties to the prospect of contempt if they should fail to pay, would certainly dissuade parties from filing frivolous or harassing lawsuits that serve only to further injure the children involved. Nevertheless, given the current statutory framework, I agree with the Court's conclusion that in absence of express statutory authority, a trial court lacks the discretion to characterize the attorney's fees incurred in a suit for custody modification as necessaries or as additional child support. For these reasons, I join the Court's opinion and concur in its judgment.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: December 13, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0251

CROSSTEX ENERGY SERVICES, L.P., PETITIONER,

v.

PRO PLUS, INC., RESPONDENT

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

Argued September 10, 2013

JUSTICE GREEN delivered the opinion of the Court.

This interlocutory appeal arises out of property damage that resulted from an explosion at a natural gas compression station. The station owner, Crosstex Energy Services, L.P., sued the lead construction contractor, Pro Plus, Inc. The parties then entered a Rule 11 agreement to move expert designation dates beyond the limitations period. After limitations ran, Pro Plus moved to dismiss because Crosstex had not filed a certificate of merit with its original petition as required by section 150.002 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 150.002. In a single order, the trial court denied the motion and granted Crosstex an extension to file the certificate. The court of appeals reversed the trial court's ruling and remanded the case. We must decide: (1) whether the court of appeals had jurisdiction to hear Pro Plus's interlocutory appeal of the extension order; (2) whether section 150.002's "good cause" extension is available only when

a party filed suit within ten days of the end of the limitations period; (3) whether a defendant's conduct can waive the plaintiff's certificate of merit requirement; and (4) if waiver is possible, whether Pro Plus's conduct constituted waiver. Because we answer yes to the first three questions but hold that Pro Plus did not waive Crosstex's certificate of merit requirement, we affirm the judgment of the court of appeals.

I. Jurisdiction

This Court has limited jurisdiction over interlocutory appeals. *See* TEX. GOV'T CODE § 22.225(b)(3). We always have jurisdiction, however, to consider whether a court of appeals appropriately exercised jurisdiction. *E.g.*, *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 300 (Tex. 2011). Further, we have jurisdiction over an interlocutory appeal where, as here, justices of a court of appeals disagree on a question of law material to the decision. TEX. GOV'T CODE § 22.001(a)(1); *see Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex. 1995) (per curiam). We therefore conclude that we have jurisdiction to hear this case.

II. Facts and Procedural Background

Crosstex provides natural gas gathering and transmission services. Crosstex uses compression stations to increase the pressure of gas from the field and discharge the gas through pipelines to downstream stations. Crosstex hired Pro Plus, a registered professional engineering firm, as the principal contractor to construct the Godley Compression Station. On November 15, 2008, a control valve gasket at the station failed. The resulting gas leak, once ignited, created a massive fire causing $10 million in property damage. Crosstex filed suit on April 14, 2010, asserting causes of action for general and specific negligence, negligent misrepresentation, breach

of implied and express warranty, and breach of contract. Pro Plus's answer generally denied each allegation, raised affirmative defenses, and included requests for disclosure under Texas Rule of Civil Procedure 194.2. Notably, Pro Plus's answer did not raise the issue of a certificate of merit under Texas Civil Practice and Remedies Code section 150.002.

The trial court entered a docket control order setting the dates for the parties to designate experts pursuant to Rule 194.2. Pro Plus joined Crosstex's motion for continuance, which the court granted just before the two-year statute of limitations ran on the negligence claims. The parties signed a Rule 11 agreement extending Crosstex's expert designation deadline to April 8, 2011, beyond the limitations period. On December 2, 2010, after limitations had run, Pro Plus moved to dismiss Crosstex's claims for failure to attach a certificate of merit to its original petition as required by section 150.002. TEX. CIV. PRAC. & REM. CODE § 150.002(e). Crosstex responded by arguing that Pro Plus waived its right to dismissal through its conduct, and that this conduct was sufficient "good cause" for an extension under section 150.002(c). *Id.* § 150.002(c), (e). The trial court denied the motion to dismiss and granted an extension in the same order.

Pro Plus appealed the interlocutory order. The court of appeals held: (1) it had jurisdiction to hear the interlocutory appeal; (2) the trial court abused its discretion by granting the extension without good cause; and (3) Pro Plus did not waive its right to dismissal. 388 S.W.3d 689, 698, 702, 706 (Tex. App.—Houston [1st Dist.] 2012, pet. granted). We granted Crosstex's petition for review. 56 Tex. Sup. Ct. J. 492 (Apr. 19, 2013).

III. Court of Appeals' Interlocutory Appeal Jurisdiction

The certificate of merit statute applies to actions for damages arising out of "the provision of professional services by a licensed or registered professional," such as Pro Plus. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a). A plaintiff "shall" file an affidavit of a qualified third party in the same profession; the affidavit must substantiate the plaintiff's claim on each theory of recovery. *See id.* § 150.002(a), (b). Failure to file this affidavit (hereafter "certificate of merit") results in dismissal. *Id.* § 150.002(e). This dismissal may be with or without prejudice. *See id.*

The threshold question is the court of appeals' jurisdiction to hear this interlocutory appeal. As a general rule, appellate courts may consider appeals from interlocutory orders only when such power is conferred expressly by statute. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Here, section 150.002(f) provides: "An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order." TEX. CIV. PRAC. & REM. CODE § 150.002(f). The trial court order simultaneously granted Crosstex an extension to file a certificate of merit and denied Pro Plus's motion to dismiss.[1] Because the statute does not mention

[1] The language of the order is as follows:

> On the below entered date came on to be heard Defendant Pro Plus'[s] Motion to Dismiss and Plaintiff Crosstex Energy Services, L.P.'s Motion to Extend Time, and the Court, after reviewing the Motions, taking judicial notice of the other pleadings on file, and considering the argument of counsel, is of the opinion Defendant's Motion to Dismiss should be denied. For good cause shown, and in the interest of justice, the Court therefore:
>
> ORDERS, ADJUDGES and DECREES that Plaintiff Crosstex Energy Services, L.P. file an expert report in compliance with the Certificate of Merit requirements contained in CPRC § 15[0].002 on or before the agreed deadline between the parties for Plaintiff to designate experts, currently April 8, 2011, which agreement was signed by the parties and thereafter filed with the court on November 29, 2010 pursuant to Rule 11 of the Texas Rules of Civil Procedure.

interlocutory review of extensions—instead mentioning only motions to dismiss—Crosstex argues the court of appeals erred in exercising jurisdiction over Pro Plus's appeal of the extension for Crosstex to file a certificate of merit. Citing *Ogletree v. Matthews*, 262 S.W.3d 316 (Tex. 2007), a medical expert report case, Crosstex asserts that the motions are inextricably intertwined; thus, it argues, a court may not review the denial of a motion to dismiss without also impermissibly reviewing the granting of an extension. Pro Plus argues *Ogletree* and its progeny compel the opposite result, and that section 150.002 provides the necessary statutory authority for jurisdiction.

This is a question of first impression. As Crosstex points out, however, the expert report requirements in the Medical Liability Act, TEX. CIV. PRAC. & REM. CODE §§ 74.001–.507, provide a useful, if imperfect, analogue. The Act requires the plaintiff, within 120 days of suit, to serve expert reports identifying the basis for liability against each health care provider. *Id.* § 74.351 (a), (r)(6). Failure to serve the report mandates dismissal, *id.* § 74.351(b)(2), but if a deficient report is timely served, a trial court may grant a thirty-day extension. *Id.* § 74.351(c). Section 51.014(a)(9) of the Civil Practice and Remedies Code expressly *authorizes* interlocutory appeals from dismissals pursuant to section 74.351(b), but also expressly *bars* interlocutory appeals from a grant of extension of time under section 74.351(c). *Id.* § 51.014(a)(9).

To summarize, both the certificate of merit statute and the Medical Liability Act allow interlocutory appeals of dismissals for failure to meet a threshold filing requirement. Only under the Medical Liability Act, however, has the Legislature expressly forbidden interlocutory appeals of extensions of time to meet the filing requirement. *See id.* The certificate of merit statute does not address the appealability of extensions of time; therefore, such interlocutory appeals, presumably,

are not permissible as the statute does not expressly confer authority for the courts of appeals to consider them. *See Koseoglu*, 233 S.W.3d at 840.

In *Ogletree*, the defendant timely objected to the sufficiency of an expert report and filed a motion to dismiss. 262 S.W.3d at 318. The trial court denied the motion to dismiss and granted a section 74.351(c) extension for the plaintiff to remedy the deficiency. *Id.* We held that when the denial of a motion to dismiss and the grant of an extension are inseparable (such that review of one necessarily involves review of the other), courts of appeals have no jurisdiction to review the motion to dismiss. *Id.* at 321. If we allowed separation of the two, and a court reviewed only the denial of the motion to dismiss, it would render meaningless the Legislature's bar on interlocutory appeals of extensions. *Id.* We recognized that the Legislature intended to provide trial courts with discretion to grant extensions to remedy deficient, but curable, reports. *See id.* at 320–21.

We clarified the scope of *Ogletree* in *Badiga v. Lopez*, 274 S.W.3d 681 (Tex. 2009). In *Badiga*, where *no* report was served within 120 days of the original petition, we concluded that the Legislature's concerns for curing *deficient* reports were inapplicable. *Id.* at 684. Unlike *Ogletree*, the denial of the motion to dismiss and the grant of an extension were not inseparable; rather, the appeal of the trial court's ruling on the motion to dismiss did not have to address the ruling on extension. *Id.* at 684–85. The issue of timeliness addressed in *Badiga* differs from a report's sufficiency, addressed in *Ogletree*. *See id.* In *Badiga*, "[w]hether the trial court granted an extension or not, the issue [was] whether a case must be dismissed when no expert report [was] timely served." *Id.*

Extending that logic to the certificate of merit context, we note that Crosstex is in a position similar to the plaintiff in *Badiga*. In each, failure to provide timely, mandatory documentation yields dismissal. *Compare* TEX. CIV. PRAC. & REM. CODE § 74.351(b)(2), *with id.* § 150.002(e). While both statutes contain a mechanism for extension, *compare id.* § 74.351(c), *with id.* § 150.002(c), the grant of an extension is immaterial in both cases where it cannot bear upon the correctness of the dismissal ruling. *See Badiga*, 274 S.W.3d at 684–85. *Badiga* allowed the court of appeals to review the trial court's denial of a motion to dismiss despite an explicit statutory ban on reviews of extensions. Surely the principle applies with equal force to certificates of merit, where no explicit statutory ban exists.

The court of appeals in this case reviewed whether the trial court erred in denying Pro Plus's motion to dismiss for lack of a certificate of merit. Crosstex's failure to file a certificate left it without a statutory basis for extension.[2] Thus, the court of appeals could evaluate the propriety of the trial court's ruling on the motion to dismiss without entanglement in the appeal of the granted extension. *Cf. Badiga*, 274 S.W.3d at 685. We hold that the court of appeals did not err in asserting jurisdiction over Pro Plus's motion to dismiss.

IV. "Good Cause" Extension for Filing a Certificate of Merit

We must now determine the contours of section 150.002(c)'s "good cause" extension to the certificate of merit filing deadline and whether it applies to Crosstex's failure to file. We review statutory construction de novo. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). If

[2] As discussed in part IV of this opinion, the good cause extension is not available to a plaintiff who does not file a certificate of merit. *Infra* at ____.

the statute is clear and unambiguous, we must read the language according to its common meaning "without resort to rules of construction or extrinsic aids." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). We rely on this plain meaning as an expression of legislative intent unless a different meaning is supplied or is apparent from the context, or the plain meaning leads to absurd results. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). Words and phrases "shall be read in context and construed according to the rules of grammar and common usage." TEX. GOV'T CODE § 311.011. We presume the Legislature chose statutory language deliberately and purposefully. *See Tex. Lottery Comm'n*, 325 S.W.3d at 635. We must not interpret the statute "in a manner that renders any part of the statute meaningless or superfluous." *Columbia Med. Ctr. of Los Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) (citing *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006)).

Subsection (c) states:

> The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed . . . professional engineer . . . could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

TEX. CIV. PRAC. & REM. CODE 150.002(c). The parties dispute the meaning of the final sentence. Crosstex contends that the trial court may extend the time regardless of when the plaintiff files the lawsuit. Pro Plus argues that the good cause extension is constrained by the full language of subsection (c) and, thus, may apply *only* if the plaintiff files the lawsuit during the final ten days of the limitations period. Indeed, the courts of appeals have reached contradictory results. *Compare*

Apex Geoscience, Inc. v. Arden Texarkana, LLC, 370 S.W.3d 14, 19–21 & n.5 (Tex. App.—Texarkana 2012, pet. granted, judgm't vacated w.r.m.) (constraining the good cause extension to filings within ten days of the end of limitations), *with WCM Grp., Inc. v. Brown*, 305 S.W.3d 222, 230–31 (Tex. App.—Corpus Christi 2009, pet. dism'd) (holding that the good cause exception may operate for suits filed outside the ten-day window). We recognize that the lack of unequivocal language renders the statute capable of multiple interpretations. Thus, we apply our rules of construction to discern legislative intent. *See R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011).

Read in isolation, the final sentence of subsection (c) suggests the availability of a good cause extension untethered from the remainder of the text. But that is not the way statutes are written or read. *See TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011) ("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."). The first sentence of subsection (c) provides an exception to the contemporaneous filing requirement, made available when a plaintiff both files within ten days of the end of the limitations period *and* alleges that the late filing prevented the preparation of a certificate of merit. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(c). The second sentence provides that in "such cases," the plaintiff "shall" have thirty days after filing to supplement with a certificate. *Id.* The final, disputed sentence allows the trial court, for good cause, to "extend such time as it shall determine justice requires." *Id.* We believe the sentence must be read in the context of the entire subsection. If the Legislature intended a good cause extension independent from the preceding sentences, it could have

created such an exception. *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."). Thus, we read the good cause exception of section 150.002(c) as flowing from compliance with the remainder of the subsection; it does not stand alone.

The untenable result of Crosstex's interpretation further solidifies this conclusion. Crosstex urges a broad exception, yet a narrow exception to the filing requirement aligns more closely with the scheme created by subsection (c). A plaintiff must allege that its near-limitations filing prevented the preparation of a certificate of merit. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(c). If Crosstex's broad good cause interpretation prevailed, a plaintiff could bring forth good cause claims independently of when it filed the suit and without the necessity of alleging the basis for delay. Crosstex's approach would thus produce two exceptions: (1) a narrow exception limited to a tight ten-day window and requiring specific allegations, yielding a thirty-day extension; and (2) a broad exception with no limitations other than a court's determination of good cause, allowing extensions "as justice requires." In practical application, a near-limitations filing would always meet the good cause standard. Therefore, the good cause exception would swallow the narrow near-limitations exception and, quite likely, the contemporaneous filing rule. We cannot adopt an interpretation that would render a statutory provision meaningless. *See Columbia Med. Ctr.*, 271 S.W.3d at 256.

We hold that the "good cause" exception in subsection (c) does not stand alone, but rather is contingent upon a plaintiff: (1) filing within ten days of the expiration of the limitations period; and (2) alleging that such time constraints prevented the preparation of an affidavit. A plaintiff

satisfying these requirements "shall" receive an extension of thirty days; upon motion, a trial court may, for good cause, extend this thirty-day period as justice requires. A plaintiff who files suit outside the ten-day window, as Crosstex did, cannot claim protection of the good cause exception.

V. Waiver

Crosstex next argues that Pro Plus waived its right to move for dismissal. This presents two questions: (1) can a defendant waive the right to obtain dismissal under section 150.002(e); and (2) if so, did Pro Plus waive this right? We address each question in turn.

A. Waiver of Right to Obtain Dismissal

We have defined waiver as "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). Parties may not waive jurisdictional statutory duties. *See Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76–77 (Tex. 2000). But mandatory statutory duties are not necessarily jurisdictional. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001). A party may waive a mandatory, non-jurisdictional requirement by failing to object timely. *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004), *superseded by statute*, TEX. GOV'T CODE § 311.034, *as recognized in Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500 (Tex. 2012). We resist classifying a provision as jurisdictional absent clear legislative intent to that effect. *See City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009); *Kazi*, 12 S.W.3d at 76 (noting the modern trend against exposing final judgments to attack on subject matter jurisdiction by treating statutory prerequisites as jurisdictional (citing RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e, at 113

(1982))). Thus, to determine whether waiver of dismissal under section 150.002(e) can occur, we must decide whether the filing requirement is mandatory and, if so, jurisdictional.

Section 150.002(a) states that a plaintiff "shall" file the certificate of merit with its complaint. TEX. CIV. PRAC. & REM. CODE § 150.002(a). In determining whether the Legislature intended the certificate of merit 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.*, 47 S.W.3d at 494. The Code Construction Act makes clear that the use of "shall" normally imposes a mandatory requirement. TEX. GOV'T CODE § 311.016(2). Nothing in the statute suggests otherwise. Thus, section 150.002(a) imposes a mandatory duty.

Statutory interpretation principles guide our evaluation of whether section 150.002's certificate of merit requirement is jurisdictional. *See White*, 288 S.W.3d at 394. We must determine whether the Legislature intended a jurisdictional bar. *See Loutzenhiser*, 140 S.W.3d at 359 ("Since the Legislature is bound to know the consequences of making a requirement jurisdictional, one must ask, in trying to determine legislative intent, whether the Legislature intended those consequences."). We may consider: (1) the plain meaning of the statute; (2) "the presence or absence of specific consequences for noncompliance"; (3) the purpose of the statute; and (4) "the consequences that result from each possible interpretation." *White*, 288 S.W.3d at 395; *Helena Chem.*, 47 S.W.3d at 495.

We address the first two factors together. The text of the statute itself does not indicate that failure to file a certificate of merit is jurisdictional. Granted, subsection (e) mandates dismissal as a remedy for non-compliance. TEX. CIV. PRAC. & REM. CODE § 150.002(e). But our aversion to

classifying statutory requirements as jurisdictional prevents such classification absent a clear indication from the Legislature of jurisdictional intent. *See White*, 288 S.W.3d at 393. For instance, the Legislature chose to make certain filing deadlines in the Labor Code jurisdictional with unequivocal language. *See* TEX. GOV'T CODE § 311.034 (providing that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity"). Mandatory dismissal language does not, in and of itself, compel the conclusion that a statute is jurisdictional. *See In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 642 (Tex. 2009) (holding that language such as "shall dismiss the suit" and "may not retain the suit on the court's docket" after deadline expiration did not automatically make the dismissal date jurisdictional). Although the plain meaning might suggest a jurisdictional bar, it does not meet the requisite level of clarity to establish the statute as jurisdictional.

Because the Legislature did not declare the statute's purpose, the third factor provides little assistance. Yet the fourth factor—consideration of the implications of alternative interpretations—strongly suggests the requirement is non-jurisdictional. If we held the certificate of merit requirement jurisdictional, a plaintiff successfully pursuing a claim to final judgment, yet omitting a certificate of merit, would find the judgment always vulnerable to collateral attack. The defendant could have the judgment set aside at any time, either returning the parties to square one or completely barring the plaintiff's claim if limitations had run. The statute acts as a procedural bar for claims without a certificate of merit. It does not follow that because the Legislature created this procedural bar, it also wanted to create a basis for attacking the judgment in perpetuity. We must conclude that the Legislature did not intend section 150.002(e) as a jurisdictional requirement.

Returning to the medical liability arena, we find further support for this conclusion. In *Jernigan v. Langley*, 111 S.W.3d 153 (Tex. 2003) (per curiam), this Court addressed whether a defendant waived the right to seek dismissal based on failure to file expert reports under the predecessor to section 74.351. *Id.* at 155. The statute effective at the time required a plaintiff to file an expert report within 180 days of filing a health care liability claim and permitted the defendant to move the court to dismiss with prejudice for failure to file an expert report. Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01(d), (e), 1995 Tex. Gen. Laws 985, 986, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. While we did not engage in the jurisdictional analysis employed in this opinion, we did evaluate whether the defendant's conduct amounted to waiver. *Jernigan*, 111 S.W.3d at 156–58. As parties cannot waive jurisdictional requirements, *Jernigan* clearly implies that the expert report requirement is not jurisdictional. *See id.*[3]

Furthermore, every court of appeals that has squarely addressed an argument for waiver of section 150.002(e) dismissal has reached a result consistent with classifying the requirement as non-jurisdictional.[4] One court of appeals explicitly recognized waiver, *see Murphy*, 374 S.W.3d at

[3] We contrast our non-jurisdictional finding here with actions under the Whistleblower Act. Under the Act, section 554.0035 of the Texas Government Code waives sovereign immunity for violations of that chapter. TEX. GOV'T CODE § 554.0035. Section 554.002 provides the standard for a violation. *Id.* § 554.002. In *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009), we held that the facts necessary to allege a violation under section 554.002 were *jurisdictional* because they were indispensable to the jurisdictional question of the waiver of sovereign immunity in section 554.0035. *Id.* at 881–82. No parallel concern exists here.

[4] *Murphy v. Gutierrez*, 374 S.W.3d 627, 632–33 (Tex. App.—Fort Worth 2012, pet. filed); *Ustanik v. Nortex Found. Designs, Inc.*, 320 S.W.3d 409, 412–14 (Tex. App.—Waco 2010, pet. denied); *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 411 (Tex. App.—Dallas 2010, pet. denied); *Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W.3d 492, 500–01 (Tex. App.—Corpus Christi 2009, no pet.), *superseded by statute on other grounds*, TEX. CIV. PRAC. & REM. CODE § 150.002, *as recognized in Morrison Seifert Murphy, Inc. v. Zion*, 384 S.W.3d 421 (Tex. App.—Dallas 2012, no pet.).

635–36, and three other courts of appeals have addressed the waiver argument without the jurisdictional analysis, as we did in *Jernigan*. *See Ustanik*, 320 S.W.3d at 412–14 (reviewing claim of waiver under section 150.002 but determining the evidence was insufficient to support a waiver finding); *Weaver*, 305 S.W.3d at 411 (same); *Landreth*, 285 S.W.3d at 500–01 (same).

For the reasons stated, we hold that section 150.002 imposes a mandatory, but non-jurisdictional, filing requirement. Thus, we hold that a defendant may waive its right to seek dismissal under the statute.

B. Pro Plus's Conduct

Waiver is primarily a function of intent. *Jernigan*, 111 S.W.3d at 156. To find waiver through conduct, such intent "must be clearly demonstrated by the surrounding facts and circumstances." *Id.* We will not find waiver where a person "says or does nothing inconsistent with an intent to rely upon such right." *Id.* Generally, waiver presents a question of fact, but "when the facts and circumstances are admitted or clearly established, the question becomes one of law." *Motor Vehicle Bd. of Tex. Dep't of Transp. v. El Paso Indep. Auto. Dealers Ass'n, Inc.*, 1 S.W.3d 108, 111 (Tex. 1999) (per curiam). The actions giving rise to Pro Plus's purported waiver are not disputed, although the parties disagree on the underlying motivations. Crosstex claims that Pro Plus waived its right to pursue dismissal by: (1) substantially invoking the judicial process through participating in discovery, filing an answer, joining continuance and docket control orders, and entering a Rule 11 agreement three days before filing a motion to dismiss; and (2) failing to file a special exception, under Texas Rule of Civil Procedure 90, to the absence of a certificate of merit. We hold that Pro Plus's conduct does not demonstrate intent to waive its right to seek dismissal.

1. Invocation of the Judicial Process

We have held that, in some circumstances, substantial invocation of the litigation process may amount to waiver. *See Perry Homes v. Cull*, 258 S.W.3d 580, 589–93 (Tex. 2008) (applying a totality-of-the-circumstances test to conclude that homeowners substantially invoked the litigation process to the prejudice of the defendants and consequently waived arbitration). We must now determine whether Pro Plus's engagement in the judicial process amounts to implied waiver by "clearly demonstrat[ing]" its intent to waive the certificate of merit requirement. *See Jernigan*, 111 S.W.3d at 156.

The Texas Rules of Civil Procedure encourage liberal discovery practices. *See Jorndan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 647 (Tex. 1985). The discovery process streamlines the insatiable quest for information as the parties try to wrap their minds around the case. *See State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) (stating that full discovery promotes fair resolution of disputes and noting that this Court "has vigorously sought to ensure that lawsuits are 'decided by what the facts reveal, not by what facts are concealed'" (quoting *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984, orig. proceeding))). Information may sustain a case, or it may lead to the end of litigation, but in either case it is the lifeblood of the process. *See id.* ("Discovery is thus the linchpin of the search for truth . . . ."). Here, Crosstex claims it exchanged 11,000 pages of written discovery with Pro Plus pursuant to the docket control order, and that this evidences waiver. Quite simply, "[a]ttempting to learn more about the case in which one is a party does not demonstrate an intent to waive the right to move for dismissal." *Jernigan*, 111

S.W.3d at 157. On these facts, Pro Plus's participation in discovery provides negligible support to the waiver argument.

Filing an answer is similarly inconsequential in the analysis. *See, e.g.*, *Palladian Bldg. Co. v. Nortex Found. Designs, Inc.*, 165 S.W.3d 430, 434–35 (Tex. App.—Fort Worth 2005, no pet.) (holding that it was not inconsistent or unreasonable for the defendant to answer before moving to dismiss). We should not penalize parties or their attorneys for acting out of an abundance of caution and protecting their interests by filing an answer.

Pro Plus joined a motion for continuance, engaged in discovery under a docket control order, and entered into a Rule 11 agreement. Crosstex construes this flurry of activity near the end of the limitations period as deliberate misrepresentation. Yet no direct evidence of such manipulation exists. As Pro Plus noted at oral argument, the Rule 11 agreement allowed Pro Plus ample time to prepare its expert reports in the event its motion to dismiss was denied (which is precisely what happened). Though Crosstex has offered some support for its waiver claim, Pro Plus's conduct falls far short of "clearly demonstrat[ing]" an intent to waive the right to dismiss under subsection 150.002(e). *See Jernigan*, 111 S.W.3d at 156.

2. Failure to Object

Crosstex next argues that Texas Rule of Civil Procedure 90 required Pro Plus to file a special exception to the absence of a certificate of merit. Rule 90 deems any defect, omission, or fault in a pleading waived unless specifically pointed out by exception. TEX. R. CIV. P. 90. However, failure to file a certificate of merit with the original petition cannot be cured by amendment. *Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W.3d 492, 499 (Tex. App.—Corpus

Christi 2009, no pet.). If a defect in the pleadings is incurable by amendment, a special exception is unnecessary. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998). We agree with the court of appeals that Pro Plus was not required to file a special exception to the lack of a certificate of merit.

VI. Extension by Agreement

Finally, we address Crosstex's argument that the Rule 11 agreement and the docket control order operated to extend the deadline for filing a certificate of merit. Pro Plus's answer included requests for disclosure under Rule 194.2, which includes expert information. The docket control order specified certain dates for designating those experts. Crosstex contends that the docket control order on Rule 194.2 experts was broad enough to encompass the section 150.002 certificate of merit. Thus, the argument goes, when the parties' Rule 11 agreement moved the date for Rule 194.2 disclosures to April 2011, this delayed the section 150.002 certificate of merit requirement.

In *Spectrum Healthcare Resources, Inc. v. McDaniel*, 306 S.W.3d 249 (Tex. 2010), this Court narrowly read the scope of a docket control order on the designation of experts. *See id.* at 250. *McDaniel* involved the interplay of an agreed order on deadlines for expert reports and the separate requirement in Civil Practice and Remedies Code section 74.351 that a plaintiff file a threshold expert medical report within 120 days or face dismissal. *See id.* We held that an agreed order dealing with expert report deadlines does not impact the separate section 74.351 requirement *unless* it is specifically mentioned in the agreed order. *Id.* Likewise, the docket control order in this case made no mention of the separate certificate of merit requirements under section 150.002. Because *McDaniel* limits the purview of the docket control order, *see id.* at 250, and the Rule 11 agreement

merely provided dates for the order, the Rule 11 agreement did not operate to postpone the filing requirement.

VII. Conclusion

We hold that the court of appeals did not err in asserting jurisdiction over this interlocutory appeal. As to the merits of the appeal, we hold that: (1) Crosstex did not file suit within ten days of the running of limitations and thus cannot claim protection from the good cause extension in section 150.002(c); (2) a defendant may, through its conduct, waive the right to seek dismissal under section 150.002(e); and (3) Pro Plus's conduct did not constitute waiver. We affirm the judgment of the court of appeals.

_____

Paul W. Green
Justice

OPINION DELIVERED: March 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0274

CITY OF LAREDO, TEXAS, PETITIONER,

v.

LUIS MONTANO, CECILIA MONTANO MOTA, CRUZ JORGE MONTANO, CLARENCE HILLBURN AND CLARENCE HILLBURN AS EXECUTOR OF THE ESTATE OF GLORIA MONTANO HILLBURN, DECEASED, RESPONDENTS

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

PER CURIAM

In this eminent-domain case, a jury determined that the City of Laredo's condemnation was not for an authorized public use and awarded attorney's fees and expenses to the property owner under Texas Property Code § 21.019(c). This fee-shifting statute authorizes the trial court to "make an allowance to the property owner for reasonable and necessary fees" and expenses to the judgment date, when condemnation is denied. The City appealed the award, complaining about deficiencies in the property owner's attorney's fees proof under the fee-shifting statute. The court of appeals reformed the award in part and, as reformed, affirmed. ___ S.W.3d ___, ___ (Tex. App.—San Antonio 2012). Because we conclude that deficiencies remain in the property owner's proof of

attorney's fees, we reverse the court of appeals' judgment, in part, and remand to the trial court for further proceedings.

The Montano family owns property in the central business district of Laredo near the International Bridge No. 1 to Mexico. In December 2004, the City decided it needed the Montanos' property to widen a street and build a pedestrian plaza near the bridge. The Montanos refused to sell. The family claimed that the City had no public purpose for their land but rather merely intended to benefit El Portal Center, a private entity operating a nearby shopping center.

The City filed suit to condemn the property in March 2006. The case was tried to a jury about four years later. The jury agreed with the Montanos that the City had no authorized public use for the property and awarded attorney's fees and expenses. The trial court rendered judgment on the jury verdict, awarding the Montanos $446,000 in attorney's fees through trial, additional attorney's fees on appeal, and additional sums for appraisals and other expenses the property owner incurred. The City appealed the attorney's fees award.

The court of appeals reversed the award of appellate attorney's fees, holding that the statute did not authorize their recovery. ___ S.W.3d at ___ (citing *FKM P'ship Ltd. v. Board of Regents of the Univ. of Houston Sys.*, 255 S.W.3d 619, 637 (Tex. 2008)). And, after the Montanos agreed to reduce their attorney's fees recovery to $422,302.91 through remittur, the court of appeals affirmed the remainder of the judgment. *Id.* at ___. The City appeals, asking this Court to remand the attorney's fees award to the trial court for reconsideration because of inadequacies in the Montanos' proof.

During this litigation, the Montanos were represented by three attorneys, Lopez Peterson, L.L.C., Richard J. Gonzalez, and Adriana Benavides-Maddox. The trial court awarded the Montanos their attorney's fees as a lump sum, but the court of appeals broke the award down by representation, concluding the evidence to be legally and factually sufficient to support an award of "$46,302.91 for Lopez Peterson's hours, $339,000 for Gonzalez's hours, and $37,000 for Benavides-Maddox's hours," yielding a reasonable and necessary fee of $422,302.91 through the trial of the case. *Id*. at ___. Lopez Peterson represented the Montanos only through the Special Commissioner's award, and the City does not question its fees in this Court. The City, however, does question the fees attributed to the other two attorneys, Gonzalez and Benavides-Maddox, and their testimony in support of the award.

Gonzalez testified that Luis Montano hired him as the lead attorney in the case in December 2004 or January 2005. Gonzalez did not testify as to the details of his fee agreement, but his testimony about the hours devoted to the case suggests the agreement was for Gonzalez to be paid an hourly rate, rather than a negotiated or contingent fee. The attorney testified to performing the following tasks in the Montanos' defense: (1) made an open records request; (2) searched through city council meeting minutes regarding the Montano family's property; (3) watched thirty-eight DVDs of the city council meetings (some more than once); (4) visited the premises many times; (5) conducted "a lot" of legal research; (6) prepared the pleadings and motions; (7) spent time in court for appearances; (8) spent "countless hours" preparing for and taking depositions; (9) reviewed the transcripts and DVDs of the depositions; and (10) prepared for trial and tried the case. Gonzalez

further testified to working on the case for 226 weeks,[1] estimating that he devoted on average "a barebones minimum" of six hours a week to the case.

Gonzalez, however, admitted that he did not keep time records in the case. Moreover, he apparently did not have a firm idea about what the Montanos owed him for his work before his testimony at trial. While on the witness stand, Gonzalez was given a calculator with which he eventually estimated that he had 1,356 hours in the case (226 weeks x 6 hours/week). He then multiplied those hours by his hourly rate of $250 to conclude that the Montanos owed him a fee of $339,000 through trial. He noted that the family had previously paid him $35,000, leaving a balance of $304,000.

In addition to the time and labor involved in representing the Montanos, Gonzalez touched upon some other factors that we have acknowledged as relevant to the determination of a reasonable attorney's fee. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (quoting Texas Disciplinary Rule of Professional Conduct 1.04, State Bar Rules, Art. 10 § 9, Rule 1.04).[2] Gonzalez testified that recent changes in the law made the case novel and complicated. He

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[1] Gonzalez did not represent the Montanos before the Special Commissioners but returned to the case after the Special Commissioners awarded the property to the City.

[2] The decision and rule list the following eight factors as relevant when determining the reasonableness of a fee:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
(2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

also claimed to have turned away other business because of the time demands of the case, although he could not remember any specific examples. Finally, he noted his success in defeating the City's attempt to condemn the Montanos' property for far less than its appraised $4,000,000 value, and the defense's modest cost, which was only about ten percent of the property's value. There was also testimony that Gonzalez was one of only a few local attorneys who would take this type of case and that his hourly rate of $250 an hour was reasonable and customary for a lawyer of his experience, reputation, and ability.

On cross-examination, Gonzalez conceded that this was his first condemnation case, although he claimed extensive experience in other types of litigation against the government. When asked about any bills, invoices or other documentary evidence of his time in the case, Gonzalez admitted he had none but pointed to the "thousands and thousands and thousands of pages that were accumulated in this case" as evidence of his time investment. Gonzalez further conceded that he would have put more effort into documenting his hours in the case were he preparing a bill for his client.

When asked about tracking his time for billing purposes, Gonzalez began to explain his process before a sustained objection cut him off in mid-sentence:

> Normally the way that I would do this is that I would go back in time and look at the documents in the case and then that would help me to make a list of how much time I spent; for example, preparing the list of witnesses that was requested by your office. I remember that list of witnesses and the list of —

Later, Gonzalez explained that his estimate of six hours a week on average during the course of the litigation was conservative, suggesting that he was giving the City a discount for his billable time in the case:

> I know that if I had had the time to put together the list of the work that I performed, that it would be well over the amount that I'm requesting. I know that it would be more than that number of hours and I would be able to tell you for each and every thing that I did in this case.

Luis Montano also hired Benavides-Maddox to assist Gonzalez in the case and agreed to pay $200 an hour for her work. Benavides-Maddox testified that her hourly rate was reasonable and customary for a lawyer of her competence and experience. She did not list all her tasks, but she testified about her areas of responsibility. Among other things, she was responsible for creating the jury charge, managing the experts, and understanding their appraisal and evaluation methods for her direct examination during the trial. Benavides-Maddox testified that she kept detailed billing records of her tasks and the time spent, and had billed and been paid $25,000 for her work before the trial began. Luis Montano confirmed that Benavides-Maddox had been paid $25,000 for her work. Benavides-Maddox also testified that she put in twelve hour days during the five-day trial and was therefore owed an additional $12,000 for her trial work. On cross-examination, she was asked whether she had brought any records to document her time in the case. Benavides-Maddox replied that she had not, explaining that the City had not asked her to produce these records.

Using the *Andersen* factors, the court of appeals found the evidence legally and factually sufficient to support an attorney's fee award to the Montanos in the amount of $422,302.91, which included "$339,000 for Gonzalez's hours and $37,000 for Benavides-Maddox's hours." ___ S.W.3d

at ___. The City complains that the evidence of attorney's fees is insufficient because Gonzalez and Benavides-Maddox failed to produce time records, billing statements, or even a client agreement to substantiate their fee requests. The City argues that such documentation is necessary in light of our recent decision in *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012).

In *El Apple*, the claimant sought recovery of attorney's fees in connection with a claim under the Texas Human Rights Commission Act. We held that an award under that statute had to be based on the "lodestar" method, which required consideration of the time spent, the reasonable value of that time, and whether the time was reasonable and necessary. *Id*. at 760. We further observed that testimony in generalities about tasks performed in a case that did not provide enough information for a meaningful review of whether the tasks and hours were reasonable and necessary was an insufficient basis for a lodestar calculation. *Id*. at 763. Finally, we observed that hours not properly billed to one's client are also not properly billed to one's adversary under a fee-shifting statute. *Id.* at 762 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

Contrary to the City's argument, *El Apple* does not hold that a lodestar fee can only be established through time records or billing statements. We said instead that an attorney could testify to the details of his work, but that "in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information." *Id.* at 763. For this reason, we encouraged attorneys using the lodestar method to shift their fee to their opponent to keep contemporaneous records of their time as they would for their own client. *Id.* The fee-shifting statute in this case, however, does not require that attorney's fees be determined under a lodestar method, as in *El Apple*. The property owner nevertheless chose to prove up attorney's fees using this

method and so our observations in *El Apple* have similar application here. And, as was the "proof" in *El Apple*, Gonzalez's testimony here is simply devoid of substance.

Gonzalez testified that he had reasonably accumulated about 1,356 hours in the case. He came to this number by multiplying his 226 weeks of active employment by a factor of six, representing his estimate of the average number of hours per week he worked the case. But some weeks, like the week of trial or the weeks he prepared for depositions, he obviously spent far more than this average weekly estimate. Other weeks, he must have devoted little or no time to the case to balance out these busier weeks and net his estimate of six hours. The record, however, provides no clue as to how Gonzalez came to conclude that six hours a week was a "conservative" estimate of his time in the case. Our puzzlement deepens when we consider Gonzalez's testimony that he did not make any record of his time in the case or prepare any bills or invoices for the Montanos. In fact, Gonzalez does not appear to have known how much he was owed for his services until the calculations at trial. In short, Gonzalez offered nothing to document his time in the case other than the "thousands and thousands and thousands of pages" generated during his representation of the Montanos and his belief that he had reasonably spent 1,356 hours preparing and trying the case. We rejected similar proof in *El Apple*. *Id*. at 763.

Gonzalez's testimony that he spent "a lot of time getting ready for the lawsuit," conducted "a lot of legal research," visited the premises "many, many, many, many times," and spent "countless" hours on motions and depositions is not evidence of a reasonable attorney's fee under lodestar. *See id.* (noting that time estimates based on generalities provide none of the specificity needed for a court to make a meaningful lodestar determination). In *El Apple*, we said that a lodestar

calculation requires certain basic proof, including itemizing specific tasks, the time required for those tasks, and the rate charged by the person performing the work. *Id.* at 765. Here, Gonzalez conceded that had he been billing his client he would have itemized his work and provided this information. A similar effort should be made when an adversary is asked to pay instead of the client. *See id.* at 762 ("A meaningful review of the hours claimed is particularly important because the usual incentive to charge only reasonable attorney's fees is absent when fees are paid by the opposing party.").

Benavides-Maddox's testimony, on the other hand, is not similarly deficient. She testified that she used a billing system to keep track of her time in the case and that she had billed, and been paid, $25,000 for her work up to trial. She further testified that her contract with the Montanos provided for payment at her $200 hourly rate. Finally, she testified that she arrived early each day of trial and continued to work after the jury was dismissed preparing for the next day. She estimated that she worked about twelve hours per day during the course of the five-day trial. While similar to Gonzalez's estimation that he worked the case an average of six hours a week during his four-year involvement, it is also different in significant respects.

The billing inquiry here involves contemporaneous events and discrete tasks—the trial and associated preparation for each succeeding day. Moreover, it is a task the opponent witnessed at least in part, having also participated in the trial. Despite this knowledge, Benavides-Maddox's charges relating to the trial were not questioned on cross-examination. Unlike Gonzalez's testimony, Benavides-Maddox's testimony about her unbilled trial work is some evidence on which to base an award of attorney's fees because it concerns contemporaneous or immediately completed work for

which she had not had time to bill, or presumably even record, in her billing system. The court of appeals accordingly did not err in affirming the award attributable to her fees.

The court of appeals, however, did err in affirming the part of the award attributable to Gonzalez's claimed fee of $339,000. Accordingly, pursuant to Texas Rule of Appellate Procedure 59.1, the Court grants the petition for review and, without hearing oral argument, reverses the court of appeals' judgment as to the amount of the award due to Gonzalez's services and remands to the trial court for further proceedings.

Opinion Delivered: October 25, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0289

HMC HOTEL PROPERTIES II LIMITED PARTNERSHIP AND HOST HOTELS & RESORTS, L.P., F/K/A/ HOST MARRIOTT, L.P., PETITIONERS,

v.

KEYSTONE-TEXAS PROPERTY HOLDING CORPORATION, RESPONDENT

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

Argued February 4, 2014

JUSTICE BROWN delivered the opinion of the Court.

This case involves the attempted sale of two pieces of real estate in downtown San Antonio—the Rivercenter Mall and the ground beneath the San Antonio Marriott Riverwalk hotel. After a deal to sell the properties fell through, the seller sued its tenant—the hotel owners—over actions the seller believed killed the deal. The jury found liability, and awarded damages for slander of title and tortious interference with a contract. Among other issues, the hotel owners argue there is no evidence their actions caused the sale's demise. We agree and, for the reasons below, reverse the court of appeals' judgment.

The Rivercenter Mall and the ground underneath the Marriott Riverwalk hotel were both owned by Keystone–Texas Property Holding Corporation, an investment arm of the Pennsylvania Public School Employees Retirement System. Keystone leased the hotel land to the petitioners (collectively, "Host"), who own and operate the Marriott Riverwalk.

In 2004, Keystone put the two properties up for sale. New York investor Ben Ashkenazy soon emerged as a potential buyer at a price of $166 million for the two properties. Host was not aware the hotel land was for sale until January 7, 2005, when Keystone sent Host notice of the pending sale in an effort to comply with section 14.02 of Host's lease. Section 14.02 provides:

> If Landlord decides to sell the Leased Premises to a third party, Landlord will give Tenant notice of such decision and afford Tenant a reasonable period of time as specified in such notice, but in no event more than ninety (90) days, in which to attempt to negotiate a mutually satisfactory agreement for purchase of the Leased Premises.

Keystone stated it was selling the hotel land to Ashkenazy Acquisition Corporation for $65 million and that the deal would close within 75 days. Keystone invited Host to make an offer for the property, but also requested that Host waive its rights under section 14.02 so the sale to Ashkenazy could go forward.

In a letter dated February 11, Host informed Keystone it may be interested in buying the land and was not ready to waive its rights under the lease. But Host never made an offer. Moreover, on March 17, a Host representative emailed Keystone to say the requested waiver was "close to being signed and sent back." Host further requested that Keystone set up a meeting between Host and Ashkenazy to discuss the potential buyer's plans for the property.

At least two such meetings took place, after which Host claims it became suspicious of the $65 million offer for the hotel land, which Host valued at no more than $35 million. Host suspected—and argued extensively at trial—that in allocating the $166 million purchase price between the two properties, the price of the hotel land was inflated to discourage Host from making an offer on the property. Host then changed course, and on April 18 sent Keystone a letter that made clear a waiver would not be coming. In the letter, Host accused Keystone of failing to comply with its obligation under the lease to extend Host a "first right of negotiation" because Keystone "apparently [had] already negotiated a deal with a third party." Host demanded Keystone extend a new 90-day negotiation period that would "focus on establishing a fair market price for the Leased Premises and not on the terms of any deal or proposed transaction that Keystone prematurely negotiated with any third party."

By the time Host sent its letter, the deal for the sale of the two properties had been split into two pieces and the mall deal had closed. But the hotel deal never did. Host sued Keystone for breach of the lease and unsuccessfully sought a temporary injunction to block the sale. Keystone counterclaimed for slander of title and tortious interference with a contract, arguing that Host's letter, which was passed to the proposed title insurers, scuttled the sale.

At the conclusion of the trial, the jury found for Keystone on all issues. The trial court awarded Keystone $39 million in actual damages, but granted Host's motion for judgment notwithstanding the verdict on the jury's award of $7.5 million in punitive damages. On appeal, the court of appeals affirmed the actual-damages award and reinstated the punitive damages.

Host presses a handful of arguments in its appeal to this Court. Among them is the contention that its actions did not cause the sale to fall through. Instead, the sale foundered because Ashkenazy was unable to secure title insurance. The two title insurers involved in the deal both required Host to waive in writing its section-14.02 rights before they would issue "clean" title policies—that is, policies without coverage exceptions for claims arising under section 14.02. Although Keystone asked Host for such a waiver, Host did not provide one, and it is undisputed that the lease did not obligate Host to do so. Host argues that because the title insurers required a waiver both before and after Host sent its April 18 letter, the letter could not have caused the deal's collapse. At most, it simply communicated that a waiver was not forthcoming. The outcome would have been the same regardless of how Host communicated its position to Keystone, or if it had said nothing at all.

In reviewing a verdict for legal sufficiency, we credit evidence that supports the verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006). Evidence is legally insufficient when (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by the rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharm. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

The court of appeals summarized testimony of several witnesses, many who blamed Host's letter for killing the deal, and concluded the evidence was sufficient to support the jury's findings that Host's letter proximately caused the deal's demise. The court of appeals did not, however, point

to any evidence showing how the ultimate outcome would have been different had Host not sent the letter.

The liability questions were submitted to the jury under a proximate-cause standard, which includes two elements: cause in fact and foreseeability. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. and Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009). The cause-in-fact element is satisfied by proof that (1) the act was a substantial factor in bringing about the harm at issue, and (2) absent the act ("but for" the act), the harm would not have occurred. *Id*. These elements cannot be established by mere conjecture, guess, or speculation. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995).

Here, Host argues no evidence supports "but-for" causation. Put another way, no evidence shows the outcome would have been different if Host had not sent its letter. Host's position is supported by title-commitment letters and testimony from employees of Fidelity National Title and Land America, the two title insurers that worked on the deal, both of which required section-14.02 waivers. The "Schedule C" provisions of Fidelity's title commitment required that it "be furnished with a duly executed and acknowledged Waiver Of Right Of Negotiation by [Host] regarding the provisions under Section 14.02 of the [lease] in connection with the proposed sale." Land America's title commitment contained a similar provision.

Sam Smith, the Fidelity account executive who worked the deal, testified that "from the very beginning of the transaction we had said: 'Hey, someone has to give us a waiver of that right of first refusal for us to remove it from the policy'" and that "unless we get a waiver there's really no way to remove that lease from Schedule C of the policy." Smith testified he assumed a waiver would be

forthcoming. Upon receiving a copy of Host's letter, however, Smith testified he "thought that we would not get a waiver from [Host] and that we would have to take exception to that lease when it closed." When asked if the insurers' decision not to "insure around"—or, issue a clean policy without a section-14.02 exception—was made "in light of the objection [Host] sent," Smith replied that Fidelity was "going to have the issue regardless" and that it "still needed the waiver on Schedule C."

Smith also testified that while title insurers have discretion to remove exceptions to a policy and "insure around" lease provisions like section 14.02, doing so here was never a possibility:

Counsel:	Did you ever consider issuing the policy around Section 14.02 based on the expiration of the 90-day negotiation period?
Smith:	I'm sure we considered it, but it was never even close to a valid option. I mean, we would never—we would never be allowed to write that policy without that waiver.
Counsel:	Okay. So from the beginning to the end, the position of Fidelity was, we simply want the waiver and we're not prepared to issue the title policy without it; is that right?
Smith:	Yeah. As I stated, even in our original commitment.
Counsel:	And that was the position of Fidelity both before and after the April 18th letter, correct?
Smith:	Yes.
Counsel:	No change at all?
Smith:	No change at all.

Land America, which was also issuing a policy but apparently following Fidelity's lead, also consistently declined to insure around section 14.02 without a waiver. Jennifer Maxwell, Land America's "closer" for the deal, testified that Land America would not have "gone it alone" on the transaction, and that "if Fidelity declined, Land America was going to decline." Maxwell further

testified that Land America's position "all along" was that a waiver was required to issue a clean policy.

The terms of the deal between Keystone and Ashkenazy independently required a waiver as a condition for closing. Included in the deal's Agreement for Sale and Purchase was a list of "Conditions Precedent to the Closing for the Benefit of the Buyer," one of which was delivery of Host's waiver of its section-14.02 rights. After the deal collapsed, Ashkenazy sent Keystone a letter claiming Keystone "failed to satisfy the 'Buyer Closing Conditions,'" including delivery of a "Waiver of First Right of Negotiation as required by Section 5.2.8 of the Agreement," among other documents. Ashkenazy further wrote that he had "previously advised Seller that the aforesaid documents were essential to Buyer's performance under the Agreement and Buyer has previously advised Seller in both letters and numerous emails that Buyer was unable to waive any of the Buyer Closing Conditions."

Ashkenazy never complains of, or even mentions, Host's letter. Rather, he blames Keystone's failure to deliver documents required by the agreement, all of which only Host could execute. But Keystone never argues Host was under any obligation to provide a waiver. To the contrary, e-mails from its attorney, Laura Sims, demonstrate the opposite. In an e-mail to Land America's Jennifer Maxwell, Sims wrote: "We are of course going to ask Purchaser to waive the condition re: written waiver from [Host]—but perhaps more to the point, as written, the obligation is to provide said waiver as the Lease requires—which is frankly none." Separately, Sims wrote to David Kriss, Ashkenazy's attorney for the transaction: "But, I'd like to re-emphasize—SECTION 14.02 DOES NOT REQUIRE A WRITTEN WAIVER BY TENANT."

Ultimately, Keystone went forward with the sale on the gamble that it could persuade Host to get on board. On March 5, John Gerdes, Keystone's asset manager, said in an e-mail to David Burke, Host's asset manager, that Keystone was "pressing forward under the assumption we will have a response shortly." As closing drew near, however, the parties to the deal grew apprehensive over Host's waiver. Gerdes wrote to Burke again on March 10, telling him, "We are proceeding to a closing date in the next two weeks and would like to finalize the [Host] waiver." Burke responded to Gerdes in a March 17 e-mail that the waiver "is close to being signed and sent back."

But on April 13, Gerdes wrote to Burke: "I haven't seen or heard anything from [Host] and am being pressed on all sides." During this time, Ashkenazy's attorney, David Kriss, wrote to Gerdes that Ashkenazy was "getting a lot of pressure from our lender and need[s] to know where [Host] stands" and that "[o]ur loan is structured so that as soon as we get the [Host] waiver we can close that piece quickly." Ashkenazy also personally e-mailed Gerdes with inquiries about the waiver.

Host's letter no doubt had a significant effect on the sale. It informed everyone involved in the deal that an anticipated and necessary waiver was not coming after all. This was a significant shift in Host's position that immediately cast doubt on whether the sale could close. But no one argues Host was obligated to provide the waiver, or that Host did not have the right to change its mind. Host clearly communicated its new position in the letter, but there is no evidence the outcome would have been any different had Host said nothing at all. At some point before closing, the title insurers would have insisted on the waiver, and Keystone, powerless to force Host's hand, would

have been unable to produce it. The deal failed not because of a letter, but because Keystone was unable to convince Host to voluntarily relinquish its rights.

Keystone agrees the deal collapsed when the title companies refused to issue "clean" policies, but argues there is "ample evidence" the title insurers would have agreed to "insure around" section 14.02 if Host had not sent its letter. At its core, Keystone's argument presupposes that if Host had behaved differently, the title insurers could have been convinced to give up their waiver demand. Keystone points out Host was a "non-objecting tenant" that had represented it would sign the waiver, and had indeed already executed a "Tenant Estoppel Certificate" stating Keystone had "fully performed and complied with" the lease. Host's "completely contrary position," assumed days before closing, "escalated the title companies' risk and foreclosed all attempts to 'insure around' section 14.02." Put another way, Keystone seems to suggest it is not simply Host's refusal to provide a waiver, but the dramatic fashion in which it changed its mind days before closing that increased the perceived risk of insuring around section 14.02.

The testimony Keystone cites certainly demonstrates the dramatic effect of Host's letter. Keystone's property manager called it "really devastating" and testified it "blew up the deal." Keystone's attorney for the transaction called it a "suckerpunch" that came as "a tremendous surprise" and was "disorienting and very disruptive." The deal's broker considered it a "bomb that was thrown in the deal at the last minute." And Ashkenazy's attorney said he knew the closing "was in jeopardy" when he saw the letter.

The testimony is powerful, but it is not evidence the outcome would have changed had Host revealed its position earlier or in a less dramatic fashion. Host's change of heart may have come as

a surprise, but no evidence demonstrates that the title insurers would have been more inclined to abandon their consistent waiver demand if Host had behaved differently.

Keystone points to additional testimony that it maintains speaks more directly to the impact of Host's letter on the title insurers' decision not to insure around section 14.02. Laura Sims, Keystone's attorney for the transaction, opined that the letter "made a claim of wrongdoing that rachets up risk" for the title insurers and made it "much more difficult for them to write a policy." Sims also testified she believed that without Host's letter, the title insurers would have insured around section 14.02 after the 90-day notice period had expired. Similarly, Ashkenazy's attorney for the transaction testified that "obviously there's a difference between [Host] sitting back and doing nothing versus the letter that they sent." Host's own senior vice president, Keystone argues, admitted the letter "reduce[d] the odds" of closing the deal. But in the end, all of this testimony is simply speculation about what the title insurers might have done had Host handled itself differently. Testimony based on nothing but speculation is evidence of nothing at all.

Turning to the title insurers, Keystone focuses on Smith's testimony that Fidelity explored the option of insuring around section 14.02 without a waiver. Smith testified Fidelity was "trying to think if there was a way to do that" and confirmed the issue was discussed internally. He further acknowledged that Host's letter was "a substantial contributing factor" to the decision not to insure around section 14.02 without a waiver. And when asked if "it was the existence of the letter itself" that compelled Fidelity's decision, rather than whether Host's position in the letter was correct, Smith testified, "Yes. Most definitely." Similarly, Land America's Jennifer Maxwell agreed the letter had a "substantial effect" and testified it "changed things from Land America's standpoint."

Keystone argues in its brief that "[i]f the absence of a waiver was outcome-determinative, Smith immediately would have told the parties that the issuance of a 'clean' title policy was off the table" and that exploring the possibility of insuring around section 14.02 "would have been an unnecessary and fruitless exercise."

In sum, Keystone's causation argument concerning the title insurers is that (1) insuring around section 14.02 could not have been impossible because the title insurers discussed the possibility after receiving Host's letter, and (2) Host's letter was an important factor the title insurers considered before refusing to insure around section 14.02. We address each component of this argument in turn.

First, exploring the option of "insuring around" section 14.02 is not evidence that doing so was ever truly possible. The impossible does not become possible merely because someone wishes or works in vain to make it so. The title insurers consistently demanded a waiver, and no evidence shows they would have backed off that demand absent Host's letter. To the contrary, Smith testified that "we were going to have the issue regardless" and that "we would never be allowed to write that policy without that waiver." Smith testified he looked for another option after receiving Host's letter, but the fruit of his labor left him where he began. Insuring around section 14.02 "was never even close to a valid option."

At most, the testimony Keystone relies on raises the inference that the title insurers could have insured around section 14.02, not that they would have. Testimony about what the insurers might have done differently is conclusory—"[b]are, baseless opinions [that] will not support a judgment even if there is no objection to their admission in evidence." *See City of San Antonio v.*

Pollock, 284 S.W.3d 809, 816 (Tex. 2009); *see also Haynes & Boone v. Bowser Bouldin*, Ltd., 896 S.W.2d 179, 183 (Tex. 1995), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007) (testimony that a property owner could have avoided foreclosure had a tenant not vacated was "so weak as to do no more than create a mere surmise or suspicion of its existence and in legal effect, is no evidence.").

Second, the title-insurance witnesses' testimony about the effect of Host's letter on the transaction is not tantamount to testimony that the outcome would have been any different if Host had not sent its letter. Host's letter certainly had an impact on the transaction. It communicated for the first time that the anticipated waiver essential to closing the deal would not be given. But testimony that the letter was a substantial factor in bringing about harm to Keystone is only half of the cause-in-fact element. *See Akin*, 299 S.W.3d at 122. Keystone also had to show that absent Host's letter, the harm would not have occurred. *See id*. The title-insurance witnesses, however, never testified there was a possibility of a different outcome had Host not sent its letter.

Moreover, even if counsel were able to get a witness to agree to language reflecting the causation standard at issue in this case, the bare assertions of the title-insurance witnesses in response to carefully worded questions from counsel do not constitute evidence of causation. *See Jelinek v. Casas*, 328 S.W.3d 526, 538 (Tex. 2010) (quoting *Pollock*, 284 S.W.3d at 818) ("[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."); *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999) ("But 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."). There is no "magic language" that checks the causation box in a sufficiency-of-the-evidence review. *See Schaefer v. Tex. Empr's Ins. Ass'n*, 612 S.W.2d 199, 205 (Tex. 1980).

Keystone contended at trial that Host's letter of April 18, 2005, doomed its real-estate deal with Ashkenazy, and formed the basis of Keystone's tortious-interference and slander-of-title claims. But there is no evidence that the letter proximately caused any damages to Keystone. Accordingly, we reverse the court of appeals' judgment and render judgment that Keystone take nothing.

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Jeffrey V. Brown
Justice

OPINION DELIVERED: June 13, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0348

DAVID HAMRICK, MAGGIE HAMRICK, SUE BERTRAM AND STEVE BERTRAM, PETITIONERS AND CROSS-RESPONDENTS,

v.

TOM WARD AND BETSEY WARD, RESPONDENTS AND CROSS-PETITIONERS

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

Argued September 11, 2013

JUSTICE GUZMAN delivered the opinion of the Court.

This case presents the Court with an opportunity to provide clarity in an area of property law that has lacked clarity for some time: implied easements. For over 125 years, we have distinguished between implied easements by way of necessity (which we refer to here as "necessity easements") and implied easements by prior use (which we refer to here as "prior use easements"). We created and have utilized the necessity easement for cases involving roadway access to previously unified, landlocked parcels. Roadways by nature are typically substantial encumbrances on property, and we accordingly require strict, continuing necessity to maintain necessity easements. By contrast, we created and have primarily utilized the prior use easement doctrine for lesser improvements to the landlocked parcel, such as utility lines that traverse the adjoining tract. We have required, to some

degree, a lesser burden of proof for prior use easements (reasonable necessity at severance rather than strict and continued necessity) because they generally impose a lesser encumbrance on the adjoining tract (*e.g.*, a power line compared to a roadway). Today, we clarify that the necessity easement is the legal doctrine applicable to claims of landowners asserting implied easements for roadway access to their landlocked, previously unified parcel.

Here, a party claims a road that was necessary for access to its landlocked, previously unified parcel is a prior use easement. The trial court and court of appeals agreed. We hold the necessity easement doctrine governs this claim. Because we clarify the law of easements, we reverse the court of appeals' judgment and remand to the trial court for the party to elect whether to pursue such a claim.

I. Background

In 1936, O. J. Bourgeois deeded 41.1 acres of his property in Harris County, Texas to his grandson, Paul Bourgeois. During Paul's ownership, a dirt road was constructed on the eastern edge of the 41.1 acre tract, providing access from the remainder of the land to a public thoroughfare, Richardson Road. In 1953, Paul deeded two landlocked acres of the tract to Alvin and Cora Bourgeois, severing the 41.1 acres into two separate parcels. Alvin and Cora used the dirt road to access their two acres. The two acre tract was subsequently transferred to Henry and Bettie Bush in 1956, who sold the land to Henry Gomez in 1957. In 1967, Henry Gomez and his wife, Anna Bell, built a house on the two acre tract with a listed address of 6630 Richardson Road. Anna Bell became the sole owner of the two acre tract when Henry died in 1990.

In the late 1990s, developer William Cook began construction of the Barrington Woods subdivision on the remaining acreage of Paul Bourgeois' property. Cook planned to close the dirt road Anna Bell used to access her two acres and to construct a paved driveway for her to directly access her property from a newly added paved street. But Anna Bell's land was not platted, and Harris County required a one foot reserve and barricade between her property and the new street, which rendered the dirt road her only means of access. In February 2000, Cook unilaterally filed a special restriction amendment to the subdivision's deed restrictions. The special restriction purported to create a "Prescriptive (Rear Access) Easement" along the southeast property line of Lots 3 and 4. It further stated, "[t]his Prescriptive Easement will also be used by Annabelle [sic] Gomez," and allowed Anna Bell a fifteen foot wide easement along the dirt road for herself, her family, social guests, and service vehicles under 6,200 pounds. Anna Bell was not a party to the special restriction, never discussed its contents with Cook, and did not learn of the existence of the document until September 2005.

David and Maggie Hamrick, as well as Sue and Steve Bertram, (collectively "the Hamricks") purchased homes on Lots 3 and 4 in Barrington Woods—the property Anna Bell's access easement traversed to reach Richardson Road. The developer told the Hamricks initially and at closing that when Anna Bell sold her home, the property would be platted, her access to the main road would open, and the Hamricks would recover full use of the dirt road.

In February 2004, before the Hamricks closed on their home, Anna Bell sold her property to Tom and Betsey Ward (collectively "the Wards"), subject to a life tenancy. After purchasing the property, the Wards continued to use the dirt road. The Wards then reinforced the dirt road with

gravel and made use of the road to construct a new home on the land. The Hamricks sued to enjoin the Wards from using the dirt road. The trial court granted the Hamricks a temporary injunction in April 2006, which prevented the Wards from using the easement for construction of their home. As a result, the Wards platted the property, the barrier and reserve were removed, and a driveway was built to provide the Wards access to the paved road and allow them to complete construction. Nonetheless, the Wards pursued a counterclaim, arguing they had an implied, prior use easement to use the dirt road and requesting the trial court enter a judgment declaring an unrestricted twenty-five foot easement connecting their property to Richardson Road.

The trial court granted the Wards' motion for summary judgment, finding they conclusively proved the existence of a prior use easement running from the Wards' property across the rear of the Hamricks' property to Richardson Road. The trial court did not specifically designate a width for the easement. The trial court denied the Hamricks' motion for summary judgment, which raised affirmative defenses of bona fide purchaser, estoppel, and waiver. Finally, the trial court awarded attorney's fees of $215,000 to the Wards and $200,000 to the Hamricks.

The Hamricks appealed, arguing the Wards failed to prove both beneficial use of the easement prior to severance and continuing necessity of the easement. The Hamricks further argued that the trial court erred in denying summary judgment on their bona fide purchaser, estoppel, and waiver defenses. The Wards cross-appealed, contending the trial court failed to designate a width for the easement and erroneously awarded attorney's fees to the Hamricks.

The court of appeals found the summary judgment evidence conclusively established beneficial use of the road prior to severance as well as the necessity of the road, affirming the trial

court. 359 S.W.3d 770, 776–79. The court unanimously held that the Wards were required to prove necessity at the time of severance, not a continuing necessity as the Hamricks proposed. *Id.* at 777. The court similarly overruled the Hamricks' arguments concerning the affirmative defenses of estoppel and waiver. *Id.* at 786–87. But the court of appeals determined a fact issue remained with respect to the bona fide purchaser defense, such that the trial court erred in denying the Hamricks' motion for summary judgment and granting the Wards' motion. *Id.* at 785. The dissent noted that reasonable jurors would not have differed concerning the fruits of an investigation, so the trial court's summary judgment should stand. *Id.* at 789–90 (Frost, J., concurring and dissenting).

With respect to the Wards' issues on cross appeal, the court of appeals declined to consider whether the trial court erred by failing to specify an easement width, and instead left this issue for the trial court to re-examine on remand. *Id.* at 787. It also reversed and remanded the attorney's fees award. *Id.* Both parties petitioned this Court for review.

II. Discussion

The parties raise three distinct issues: (1) whether the Wards have an implied easement over the Hamricks' land despite a lack of continued necessity; (2) whether the Hamricks qualify as bona fide purchasers so as to take the land free of any easement the Wards may have; and (3) the propriety of the trial court's award of attorney's fees. Our disposition of the first issue precludes us from reaching the remaining two.

A. Implied Easement

The Hamricks argue the court of appeals erred by concluding the Wards were only required to demonstrate the necessity of the easement at the time of severance. The Wards counter that we

have never before required continued necessity for prior use easements. As explained below, we determine the applicable doctrine for roadway access to previously unified, landlocked parcels is the necessity easement.

Under Texas law, implied easements fall within two broad categories: necessity easements and prior use easements. *See Koonce v. J.E. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984) (necessity easement); *Bickler v. Bickler*, 403 S.W.2d 354, 357 (Tex. 1966) (prior use easement). But the unqualified use of the general term "implied easement" has sown considerable confusion because both a necessity easement and a prior use easement are implied and both arise from the severance of a previously unified parcel of land.[1] *Seber v. Union Pac. R. Co.*, 350 S.W.3d 640, 648 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Further contributing to this confusion, courts have used a variety of terms to describe both necessity easements[2] and prior use easements.[3] Despite imprecise semantics, we have maintained separate and distinct doctrines for these two implied easements for

[1] The Restatement of Property may also have added to confusion in these cases. Originally, the Restatement did not differentiate between necessity easements and prior use easements, and instead merely listed a series of factors to be considered by courts to determine whether an easement ought to be implied. RESTATEMENT OF PROP. § 476 (1944). But the Restatement Third contains separate sections with separate definitions, one for "Servitudes Created by Necessity" and one for "Servitudes Implied from Prior Use." RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.12, 2.15 (2000).

[2] As one court of appeals has rightly observed: "It is apparent that whether an easement is denominated a 'way of necessity,' an 'easement by necessity,' an 'easement of necessity,' 'an implied easement by necessity,' an 'implied reservation of an easement by necessity,' or an 'implied grant of a way of necessity' the elements of each are identical." *Daniel v. Fox*, 917 S.W.2d 106, 111 (Tex. App.—San Antonio 1996, writ denied). This Court alone has used a wide variety of terms in reference to implied easements by way of necessity. *See, e.g.*, *Koonce*, 663 S.W.2d at 452 ("implied easement by necessity"); *Othen v. Rosier*, 226 S.W.2d 622, 625—26 (Tex. 1950) ("easement of necessity," "way of necessity," and "implied reservation of a right of way by necessity"); *Bains v. Parker*, 182 S.W.2d 397, 398 (Tex. 1944) ("right of way by necessity"); *Alley v. Carleton*, 29 Tex. 74, 78 (1867) ("way of necessity").

[3] This Court alone has employed three terms to refer to a prior use easement: "implied easement appurtenant," *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1962), "easement by implication," *Bickler*, 403 S.W.2d at 356, and "quasi-easement," *Ulbricht v. Friedsam*, 325 S.W.2d 669, 677 (Tex. 1959).

well over a century. Today, we clarify that a party claiming a roadway easement to a landlocked, previously unified parcel must pursue a necessity easement theory.

1. Necessity Easement

"Anyone who grants a thing to someone is understood to grant that without which the thing cannot . . . exist." James W. Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571, 572 (1925). With similar emphasis on this ancient maxim, we recognized in 1867 that a necessity easement results when a grantor, in conveying or retaining a parcel of land, fails to expressly provide for a means of accessing the land. *Alley v. Carleton*, 29 Tex. 74, 78 (1867). When confronted with such a scenario, courts will imply a roadway easement to facilitate continued productive use of the landlocked parcel, rather than rigidly restrict access. *Id.*

To successfully assert a necessity easement, the party claiming the easement must demonstrate: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the claimed access is a necessity and not a mere convenience; and (3) the necessity existed at the time the two estates were severed. *Koonce*, 663 S.W.2d at 452. As this analysis makes clear, a party seeking a necessity easement must prove both a historical necessity (that the way was necessary at the time of severance) and a continuing, present necessity for the way in question. *Id.* Once an easement by necessity arises, it continues until "the necessity terminates." *Bains*, 182 S.W.2d at 399 ("[A] way of necessity is a temporary right, which arises from the exigencies of the case and ceases when the necessity terminates."); *see also Alley*, 29 Tex. at 76 (providing "if the necessity for its use ceases, the right also ceases"). The temporary nature of a necessity easement is thus consistent with the underlying rationale; that is, providing a means of roadway access to land only so long as no

other roadway access exists. *Alley*, 29 Tex. at 78 ("A way of necessity, however, must be more than one of convenience, for if the owner of the land can use another way, he cannot claim by implication to pass over that of another to get to his own.").

Accordingly, it is no surprise that the balance of our jurisprudence on necessity easements focuses on roadway access to landlocked, previously unified parcels. *See Koonce*, 663 S.W.2d at 452 (assessing a roadway easement by the standard of an easement by necessity); *Duff v. Matthews*, 311 S.W.2d 637, 641 (Tex. 1958) (same); *Othen v. Rosier*, 226 S.W.2d 622, 626 (Tex. 1950) (same); *Bains*, 182 S.W.2d at 399 (same); *Alley*, 29 Tex. at 78 (same).

2. Prior Use Easements

Two decades after we established the necessity easement doctrine for roadways in *Alley*, we found that framework to be ill suited for other improvements that nonetheless are properly construed as implied easements. In *Howell v. Estes*, we addressed use of a stairwell to access two buildings. 12 S.W. 62, 62 (Tex. 1888). In *Howell*, a father had constructed adjoining two-story buildings that jointly used a stairwell in one building. *Id*. When he died, he left one building to his son and the other to his daughter. *Id*. In the wake of a familial dispute, the sibling who owned the building with the stairwell denied use of it to the other sibling. *Id*.

Our preexisting doctrine for necessity easements could not adequately address such a situation. The party seeking the easement likely could not claim strict necessity, as he was still able to access his land and the bottom floor of his building.[4] *Id*. But recognizing that the law should

[4] We recognized that he could access his second floor by building a stairwell for the then considerable sum of $50. *Howell*, 12 S.W.2d at 62.

afford a remedy, we established an alternate doctrine for assessing whether to recognize implied easements for improvements across previously unified adjoining property as follows:

> [I]f an improvement constructed over, under, or upon one parcel of land for the convenient use and enjoyment of another contiguous parcel by the owner of both be open and usable and permanent in its character . . . the use of such improvement will pass as an easement, although it may not be absolutely necessary to the enjoyment of the estate conveyed.

Id. at 63. Unlike necessity easements, which are implied out of the desire to avoid the proliferation of landlocked—and therefore, unproductive—parcels of land, the rationale underlying the implication of an easement based on prior use is not sheer necessity. Rather, as this Court has expressly recognized, "[t]he basis of the doctrine [of prior use easements] is that the law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration." *Mitchell v. Castellaw*, 246 S.W.2d 163, 167 (Tex. 1952). There is a presumption that parties contracting for property do so "with a view to the condition of the property as it actually was at the time of the transaction," and therefore, absent evidence to the contrary, such conditions which openly and visibly existed at the time are presumed to be included in the sale. *Miles v. Bodenheim*, 193 S.W. 693, 696–97 (Tex. Civ. App.—Texarkana 1917, writ ref'd).

This Court has explained the requirements for establishing a prior use easement as "fairly standardized," such that the party claiming a prior use easement must prove: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the use of the claimed easement was open and apparent at the time of severance; (3) the use was continuous, so the parties must have intended that its use pass by grant; and (4) the use must be necessary to the use of the dominant

estate. *Drye v. Eagle Rock Ranch*, 364 S.W.2d 196, 207–08 (Tex. 1962). Because the actual intent of the parties at the time of severance is often elusive, these factors effectively serve as a proxy for the contracting parties' intent.

It is worth noting that we have elevated the proof of necessity for a subset of prior use easement cases. A prior use easement may arise either by reservation (where the grantor of the previously unified parcel retains the landlocked parcel) or by grant (where the grantor conveys the landlocked parcel). We have expressly held that to establish a prior use easement implied by reservation, a party must demonstrate strict necessity with respect to the easement claimed. *Mitchell*, 246 S.W.2d at 168. But, with respect to a prior use easement implied by grant, some ambiguity remains as to whether a party must demonstrate strict necessity or reasonable necessity for a party to succeed. *See Drye*, 364 S.W.2d at 208–09. Because we hold below that the Wards must pursue an implied easement by way of necessity theory, we need not reach this question.

The factual circumstances in which we have discussed the prior use easement illuminate its purpose. We have used the prior use easement doctrine to assess situations such as use of a stairwell in an adjacent building,[5] grazing cattle,[6] and recreational use of adjoining property.[7] In addition to access, we have also discussed the application of the prior use easement doctrine to "a part[ition] wall," "a drain or aqueduct," "a water [gas] or sewer line into the granted estate," "a drain from the land," "light and air," "lateral support," and "water." *Drye*, 364 S.W.2d at 207–08. In light of the

[5] *Howell*, 12 S.W. at 62.

[6] *Ulbricht*, 325 S.W.2d at 677.

[7] *Drye*, 364 S.W.2d at 208.

history and the purpose behind these two types of implied easements, we clarify when parties should pursue each type of easement.

3. Roadway Easements to Landlocked, Previously Unified Parcels Must Be Tried as Implied Easements by Way of Necessity

The Hamricks claim that we should inject continued necessity as a requirement for prior use easements. The Wards claim that, despite the confusion between necessity easements and prior use easements, we have never required continued necessity for prior use easements. We view the pertinent question not as whether continuing necessity is required of prior use easements but rather as whether the Wards' use of the roadway is appropriate to assess under the prior use easement doctrine.

We clarify that courts adjudicating implied easements for roadway access for previously unified, landlocked parcels must assess such cases under the necessity easement doctrine.[8] Admittedly, the express elements required for prior use easements do not restrict themselves to certain easement purposes. *Drye*, 364 S.W.2d at 207–08. As a result, we have previously encountered a party asserting a prior use easement for a roadway to access his previously unified, landlocked parcel. *See Bickler*, 403 S.W.2d at 357.[9] But we developed the two types of implied easements for discrete circumstances. The less forgiving proof requirements for necessity easements

[8] There exist other types of easements, such as prescriptive easements, easements by estoppel, and express easements. *Drye*, 364 S.W.2d at 204. The Wards also pleaded a prescriptive easement claim, which will be within the scope of our remand to the trial court.

[9] Before *Bickler*, two parties in this Court sought to assess easements for improvements and roadway access together under the prior use easement doctrine. *See Ulbricht*, 325 S.W.2d at 677 (granting prior use easement for grazing cattle and ingress and egress to a lake); *Mitchell*, 246 S.W.2d at 164 (assessing a driveway and shed as prior use easements).

(strict and continuing necessity) simply serve as acknowledgment that roadways typically are more significant intrusions on servient estates. By contrast, improvements at issue in prior use easements (*e.g.*, water lines, sewer lines, power lines) tend to involve more modest impositions on servient estates. Accordingly, for such improvements, we have not mandated continued strict necessity but instead carefully examine the circumstances existing at the time of the severance to assess whether the parties intended for continued use of the improvement.[10] Our clarification today in no way should impact the continued ability of such improvements to qualify as prior use easements.

Applying this distinction to the Wards' claimed easement does not entail prolonged analysis. Their claimed easement concerns a roadway to access a previously unified, landlocked parcel. This is precisely the factual scenario for which we created the necessity easement doctrine well over a century ago, and here, the Wards must pursue a necessity easement rather than a prior use easement.

4. Remand

The Wards only pleaded theories of a prior use easement and easement by prescription in the trial court. The trial court and court of appeals held that the Wards conclusively established a prior use easement. Ordinarily, "parties are restricted in the appellate court to the theory on which the case was tried in the lower court." *Safety Cas. Co. v. Wright*, 160 S.W.2d 238, 245 (Tex. 1942). Accordingly, we procedurally cannot hold that the Wards prevailed on a theory they have not advanced in the trial court. However, we will not foreclose the Wards from bringing a necessity easement claim in light of our clarification of the law. "We have broad discretion to remand for a

[10] We have, however, required strict necessity when a grantor reserves for himself a prior use easement. *Mitchell*, 246 S.W.2d at 168.

new trial in the interest of justice where it appears that a party may have proceeded under the wrong legal theory." *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993). Moreover, "[r]emand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled." *Id.* As we have indicated, we have encountered at least one situation in which a party pursued a prior use easement (rather than a necessity easement) for roadway access to a previously unified, landlocked parcel. *Bickler*, 403 S.W.2d at 357. Although we refrain from opining as to whether the Wards will ultimately prevail on a necessity easement claim, our clarification of the law entitles them to the opportunity to plead and prove such a claim.

In addition to the issue of what type of easement the Wards must claim, the parties raise the issues of the Hamricks' bona fide purchaser defense and the trial court's award of attorney's fees. Our remand for the Wards to pursue a necessity easement claim precludes us from reaching either issue. We note that the court of appeals held the bona fide purchaser defense is an appropriate defense to prior use easements. 359 S.W.3d at 782. It did not address whether the bona fide purchaser defense applies to a claim the Wards had not yet raised. Accordingly, that issue remains unresolved and is before the trial court on remand. Likewise, we need not assess the propriety of the trial court's award of attorney's fees because that question will also be within the scope of the remand to the trial court.

III. Conclusion

In sum, we have long recognized a distinction between necessity easements (which have elevated proof requirements due to the more significant encumbrance typified by roadway

easements) and prior use easements (which have relaxed proof requirements due to the typically lesser encumbrance of other improvements such as utility lines). Today, we clarify that one claiming an implied easement for roadway access to a landlocked, previously unified parcel must pursue a necessity easement rather than a prior use easement. Because the Wards seek an implied easement for roadway access to their landlocked, previously unified parcel, we remand for them to elect whether to pursue a necessity easement claim. TEX. R. APP. P. 60.3. We reverse the portion of the court of appeals' judgment affirming summary judgment on the Wards' prior use easement claim, and remand to the trial court for dismissal of that claim and for further proceedings consistent with this opinion.

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Eva M. Guzman
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0360

ARSENIO COLORADO, ET AL., PETITIONERS,

v.

TYCO VALVES & CONTROLS, L.P. AND TV&C GP HOLDINGS, INC., RESPONDENTS

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

Argued September 11, 2013

JUSTICE LEHRMANN delivered the opinion of the Court.

After deciding to close one of its facilities, Tyco Valves & Controls, L.P. (Tyco) offered certain skilled employees retention agreements to encourage them to remain with the company through the facility's closure. These agreements provided that, in consideration for remaining employed during the retention period, the employees would receive (1) a cash bonus, and (2) severance payments in the event they were not offered comparable employment with Tyco. Eventually, Tyco sold one of the production units located in the facility to another company. Seventeen former Tyco employees who had worked in that unit and been denied severance sued Tyco for breach of contract. Eleven of those employees alleged that they were entitled to severance payments under the retention agreements, notwithstanding the fact that the purchasing company had

offered them comparable employment commencing immediately upon the employees' termination by Tyco. The other six employees, who had not executed retention agreements, alleged that they were entitled to severance payments under oral agreements with Tyco. After a bench trial, the trial court found for the employees, awarding them severance pay. The court of appeals reversed in a divided opinion and rendered judgment for Tyco. 365 S.W.3d 750.

Three issues are presented for our review. First, we determine whether the employees' breach-of-contract claims are preempted by the Employee Retirement Income and Security Act of 1974 (ERISA).[1] If the claims are not preempted, we must also consider whether legally sufficient evidence exists to prove that (1) Tyco breached the retention agreements by failing to pay severance in light of the purchasing company's offers of comparable employment, and (2) oral agreements to pay severance existed between Tyco and the employees who did not have written agreements. We hold that ERISA preempts the employees' breach-of-contract claims and thus need not reach the remaining issues. Accordingly, we affirm the court of appeals' judgment.

I. Factual and Procedural Background

The plaintiffs in this action (Gimpel Employees) worked in Tyco's Gimpel Unit, which manufactured specialized valves. Along with various other Tyco production units, the Gimpel Unit was located in Tyco's West Gulf Bank facility in Houston. By the summer of 2006, Tyco planned to close the West Gulf Bank facility and relocate the units housed there. At that time, the Gimpel Employees were covered by Tyco's Severance Plan for U.S. Employees (ERISA Plan), which was undisputedly governed by ERISA and which provided for eligible employees to receive certain

[1] ERISA is codified in Title 29 of the United States Code. *See* 29 U.S.C. §§ 1001–1461.

severance benefits in the event they were terminated for reasons other than cause. The ERISA Plan excluded from eligibility employees who were terminated as the result of a sale of Tyco's assets and had the opportunity to continue employment with the purchaser. The benefits schedule under the Plan included one week's severance pay for each year of the employee's service, subject to a minimum of two weeks and a maximum of fifty-two weeks (referred to as a "2-and-52" schedule).

In August 2006, while plans for closing the West Gulf Bank facility were underway, Tyco's new human resources director, Holly Kriendler, created a one-page document entitled "Tyco Valves and Controls Severance" that outlined a severance schedule for that facility. Pursuant to this schedule (West Gulf Bank Schedule), eligible hourly employees would receive one week's severance pay for each year of service and eligible salaried employees would receive two weeks' severance pay for each year of service, subject to a minimum of six weeks and a maximum of twenty-six weeks (referred to as a "6-and-26" schedule). In addition to this 6-and-26 schedule, the West Gulf Bank Schedule contained several provisions copied directly from the ERISA Plan, utilizing capitalized terms that were defined only in the ERISA Plan.[2] It also stated: "This policy shall apply to bands 4 – 7 and supersede any prior plan, program or policy under which the Company provided severance benefits prior to the Effective Date of the Policy."[3]

In late 2006, Tyco informed the Gimpel Employees of its intention to sell, rather than relocate, the Gimpel Unit. In order to retain its skilled labor force and facilitate the sale, Tyco

[2] For example, the West Gulf Bank Schedule uses terms like "Severance Benefit," "Participant," and "Committee."

[3] Tyco classified its employees in "bands" depending on their position. The Gimpel Employees were all classified within bands four through seven.

offered a Retention Incentive Agreement (RIA) to eleven of the Gimpel Employees (RIA Employees).[4] Each RIA, dated between January 5 and January 15, 2007, was made "by and between Tyco Valves and Controls, its successors and assigns ('Tyco' or 'Company'), and [the respective RIA Employee]."[5] The RIAs provided for the payment of a "retention incentive bonus" if the employees remained with Tyco through a specified period, stating in relevant part:

> (a) **Stay Incentive Bonus.** If the Employee has remained an Active Employee of Tyco for the entire Retention Period . . . then, as soon as practical following the end of the Retention Period, Tyco will pay the Employee a retention incentive bonus (a "Retention Bonus") consisting of either:
>
> > (i) in the event that the Employee is not offered Comparable Employment with Tyco, an amount equal to [between $2,500 and $10,000, depending on the Employee] (Retention Bonus) plus the standard Severance in accordance to [sic] the severance schedule associated with the closure of this facility. . . . [or]
> >
> > (ii) in the event that the Employee is offered Comparable Employment with Tyco, a cash payment of [between $2,500 and $10,000] subject to the Employee's acceptable performance during the Retention Period.

The RIAs defined "Comparable Employment" to mean that "within 30 days after the end of the Retention Period, the Employee is offered employment with the Company of comparable pay, status and skill level at a location that is within 25 miles of Employees [sic] current work location."

In meetings with the West Gulf Bank facility's acting human-resources manager, conducted either when the RIAs were executed or shortly thereafter, the RIA Employees were orally assured that they would receive severance if the Gimpel Unit were sold. After discussions among

[4] The RIA Employees are Petitioners Steven Craig, Umit Davulcu, Richard Gonzales, Lanny Heinrich, Leonard Hill, Chris Kahrig, Lay Keonakhone, Tung Le, Raul Martinez, Kenneth Nash, and Jimmy Phoumlavanh.

[5] Beginning in August 2006, Tyco also entered into substantially identical RIAs with employees of other units located at the West Gulf Bank facility. Those employees are not part of the underlying suit.

management that "confusion" existed with respect to employee communications about severance, the Gimpel Employees were told that they would not be entitled to severance if they were offered a job by the purchaser of the Gimpel Unit. None of the RIA Employees who testified at trial had heard of the ERISA Plan when they signed the RIAs.

On February 27, 2007, Tyco formally amended the ERISA Plan with an effective date relating back to December 1, 2006. Under the amended ERISA Plan, the severance schedule for the West Gulf Bank facility mirrored the 6-and-26 schedule set out in the West Gulf Bank Schedule; the amended Plan did not change the provision relating to employees who were terminated as a result of an asset sale. According to internal e-mails and Kriendler's testimony at trial, at the time the ERISA Plan was formally amended Tyco was already utilizing the 6-and-26 schedule for West Gulf Bank employees who had been terminated in connection with the facility's closure. Kriendler explained that she had believed flexibility existed in the ERISA Plan's severance schedule as it applied to non-executive employees. Thus, although the 6-and-26 schedule had been approved by the company's financial group, Kriendler "didn't realize that there was a separate administrative approval that needed to be done through the plan administrator" to properly utilize a schedule of benefits that differed from the schedule laid out in the ERISA Plan. As noted above, that administrative-approval process was completed on February 27, 2007, with an effective date of December 1, 2006.

In the spring of 2007, Tyco agreed to sell the Gimpel Unit to Dresser-Rand Company. The asset purchase agreement between Dresser-Rand and Tyco required Dresser-Rand to hire all the Gimpel Employees at substantially the same pay rate and seniority level with respect to accrual of

and eligibility for non-pension retirement benefits, severance, and vacation. However, Tyco expressly reserved liability for "wages, salary, severance, [and] bonuses," as well as "any duties, obligations or liabilities arising under any employee benefit plan" and any other amounts owed to the Gimpel Employees as of the closing date.

In accordance with the purchase agreement, Dresser-Rand offered all the Gimpel Employees employment in effectively identical positions, with largely identical pay, benefits, and seniority. The Gimpel Employees commenced working for Dresser-Rand immediately following their termination by Tyco. The Gimpel Unit was moved to a Dresser-Rand facility fewer than twenty-five miles away from the West Gulf Bank facility.

Tyco timely paid the lump-sum cash bonuses to the RIA Employees under the terms of the RIAs, but refused to pay severance to any of the Gimpel Employees because of Dresser-Rand's employment offers. The Gimpel Employees sued Tyco[6] for breach of contract, alleging that they were entitled to severance upon the sale of the Gimpel Unit and their termination by Tyco. Six Gimpel Employees who had not executed RIAs (non-RIA Employees) claimed that Tyco had breached oral agreements to pay them severance on the same terms as the RIA Employees.[7] The Gimpel Employees collectively alleged that they were not offered comparable employment with Tyco upon the sale of the Gimpel Unit and were therefore entitled to severance despite having obtained comparable positions with Dresser-Rand. Tyco denied entering into oral agreements with

[6] Tyco's general partner, TV&C GP Holdings, Inc., is also a defendant.

[7] The non-RIA Employees are Arsenio Colorado, Andy Huynh, Chris Luckey, Fernando Macias, Jorge Martinez, and Souk Vongsamphanh.

the non-RIA Employees and denied breaching the RIAs, contending that the RIA Employees were not entitled to severance because they were offered comparable employment with a Tyco successor. Shortly before trial, Tyco pled as an affirmative defense that the Gimpel Employees' claims were preempted by ERISA.

After a bench trial, the trial court rendered judgment for the Gimpel Employees. In its findings of fact and conclusions of law, the trial court found that the Gimpel Employees' contract claims were not preempted by ERISA, as the agreements between Tyco and the Gimpel Employees were "not connected to, dependent on, or related to the Tyco Severance Plan" and were "independent contracts with terms and conditions that [were] different from the Tyco Severance Plan." The trial court also held that Dresser-Rand was not a "successor or assign" of Tyco and that Tyco therefore breached the RIAs by refusing to pay severance to the RIA Employees. With regard to the non-RIA Employees, the trial court found that Tyco had made oral promises to pay them severance under the West Gulf Bank Schedule and that those promises constituted binding unilateral contracts that became irrevocable upon the employees' performance by remaining with Tyco through the sale to Dresser-Rand.

The court of appeals reversed in a divided opinion. A majority held that ERISA did not preempt the breach-of-contract claims and that no evidence demonstrated an oral agreement between Tyco and the non-RIA Employees. 365 S.W.3d at 770–71. As to the RIA Employees, the two justices who reached the issue were split as to whether the RIA Employees were offered comparable employment with a "successor" of Tyco and, in turn, whether Tyco breached the RIAs. *Id.* at 774; *see also id.* at 779–80 (Sharp, J., dissenting in part). One justice would have held that the claims

were preempted by ERISA and thus concurred in the court's take-nothing judgment for Tyco. *Id.* at 777 (Massengale, J., concurring). We granted the Gimpel Employees' petition for review.

II. ERISA Preemption of State-Law Claims

We first address whether ERISA preempts the Gimpel Employees' breach-of-contract claims. As applied to this case, ERISA preemption is an affirmative defense on which Tyco bore the burden of proof at trial. *See Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex. 1991) (holding that ERISA preemption is an affirmative defense "where ERISA's preemptive effect would result only in a change of the applicable law" and would not subject the claim to exclusive federal jurisdiction); 29 U.S.C. § 1132(a)(1)(B), (e)(1) (giving state and federal courts concurrent jurisdiction over actions by a beneficiary to recover benefits due under the terms of a covered plan or to enforce rights under the plan). Accordingly, we will disturb the trial court's finding against Tyco on this issue only if the Gimpel Employees' claims were preempted as a matter of law. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989).

ERISA is a comprehensive scheme enacted to promote employees' interests in their benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); *Cathey v. Metro. Life Ins. Co.*, 805 S.W.2d 387, 388 (Tex. 1991). The statute establishes various pension-plan requirements and mandates uniform standards for both pension and welfare-benefit plans. *Shaw*, 463 U.S. at 91. ERISA does not itself mandate any particular set of benefits, but rather sets standards governing reporting, disclosure, and fiduciary responsibility for ERISA-governed plans. *Id.*; *Cathey*, 805 S.W.2d at 388.

Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). ERISA's expansive preemption provisions are intended to ensure exclusive federal regulation of employee benefit plans. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Accordingly, ERISA's preemption provision has been broadly construed. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (citing *Shaw*, 463 U.S. at 96–97). State laws that are subject to preemption include not just statutes, but also common-law causes of action like the Gimpel Employees' breach-of-contract claims. *Gresham v. Lumbermen's Mut. Cas. Co.*, 404 F.3d 253, 258 (4th Cir. 2005) (citing 29 U.S.C. § 1144(c)(1)). Thus, in resolving the preemption issue, we must decide whether those claims "relate to" Tyco's ERISA Plan, which itself undisputedly qualifies as an employee benefit plan governed by ERISA.

In *Shaw*, the United States Supreme Court construed the phrase "relates to" as carrying its ordinary meaning of having "a connection with or reference to" an employee benefit plan. 463 U.S. at 96–97. The Supreme Court noted, however, that if the state action affects a benefit plan "in too tenuous, remote, or peripheral a manner," the impermissible connection to ERISA does not exist. *Id.* at 100 n.21; *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (looking to "the objectives of the ERISA statute" and "the nature of the effect of the state law on ERISA plans" in determining whether "the forbidden connection" exists) (citations and internal quotation marks omitted).

The Supreme Court further clarified the bounds of ERISA preemption in *Fort Halifax*, holding that a statutorily mandated one-time, lump-sum severance payment to employees upon a plant closure did not require an administrative scheme to administer, and as such did not constitute

an employee benefit plan generating the potential for conflicting regulation. 482 U.S. at 12. The Court reasoned that "Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations[, but this] concern only arises . . . with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." *Id.* at 11; *see also Peace v. Am. Gen. Life Ins. Co.*, 462 F.3d 437, 440–41 (5th Cir. 2006) (holding that the employer did not have a plan under ERISA where no administrative scheme was required to pay the annuity benefit).

Federal circuit cases addressing the preemption issue confirm that "ERISA . . . preempts state common law causes of action that reference or pertain to an ERISA plan." *Eide v. Grey Fox Technical Servs. Corp.*, 329 F.3d 600, 604 (8th Cir. 2003); *see also Epps v. NCNB Tex.*, 7 F.3d 44, 45 (5th Cir. 1993) ("When a court must refer to an ERISA plan to determine the plaintiff's retirement benefits and compute the damages claimed, the claim relates to an ERISA plan."). Further, if alleged promises made to employees "were simply an attempt to amend [an] existing plan, then it follows that they were based on that plan." *Crews v. Gen. Am. Life Ins. Co.*, 274 F.3d 502, 505 (8th Cir. 2001).

The trial court found that Tyco's promises to pay severance to the Gimpel Employees were independent agreements based on the West Gulf Bank Schedule terms, not Tyco's ERISA Plan. The court of appeals agreed, holding that the RIAs' provision for "standard Severance in accordance to the severance schedule associated with the closure of this facility" referred to the West Gulf Bank Schedule, 365 S.W.3d at 767, and that the West Gulf Bank Schedule "was not associated with or related to an ERISA Plan," *id.* at 769. The concurring justice in the court of appeals would have

held that, rather than creating an independent duty, the RIAs and the West Gulf Bank Schedule were merely impermissible amendments to the Tyco Severance Plan and were thus "related to" the Plan and preempted by ERISA. *Id.* at 776–78 (Massengale, J., concurring).

As an initial matter, and leaving aside the RIAs for the moment, we disagree with the trial court's and court of appeals' conclusion that the West Gulf Bank Schedule was not related to the ERISA Plan, as they rely on evidence that is not probative of the improper amendment issue and ignore conclusive evidence contradicting that conclusion. Those courts found persuasive the undisputed fact that the West Gulf Bank Schedule's 6-and-26 schedule was in use at the West Gulf Bank facility, and had been communicated to its employees, before the ERISA Plan's formal amendment.[8] By itself, however, this evidence is inconclusive. The express terms of the West Gulf Bank Schedule, the principal document on which the Gimpel Employees rely, provide that it "supersede[s] any prior plan, program or policy under which the Company provided severance benefits prior to the Effective Date of the Policy." And Tyco provided such benefits under its ERISA Plan. This is consistent with Tyco's internal e-mails and Kriendler's testimony that the 6-and-26 schedule was intended to replace the ERISA Plan's schedule of benefits as it applied to certain employees at the West Gulf Bank facility, and that confusion existed about the need to

[8] This is consistent with the trial court's finding that one portion of Kriendler's testimony—that she created the specific one-page document outlining the West Gulf Bank Schedule for her own use and did not intend for it to be distributed to employees—lacked credibility. Kriendler never denied, and in fact affirmatively testified, that by August 2006 Tyco intended the 6-and-26 schedule reflected in the West Gulf Bank Schedule to apply to the closure of the West Gulf Bank facility.

formally amend the ERISA Plan to effectuate that change.[9] Based on this evidence, we can come to no other conclusion than that the West Gulf Bank Schedule was an attempt to amend Tyco's ERISA Plan and that the formal process of amending the ERISA Plan was completed in February 2007.[10] As discussed below, this conclusion is dispositive of the preemption question presented.

Addressing the non-RIA Employees' claims first, we hold that they are preempted by ERISA. The trial court found that Tyco agreed to pay severance to those employees by directly communicating the West Gulf Bank Schedule terms to the employees and posting the schedule on a facility bulletin board. But promises to pay severance pursuant to the West Gulf Bank Schedule were simply promises to pay severance pursuant to an improperly amended ERISA Plan. It follows, then, that such promises "were based on that plan." *Crews*, 274 F.3d at 505.

While the RIA Employees' claims are a closer question, we similarly hold that they are preempted. The RIAs, in order to give employees incentive to remain with Tyco through the closure of the West Gulf Bank facility, promised the employees (1) a one-time cash bonus, payable without further condition, and (2) "in the event that the Employee is not offered Comparable Employment with Tyco, . . . the standard Severance in accordance to [sic] the severance schedule associated with the closure of this facility." Although the bonus provision, with which Tyco complied, is not at

[9] The trial court found that the West Gulf Bank Schedule had been created in connection with a prior restructuring. Specifically, Kriendler testified that the 6-and-26 schedule was utilized with respect to a handful of employees who had been displaced when two other Tyco facilities were relocated. We fail to see how this evidence is relevant to the question of whether the schedule was an improper attempt to amend the ERISA Plan with respect to the West Gulf Bank employees.

[10] The parties do not address, and we express no opinion on, the propriety under ERISA of making the amended Plan effective retroactively to December 1, 2006.

issue in this case, a comparison of that provision with the severance provision aids our conclusion that the latter is preempted.

The bonus provision does not refer to or rely on the ERISA Plan in any way, and is akin to the non-preempted statute in *Fort Halifax* mandating a one-time, lump-sum severance payment to employees for remaining employed through a plant closure. *Fort Halifax*, 482 U.S. at 12. By contrast, the severance provision may be analyzed only in conjunction with the "standard Severance." The trial court and court of appeals held that the "standard Severance" referenced in the RIAs was the West Gulf Bank Schedule and that these two documents could be analyzed independently of the ERISA Plan. But as discussed above, the West Gulf Bank Schedule was an improper attempt to amend the ERISA Plan's schedule of benefits, which was subsequently incorporated by formal amendment to the Plan. Accordingly, even if the "standard Severance" to which the RIAs refer is the severance benefit described in the West Gulf Bank Schedule, that Schedule itself relates to and is an improper attempt to amend the ERISA Plan. *See* 365 S.W.3d at 777 (Massengale, J., concurring).

In turn, any benefits must be calculated pursuant to the ERISA Plan, which, as amended, sets out the 6-and-26 schedule described above. *See Epps*, 7 F.3d at 45 (holding that an employee's claim for breach of a letter agreement was preempted by ERISA where the agreement "d[id] not specify the amount or other terms of [the employee's] retirement benefits, and the court would have to refer to the [employer's ERISA-governed retirement plan] to determine [the employee's] retirement benefits and calculate the damages claimed"). We thus agree with the concurring justice in the court of appeals that "[t]he contract claims at issue have the forbidden connection because the

RIAs reference and borrow terms from Tyco's [ERISA P]lan, yet they also purport to modify the eligibility parameters of the severance benefit provided under that plan." 365 S.W.3d at 777 (Massengale, J., concurring); *see also Crews*, 274 F.3d at 505 (where promises made to employees are "simply an attempt to amend [an] existing plan, then it follows that they were based on that plan").

The RIAs' reference to and reliance on the ERISA Plan is significant and distinguishes this case from those relied upon by the RIA Employees. In *Crews*, for example, General American Life Insurance Company allegedly promised its employees a lump-sum severance payment in consideration for the employees' remaining with the company following the termination of its contract with the Health Care Financing Administration. 274 F.3d at 505–06. General American did not mention the plan in promising to pay the "stay-on bonus," which was calculated differently from the benefit in the established plan. *Id.* at 505. Further, the bonus's purpose was unrelated to the plan's purpose of aiding terminated employees. *Id.*

The stay-on bonus in *Crews* is akin to the cash-bonus provision in the RIAs. Both specify a benefit in a particular amount that differs from the calculation under an established ERISA plan, and both are triggered solely by the employees' remaining with the company through a fixed date. By contrast, the RIAs' severance provision enumerates benefits that can only be calculated by reference to the West Gulf Bank Schedule, which in turn relates to the ERISA Plan. Further, by promising the severance payment only in the event the employee is not offered "comparable employment," the severance provision goes beyond giving employees incentive to stay with the company and remains tied to protecting employees who suffer at least an adverse employment

action, if not a total loss of employment, through no fault of their own. The ERISA Plan serves a similar purpose of providing benefits to employees who are involuntarily terminated for reasons other than cause.

The RIA Employees also rely heavily on *Gresham*, in which the Fourth Circuit held that an employee's breach-of-contract claim based on a severance provision in a written employment offer was not preempted by ERISA because the agreement operated independently of the employer's established severance plan. 404 F.3d at 259. The facts of *Gresham* are similar in several ways to the facts at hand. As in this case, the established plan denied severance to an employee who was offered employment by a purchasing company, while the only condition on payment of severance in the employment agreement was termination without cause. *Id.* Further, the Fourth Circuit held that the employee was entitled to the severance benefit even though he had accepted employment with a purchasing company. *Id.* at 262–63.

However, significant differences also exist between the circumstances in *Gresham* and those at issue here that lead us to reach the opposite conclusion on preemption. First, the offer letter in *Gresham* did not mention the established plan and expressly set out a benefit calculation that differed from the plan's schedule. *Id.* at 256; *see also Santini v. Cytec Indus., Inc.*, 537 F. Supp. 2d 1230, 1245 (S.D. Ala. 2008) ("In the instant action, the agreement at issue does not promise to provide benefits under the Plan or refer to the Plan in any way. Plaintiff's employment contract agrees to provide a notice period and/or payments upon termination, calculated according to the terms stated in the employment contract."). Again, in this case, the RIAs referenced the West Gulf Bank Schedule, which related to the ERISA Plan, and benefits could not be calculated independently

of that Plan. Further, in *Gresham*, the Fourth Circuit found persuasive that there was "no indication in the record that severance pay awarded to Gresham pursuant to his employment agreement would be paid out of funds allocated to the Severance Plan." 404 F.3d at 259; *see also Eide*, 329 F.3d at 606 (noting that promised severance benefits in the event of termination by a purchasing company "were not to be delivered pursuant to [the severance plan]," but were to be distributed as a lump-sum payment upon termination). In this case, both the ERISA Plan and the West Gulf Bank Schedule provided that benefits "shall be paid in accordance with normal payroll practices over the Severance Period or from a supplemental unemployment benefits trust." All indications, therefore, are that any severance benefits owed to the employees under the RIAs would originate from the same source as any benefits owed under the ERISA Plan.

Based on the clear connection between the RIAs and the ERISA Plan, we cannot conclude that they operated independently. That said, we share the Fourth Circuit's concern, expressed in *Gresham*, that a finding of preemption "whenever the plaintiff claims an independent promise to pay benefits of the same type as benefits also provided by an ERISA-governed plan would limit employers' ability to lure desirable employees by offering benefits better than those available to the rank-and-file." 404 F.3d at 259 n.5. But our holding is not based on the fact that the RIAs' severance provision promises to pay benefits "of the same type" as benefits offered under the ERISA Plan. Rather, it is based on the fact that the employees' entitlement to benefits under the RIAs, and the damages claimed, could not be fully evaluated without considering the ERISA-governed plan that was expressly referenced in the RIAs. Further, the benefits originated from the same source. As discussed above, at best, the RIA Employees' claims stem from an improper attempt to amend

the ERISA Plan and are thus necessarily "based on" that plan. *Crews*, 274 F.3d at 505. Accordingly, we hold that the RIAs did not operate independently of the ERISA Plan. The RIA Employees' breach-of-contract claims are thus "related to" the ERISA Plan and are in turn preempted by ERISA.

IV. Conclusion

Because the Gimpel Employees' contract claims are preempted, we need not decide whether legally sufficient evidence supports the trial court's findings as to those claims.[11] Although we disagree with the court of appeals' opinion on the preemption issue, we nevertheless agree with the court's judgment that the Gimpel Employees take nothing by their breach-of-contract claims. Accordingly, we affirm the court of appeals' judgment.

Debra H. Lehrmann
Justice

OPINION DELIVERED: March 28, 2014

[11] The Gimpel Employees have never asserted that they prevail under ERISA in the event the claims are preempted. At oral argument, counsel for the Gimpel Employees conceded that they could not successfully assert a claim for benefits under the ERISA Plan. Thus, there is no basis on which to remand the case.

IN THE SUPREME COURT OF TEXAS

NO. 12-0410

IN RE HEALTH CARE UNLIMITED, INC.

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

The trial court in this case granted a motion for new trial based on a juror's communications with a party's representative even though there was no evidence that the communications probably caused injury. In the absence of such evidence, we conclude that the trial court abused its discretion and improperly granted a new trial, and we conditionally grant relief.

The estate and survivors of Belinda Valdemar (collectively Valdemar's Survivors) sued Relator Health Care Unlimited, Inc. (HCU) and its employee, Edna Gonzalez, after Valdemar died as a result of an automobile accident. Valdemar was a passenger in a vehicle that Gonzalez was driving at the time of the accident, and Valdemar's Survivors alleged that HCU was vicariously liable because Gonzalez was driving within the course and scope of her HCU employment. Although the jury agreed that Gonzalez negligently caused the accident, it found that she was not acting within the scope of her employment, and thus HCU was not vicariously liable. Valdemar's Survivors moved for a mistrial, alleging that the presiding juror, Dominique Alegria, had engaged

in juror misconduct by communicating with an HCU employee, Sonny Villarreal, during breaks while the jury was deliberating.

The trial court initially granted the motion without conducting an evidentiary hearing. After HCU filed a motion for reconsideration, arguing that the Texas Rules of Civil Procedure require that "the court shall hear evidence [of alleged juror misconduct] from the jury or others in open court," *see* TEX. R. CIV. P. 327(a), the trial court conducted a hearing at which Juror Alegria, Villarreal, and Gi Anna Valdemar (one of Valdemar's Survivors) testified. Gi Anna testified that, while the jury was taking a break from its deliberations, she saw Juror Alegria place a call on her cell phone and overheard Juror Alegria address the person on the call as "Sonny," whom she believed to be Villarreal. Juror Alegria and Villarreal both admitted in their testimony that they had telephone conversations during the time the jury was deliberating, but explained that they knew each other from church and their discussions only involved preparations for the food to be served at an upcoming church retreat. Voicemail recordings played during the hearing supported this testimony, and Juror Alegria and Villarreal both denied that they talked about the pending case at all during the trial. Juror Alegria testified, in fact, that she did not know Villarreal was employed by HCU at that time, and she denied that she ever saw or noticed Villarreal at the trial. Juror Alegria and Villarreal both also admitted that Villarreal was a member of the school board of the district in which Juror Alegria and her husband were employed.

The trial court treated the motion for mistrial as a motion for new trial and issued an amended order, again granting the motion. In a two-page amended order, the trial court found that Villarreal was "a local manager" for HCU, that he sat behind and conferred with HCU's counsel

during the evidentiary part of the trial "in the full view of the jury," that during jury deliberations Juror Alegria had at least two cell phone conversations with Villarreal "concerning preparations for an upcoming church retreat," that Villarreal was a board member of the school district at which Juror Alegria's husband was employed, and that Juror Alegria had violated the court's instructions by communicating with an HCU representative during the trial of the case. The court concluded in its order that, "[i]n light of the totality of the circumstances, the integrity of the verdict rendered in this cause has been compromised and in the interest of justice, a new trial should be granted." The trial court did not find or conclude, however, that Juror Alegria's communications with Villarreal were material or probably resulted in injury. HCU petitioned the San Antonio Court of Appeals for mandamus relief, and that court denied the petition without explanation.

In *In re Toyota Motor Sales, U.S.A. Inc.*, we held that an appellate court may conduct a merits-based review of a trial court's order granting a new trial. 407 S.W.3d 746, 757 (Tex. 2013). Because we held in previous cases that a trial court must give a reasonably specific explanation of its reasons for granting a new trial,[1] we concluded that an appellate court's ability to evaluate the specificity of a stated reason is toothless if it cannot also evaluate the correctness of the stated reason. *See id.* at 757–58. Thus, an appellate court may review whether a trial court's explanation supports its decision to grant a new trial. *Id.* at 758. In the instant case, the trial court's amended order made specific findings of fact and conclusions of law based on the circumstances of the case.

[1] *See In re Columbia Med. Ctr. Of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 206 (Tex. 2009) (holding that when a trial court grants a new trial it must provide an understandable, reasonably specific explanation for doing so); *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688–89 (Tex. 2012) (holding that the trial court's stated explanation must be legally appropriate and specific enough to assure parties that the articulated reasons are based, not on a pro forma template, but on the facts and circumstances of the case).

However, under Toyota, "[s]imply articulating understandable, reasonably specific, and legally appropriate reasons is not enough; the reasons must be valid and correct." *Id.* at 759.

To warrant a new trial based on jury misconduct, the movant must establish that (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. TEX. R. CIV. P. 327(a); *see also Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000). The complaining party has the burden to prove all three elements before a new trial can be granted. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985). Whether misconduct occurred and caused injury are questions of fact for the trial court. *Golden Eagle*, 24 S.W.3d at 372.

Rule 327's first requirement is not at issue in this case. It is undisputed that Alegria communicated with Villarreal during jury deliberations while the jury was on break, and thus that the instance of misconduct did occur. By engaging in these communications, Alegria violated the trial court's instructions, regardless of whether she knew that Villarreal was an HCU employee or representative, and Gi Anna Valdemar's and the trial court's concerns about these communications were justified. But HCU contends that there is no evidence to satisfy Rule 327's requirement that the misconduct cause probable injury. We agree. HCU also contends that the evidence is insufficient to establish materiality, Rule 327's second requirement. Because we find no evidence of probable injury, we need not address whether the misconduct was material.

"To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment." *Redinger*, 689 S.W.2d at 419 (internal quotation marks

omitted). We find no evidence in the record that Alegria's conversations with Villareal about the church retreat affected her vote or any other juror's vote.

Valdemar's Survivors cite to this Court's holding in *Texas Employers' Insurance Ass'n v. McCaslin* to support their contention that the communications were themselves sufficient to show materiality and probable injury. 317 S.W.2d 916 (Tex. 1958). But the facts of this case are distinguishable from the facts of *McCaslin*. In *McCaslin*, we held that injury occurred as a matter of law when undisputed facts showed that the plaintiff went to the office of one of the jurors, engaged the juror in conversation, and asked the juror to "'[b]e sure and do all you can to help me,' or something of a similar nature." *Id.* at 918. As we explained, "[t]he testimony in the record clearly indicate[d] to us that the purpose of this visit was to influence [the juror's] actions as a juror." *Id.* The ultimate issue was whether the trial was substantially unfair, and we held that misconduct not resulting in injury does not "condemn a trial as unfair." *Id.* at 921 (quoting *Cloudt v. Hutcherson*, 175 S.W.2d 643, 649 (Tex. Civ. App.—1943, writ ref'd w.o.m.)). We found that the communication in *McCaslin* was an overt act that created a strong inference of prejudice sufficient to show probable injury. *Id.*

In contrast to *McCaslin*, there is no evidence here that Juror Alegria's communications with Villareal probably changed or influenced Juror Alegria's vote or the outcome of the trial. In *McCaslin*, the plaintiff discussed the trial with the juror in a direct attempt to persuade the juror to help her in the case. Their communications were specifically and directly related to the trial, and intended to affect the juror's vote. In this case, the evidence established and the trial court found that Villareal and Alegria communicated solely about the upcoming church retreat, and these were

communications that began before the trial. As we held in *McCaslin*, misconduct itself does not condemn a trial as unfair. Here, there is no evidence that the communications, although prohibited by the trial court, were related to the trial or probably affected its outcome.

The record reveals that the trial court essentially used an "appearance of impropriety" standard to grant the motion for new trial. During discussions with counsel in open court, the trial judge explained:

> [Y]ou know, that conversation should have never taken place, as innocent as it may very well have been. But it—the mere appearance of that looks bad. . . . And—and I don't think I need to hear the evidence, whether it's good or should or the legal part about it. That in and—in and of itself, that there was a contact with someone associated with a party in this case, with a member of that jury during the actual trial of the cause, is enough for me to grant a mistrial in this matter. And you can argue what you want to from there, but that's going to be my decision.

After hearing evidence, the court concluded in its order granting a new trial that "the integrity of the verdict rendered in this cause has been compromised and in the interest of justice, a new trial should be granted." While we appreciate the court's desire to protect the "integrity of the verdict," Rule 327 accomplishes this by giving due consideration to the right to a jury trial in an effort to best protect the trial process. *See In re Columbia*, 290 S.W.3d at 213 ("[S]uch a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury."). Under Rule 327, protecting the trial process in the jury misconduct context requires a finding of misconduct, materiality, and probable injury, not merely that there was an appearance of impropriety from which harm could be presumed. The facts here, without more, do not support a finding of probable injury,

and therefore do not satisfy Rule 327 requirements to warrant granting a new trial based on jury misconduct.

Accordingly, after reviewing the trial court's findings and reasons for granting a new trial in this case, we hold that the trial court abused its discretion. The evidence is not legally sufficient to support a finding that the communications between the juror and the person associated with a party probably caused injury. Thus, granting the motion for new trial was improper. We conditionally grant relief and order the trial court to withdraw its First Amended Order Granting New Trial and render judgment on the verdict.

OPINION DELIVERED: April 25, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0452

GOTHAM INSURANCE COMPANY, PETITIONER,

v.

WARREN E&P, INC. F/K/A PETROLEUM DEVELOPMENT CORPORATION D/B/A PEDECO, INC., WARREN RESOURCES, INC., AND OIL TECHNOLOGY FUND 1996 - SERIES D, L.P., RESPONDENTS

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

Argued November 8, 2013

JUSTICE GUZMAN delivered the opinion of the Court.

This is an insurance coverage dispute concerning an oil well that blew out and caught fire. The parties have previously appealed on three separate occasions to the court of appeals, and this is the first time we have granted review. Though the parties raise a number of issues related to equity and contract claims, the crux of our analysis is determining the proper role of equity claims when a contractual provision addresses the matter in dispute. Here, the insured obtained an insurance policy to reimburse its expenses in regaining control of an oil well in the event of a blowout. When the well blew out, the insured represented to the insurer that it owned a 100% working interest in the well and the insurer paid claims accordingly. But a later-discovered joint operating agreement reflected that the insured might have possessed less than a 100% working

interest in the well. The insurer sued for a return of its payments under breach of contract and equity theories.

In the first two appeals, the court of appeals held that summary judgment in favor of the insurer was proper on its equity claims. The third appeal was transferred to a different court of appeals under docket equalization procedures. That court of appeals overturned the prior rulings, concluding that under *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*,[1] the insurer had no equitable right to reimbursement. We agree with the court of appeals that the insurer may not proceed on its equity claims but for different reasons. We held in *Fortis Benefits v. Cantu* that an insurer is limited to contractual claims when the policy addresses the matter at issue.[2] There, we held that an insurer is limited to contractual claims when the policy addresses the matter at issue. Here, this policy contains several clauses addressing misrepresentations, reporting, salvage and recoveries, subrogation, and due diligence. Thus, because the insurance contract addresses the insured's conduct, we hold that the insurer cannot rely on its equity claims. We therefore reverse the judgment of the court of appeals and remand to that court to address the contract claims.

I. Background

The factual and procedural background surrounding this appeal is complex. The underlying suit involves the Halff-Oppenheimer No. 1 oil well (the H&O Well) in Frio County, which blew out and caught fire in 1997. Pedeco, Inc., now known as Warren E&P, Inc. (Pedeco), entered into a

[1] 246 S.W.3d 42 (Tex. 2008).

[2] 234 S.W.3d 642 (Tex. 2007).

joint venture with Warren Resources, Inc. (WRI) and Oil Technology Fund 1996—Series D, L.P. (the Fund) in 1992 to drill a series of wells that included the H&O Well. In 1996, Pedeco, WRI, and the Fund entered into a joint operating agreement that covered a number of wells, including the H&O Well, once the wells went into production. The operating agreement designated Pedeco as the operator and indicated Pedeco and WRI would each possess 12.5% cost-bearing working interests while the Fund would possess the remaining 75% interest.[3] After receiving a drilling permit, Pedeco began drilling the H&O Well in July 1997. During the drilling process, the rig lost circulation pressure, formation gas rose to the surface, the blowout preventer failed, and the gas ignited.

Pedeco was insured under a policy by Gotham Insurance Company (Gotham) to reimburse Pedeco for actual expenses in regaining or attempting to regain control of the well. The policy covered Pedeco to the extent of its working interest in the well.[4] Pedeco notified Gotham of the loss and represented it was the sole operator and held a 100% working interest in the well. Gotham requested all turnkey contracts,[5] joint operating agreements, and other documents regarding the claim. Pedeco sent a handwritten response from its insuring agent that Pedeco was the operator for the well and subsequently sent sworn proofs of loss to Gotham that it held a 100% working interest.

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[3] These allocations are for revenues received before payout. After the well reached payout, revenue was to be distributed 20% each to Pedeco and WRI and 60% to the Fund under the operating agreement. Notwithstanding these revenue allocations, Pedeco and WRI remained obligated for drilling expenses.

[4] The primary insured on the policy was R.W. Dirks Petroleum Engineers, Inc., whom Pedeco contracted with to perform its duties before Pedeco became fully licensed in Texas. Pedeco was named an additional insured for no additional premium on the representation that Pedeco was a non-operator. The parties initially disputed the effect of that representation, which is not at issue in our disposition of this appeal.

[5] In this context, a turnkey contract is a contract by which an entity agrees to drill a well for a fixed price. The record indicates WRI agreed to a turnkey contract with the Fund, and Pedeco agreed to a turnkey contract with WRI for a lower price.

WRI reimbursed Pedeco for its expenses in controlling the well, but WRI's CEO testified that under the arrangement between WRI and Pedeco, the two companies would share evenly in drilling profits and drilling losses in the aggregate at the end of each year. Gotham subsequently paid claims totaling over $1.8 million.

After issuing payment on the claim, in May 1998, Gotham discovered that several subcontractors providing services to Pedeco for the H&O Well had sued Pedeco for allegedly failing to use proper blowout prevention equipment. Gotham also obtained a copy of Pedeco's joint operating agreement from another source indicating Pedeco's interest was 12.5%. Gotham then inquired of Pedeco whether it had a 100% working interest in the well, as it previously reported, in light of the agreement. Pedeco responded that it held 100% of the equitable title to the well under a farmout agreement, was the sole performing party under the turnkey drilling agreements, would have full liability in the event of a blowout, and paid full premiums to Gotham for its full interest in the well.

Gotham ceased further payments under the claim and intervened in the existing lawsuit involving Pedeco and its subcontractors. Gotham alleged Pedeco breached the insurance policy by using improper blowout prevention equipment and making misrepresentations regarding its interest in the well. Gotham also added a claim for restitution and unjust enrichment against Pedeco for a return of its payments, and sued WRI and the Fund to recoup the portion of its payments that benefitted them under theories of restitution, unjust enrichment, and subrogation. Pedeco counterclaimed for breach, alleging that Gotham failed to pay sums due under the policy.

The parties were in the discovery phase of the underlying suit when we announced in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County* that an insurer may not seek reimbursement from the insured in equity for settlement funds paid in the absence of a contractual right to do so. 52 S.W.3d 128, 133–36 (Tex. 2000).

In the trial court, Gotham, Pedeco, WRI, and the Fund all moved for summary judgment. In 2001, the trial court denied Gotham's motion for summary judgment and entered judgment in favor of Pedeco, WRI, and the Fund. In the first of three appeals, the court of appeals held Pedeco should take nothing on its contract counterclaim on the ground that it was not entitled to benefits under the policy because WRI reimbursed Pedeco, who thus suffered no loss. __ S.W.3d __, __ (*Gotham I*). The court of appeals further held that because Pedeco was not entitled to benefits, Gotham prevailed on its claims for restitution and unjust enrichment against Pedeco, WRI, and the Fund. *Id*. at __. The court reasoned that our holding in *Matagorda* (precluding equitable reimbursement for voluntary settlement of claims in litigation when the contract does not address such a right to recovery) did not apply because Gotham was not settling a claim in litigation on behalf of Pedeco. *Id*. at __. But the court remanded Gotham's restitution and unjust enrichment claims for a determination on the amount of damages because "the judgment that should have been rendered [wa]s not at all obvious." *Id*. at __.

On the first remand, the trial court awarded Gotham a judgment of over $1.8 million against Pedeco, WRI, and the Fund. In the second appeal, the court of appeals again reversed and remanded because the trial court failed to conduct further proceedings to determine the amount Gotham was entitled to under its restitution and unjust enrichment claims. __ S.W.3d __, __ (*Gotham II*).

In January 2010, the trial court again awarded Gotham judgment for over $1.8 million against Pedeco, WRI, and the Fund.[6] The third appeal was transferred under docket equalization procedures to a different court of appeals. 368 S.W.3d 633, 634 n.1 (*Gotham III*). After determining that *Frank's Casing* was a change in governing law, the court of appeals reconsidered *Gotham I* and *Gotham II* and held that Gotham was not entitled to any equitable right of reimbursement because it concluded that such a right does not exist in the insurance policy.[7] *Id*. at 638–39. We granted Gotham's petition for review.

II. Discussion

We conclude that under *Fortis Benefits*, Gotham may not proceed on its equity claims because the policy addresses the matters in dispute. 234 S.W.3d at 648–49. Regarding Gotham's contract claim, we disagree with the court of appeals in *Gotham III* that the contract conclusively precludes Gotham's recovery. We hold that there is some evidence Pedeco breached the policy as alleged in Gotham's live pleading. Finally, we disagree with the *Gotham I* court of appeals' holding that because WRI reimbursed Pedeco's expenses in controlling the well, Pedeco suffered no loss. There is record evidence that WRI and Pedeco agreed to evenly share in the aggregate drilling profits and losses at the end of each calender year; therefore Gotham has not conclusively established that Pedeco suffered no loss.

[6] During the second remand, we issued *Frank's Casing*, where we declined to recognize an exception to the rule we announced in *Matagorda*. 246 S.W.3d at 43–44.

[7] The dissenting justice concluded that "*Frank's Casing* did not change the law" and did not allow the court to revisit the holding of *Gotham I*. 368 S.W.3d at 643 (Antcliffe, J., dissenting).

A. Gotham's Equity Claims

The court of appeals in *Gotham III* concluded Gotham had no equitable right to reimbursement under *Frank's Casing*. 368 S.W.3d at 638–39. We agree that Gotham cannot proceed on its equity claims but for a different reason.[8]

In *Fortis Benefits*, we held that "[w]here a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy." 234 S.W.3d at 648–49. At issue in *Fortis Benefits* was the equitable "made whole" doctrine that bars insurers from recovering through equitable subrogation if the insured's loss exceeds their recovery. *Id*. at 645. Without referencing the "made whole" doctrine, Fortis Benefits' insurance policy granted it the right to recover through subrogation against third parties or seek reimbursement from the insured. *Id*. at 651. We held that:

> We generally adhere to the maxim that "equity follows the law," which requires equitable doctrines to conform to contractual and statutory mandates, not the other way around. Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.

[8] The *Gotham III* court revisited the holdings of the *Gotham I* and *Gotham II* courts. Under the law of the case doctrine, a court of appeals is ordinarily bound by its initial decision if there is a subsequent appeal in the same case; but a determination to revisit an earlier decision is within the discretion of the court under the particular circumstances of each case. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 182 (Tex. 2012); *City of Houston v. Jackson*, 192 S.W.3d 764, 769 (Tex. 2006); *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). Regardless, the law of the case doctrine does not foreclose our consideration of legal questions properly before us for the first time. *Jackson*, 192 S.W.3d at 769. Therefore, we first assess the court's holding in *Gotham III* that Gotham may not proceed on its equity claims.

Id. at 648–49. Because the contractual provisions there did not violate positive law or offend public policy, we enforced the contractual provisions without subordinating them to the equitable "made whole" doctrine.[9] *Id*. at 649, 651.

Here, Gotham has argued that several clauses in the policy address its ability to recover from Pedeco and other parties for payments made based on Pedeco's purported failure to use due diligence in preventing the blowout and alleged misrepresentations regarding its interest in the well. First, the due diligence clause requires Pedeco to utilize a blowout preventer "in accordance with all regulations, requirements and normal and customary practices in the industry." Second, under the misrepresentation clause, if Pedeco makes material misrepresentations of fact concerning its interest or the subject of the insurance, one remedy is to allow Gotham to void the policy. Third, the salvage and recoveries clause operates to apply payments and recoveries received after settling a loss as if received before the loss. Fourth, the reporting clause requires Pedeco to semi-annually report to Gotham the status of all covered wells. And fifth, the subrogation clause grants Gotham the authority to pursue Pedeco's right to recover against other parties that may be liable for the loss.[10] As in *Fortis Benefits*, these clauses indicate that the contract addresses the matter at issue,

[9] We decided *Fortis Benefits* well after this lawsuit began, but we cannot say that *Fortis Benefits* announced a new rule of law. *See, e.g.*, *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000) (requiring a party opposing claim for unjust enrichment to secure findings "that an express contract exists that covers the subject matter of the dispute" (citing *Freeman v. Carroll*, 499 S.W.2d 668 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.)); *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988) (discussing the general rule that one may recover in quantum meruit only when there is no express contract).

[10] Gotham's live pleading omitted its claim for contractual subrogation, but this does not negate the fact that the contract addresses the issue and bars Gotham from pursuing an equitable subrogation claim.

and Gotham is limited to the contract rather than equity when determining liability.[11] *See id*. at 648–49.

Thus, Gotham is limited to its contractual claims unless the contractual provisions on which it relies violate positive law or offend public policy. *Id*. When conducting this inquiry, we bear in mind the strong public policy to preserve freedom of contract. *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001). Further, the public policy of the State is reflected in its statutes. *Fortis Benefits*, 234 S.W.3d at 649. Thus, we will enforce the parties' bargain unless it contravenes some positive statute. *Id*.

We held in *Fortis Benefits* that neither contractual subrogation nor reimbursement clauses[12] violate public policy. 234 S.W.3d at 649. And we are aware of no statutes that limit the contractual subrogation or reimbursement clauses at issue here.[13] Likewise, we are aware of no applicable statutes relating to the policy's reporting clause. The due diligence clause requires Pedeco to comply with regulations and industry standards. The Texas Railroad Commission, which regulates oil and gas drilling and production in Texas, promulgated Rule 36 to address blowout prevention equipment to be used in drilling hydrogen sulfide wells such as the H&O Well. 16 TEX. ADMIN. CODE. § 3.36. A contractual clause requiring compliance with state regulations generally will not

[11] We cannot say, however, that it is appropriate to dismiss Gotham's equity claims against Pedeco, WRI, and the Fund at summary judgment. Gotham's live pleading alleges that Pedeco's misrepresentations concerning its working interest could, among other remedies, operate to render the policy void. If Gotham prevails on this theory and elects to void the policy, its equity claims might operate to secure a return of the approximately $1.8 million it paid under the claim. Thus, it is premature to dismiss Gotham's equity claims against Pedeco, WRI, and the Fund.

[12] Gotham contends the salvage and recoveries clause functions as a reimbursement clause.

[13] The Legislature recently specified (with respect to contractual subrogation clauses in certain health insurance policies) the recovery insurers may obtain from a settlement between the insured and the responsible third party that caused the injury. TEX. CIV. PRAC. & REM. CODE § 140.001 *et seq.*

offend public policy. *See Fortis Benefits*, 234 S.W.3d at 649 ("It is indeed difficult to declare something contrary to public policy when state law, both statutory and regulatory, actually suggests approval."); *see also Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 96 (Tex. 2011) (enforcing a contractual agreement when state law did not contravene the agreement).

The remaining clause is the misrepresentation clause. Section 705.003 of the Texas Insurance Code renders invalid insurance clauses that make policies void or voidable due to misrepresentations in proofs of loss unless it is shown at trial that the misrepresentation: (1) was fraudulently made; (2) misrepresented a fact material to the insurer's liability under the policy; and (3) misled the insurer into waiving or losing a valid defense to the policy. TEX. INS. CODE § 705.003.[14] In other words, public policy allows misrepresentation clauses to render insurance policies void or voidable only for fraudulent, material misrepresentations that mislead insurers into waiving or losing defenses. *Id*. Gotham's live pleading alleges that Pedeco "knowingly and wrongfully" reported it had a 100% working interest when it purportedly had no interest in the well, and that Gotham paid claims pursuant to the alleged misrepresentation. The parties do not dispute that Gotham issued payments based upon Pedeco's representation that it possessed a 100% working interest. But the record indicates there are genuine issues of material fact as to whether that representation was false and fraudulently made.[15] If Gotham proves its allegations to be true, the

[14] The precodified version of this law was in effect when the policy was signed and the suit was filed, but it is substantively similar to the present statute. Act of June 7, 1952, 52d Leg., R.S., ch. 491, § 1, sec. 21.19, 1951 Tex. Gen. Laws 868, 1075, *repealed by* Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 26, 2003 Tex. Gen. Laws 3611, 4138.

[15] Regarding falsity, Pedeco indicates it held 100% of the working interests that were available under a farmout agreement with the George R. Brown Company. Gotham asserts that Pedeco would only earn a working interest on the completion of a successful well and also relies on a title opinion indicating WRI (not Pedeco) held the equitable title to the working interest. Regarding whether the representation was fraudulent, this is an inquiry typically left to the jury

misrepresentation clause does not violate public policy and Gotham is limited to its contract claim.[16] In sum, because the policy addresses the matters at issue, Gotham may not proceed on its equity claim against Pedeco.

Gotham argues that even if it may not pursue its equity claim against Pedeco, it may still pursue its equity claim against WRI and the Fund because they passively received benefits that discharged their obligations. We disagree. The policy here addresses the matter of Gotham seeking a return of payments that benefitted others. Gotham does not claim that it paid sums directly to WRI and the Fund. Rather, it claims it made payments to Pedeco as well as through an escrow fund that directly paid third parties that performed services for Pedeco in regaining control of the well. Gotham contends these payments discharged WRI and the Fund's obligations as uninsured co-venturers. Assuming WRI and the Fund were not covered by Pedeco's policy with Gotham,[17] the salvage and recoveries clause and the subrogation clause address Gotham's ability to recover an overpayment that discharged WRI and the Fund's obligations. Gotham asserts that the salvage and recoveries clause allows Gotham to seek reimbursement from Pedeco for WRI's reimbursement of Pedeco's expenses in controlling the well. And if WRI and the Fund had made no such payments

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as it often involves proof of intent by circumstantial evidence. *See Quinn v. Dupree*, 303 S.W.2d 769, 774 (Tex. 1957).

[16] If Gotham proves its allegations that Pedeco knowingly misrepresented its interest, the misrepresentation clause will not violate public policy and the clause could operate to, among other remedies, render the insurance policy void. If Gotham prevails on this theory and elects to void the policy, its equity claim might still allow Gotham to recover. For this reason, we do not affirm the dismissal of Gotham's equity claim against Pedeco at this stage of the proceeding.

[17] It is not entirely clear from the record whether WRI and the Fund were uninsured for the blowout. Pedeco's policy with Gotham applies to co-venturers if certain procedures are followed. The record does not indicate if those procedures were followed. If WRI and the Fund were covered under the policy, the policy addresses the matter and Gotham's equity claim against them is improper. As addressed below, if WRI and the Fund were not covered by the policy, the salvage and recoveries clause and the subrogation clause still address the matter.

(or if Pedeco returned them), the subrogation clause allows Gotham to pursue Pedeco's rights and seek recovery from responsible parties.[18] As addressed above, these clauses do not violate public policy. Because the policy addresses Gotham's right to recover from Pedeco or responsible third parties, Gotham may not proceed on its equity claims against Pedeco, WRI, or the Fund.[19]

B. Gotham's Contract Claim

In addition to its equity claims, Gotham's live pleading contains a claim that Pedeco breached several clauses in the policy, entitling Gotham to recover its overpayment. Pedeco contends Gotham waived its contract claim by moving for entry of judgment only on its equity claims following the remands in *Gotham I* and *Gotham II*. The court of appeals in *Gotham III* concluded that Gotham's contract claim fails because there is no clause in this policy granting Gotham a right to reimbursement. 368 S.W.3d at 638. We disagree with Pedeco that Gotham waived its contract claim and remand for further proceedings.

1. Waiver

In *City of Austin v. Whittington*, we held that a party may raise an independent ground for obtaining the same relief awarded in the judgment as an issue on appeal rather than pursuing a cross-

[18] The subrogation clause provides that Gotham "shall upon reimbursement hereunder to [Pedeco] of any loss, damage or expense be subrogated to all [Pedeco's] rights of recovery against any other person, form or corporation who may be legally or contractually liable for such loss, damage or expense . . . ." That Gotham omitted its contractual subrogation claim in its live pleading does not alter the fact that the contract addresses the matter of subrogation. *See supra* note 10.

[19] Gotham claims in this Court that Pedeco made a false representation (that it was a non-operator) to obtain coverage under the policy and that this false statement negates the policy. But Gotham did not move for summary judgment on this ground in the trial court, and we need not consider it here. *See Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 609 (Tex. 2012).

appeal. 384 S.W.3d 766, 789 (Tex. 2012). Here, Gotham initially moved for summary judgment in the trial court on both its contract and equity claims. The court of appeals in *Gotham I* concluded that Gotham conclusively proved it was entitled to restitution. __ S.W.3d at __. On remand, Gotham moved for entry of judgment on its equity claims, and the trial court entered judgment in its favor. Ultimately, the court of appeals in *Gotham III* reversed, holding that Gotham was not entitled to any equitable right of reimbursement because it concluded such a right does not exist in the insurance policy. 368 S.W.3d at 638–39.

In this Court, Gotham contends that its contract claim is an alternate ground to its equity claims to uphold the trial court's judgment in its favor. Gotham has sought the same monetary relief (a return of payments made to or on behalf of Pedeco) under both its equity and contract claims. Because Gotham has raised on appeal its contract claim as an independent ground for the relief awarded in the trial court's judgment, it has not waived its contract claim. *Whittington*, 384 S.W.3d at 789**.**

2. *Gotham III*

Having determined Gotham did not waive its contract claim, we next address the court of appeals' holding in *Gotham III* that no contract provision allowed Gotham to recover. 368 S.W.3d at 638. Specifically, the court of appeals held without elaboration that "Pedeco's policy with Gotham did not provide for a right to reimbursement for payment of non-covered claims. Therefore, Gotham has no right to reimbursement from [Pedeco] for payment of the non-covered claims in question." *Id*. We disagree.

A reimbursement clause may operate to allow an insurer to recover payments previously made even if the insured did not breach the policy. *See Frank's Casing*, 246 S.W.3d at 43–45 (discussing right to reimbursement of settlement proceeds if it is later determined that coverage did not exist for reasons unrelated to an insured's breach). But the absence of a reimbursement clause does not necessarily foreclose an insurer's ability to recover if the insured has breached the policy. The insurer may still pursue a claim that the insured's breach proximately caused its damages, which is subject to any applicable defenses and affirmative defenses. As addressed above, this policy contains clauses requiring Pedeco to comply with all regulations, and potentially rendering the policy void if Pedeco made a material misrepresentation concerning its interest. Gotham's live pleading alleges that Pedeco breached these clauses by: (1) failing to use state-mandated blowout prevention equipment suitable for the well, and (2) misrepresenting its interest in the well. There is some evidence supporting both allegations. Regarding due diligence, there is evidence that Pedeco's drilling subcontractor violated Railroad Commission Rule 36 by using improper blowout prevention equipment, despite Pedeco's contractual obligation to comply with all regulations. Regarding misrepresentations, there is some evidence that Pedeco was drilling the well under a farmout agreement that would only grant Pedeco a working interest once it completed a successful well. Thus, there is some evidence that Pedeco breached the contract in the manner Gotham alleged.

In addition to proving breach, Gotham must also prove the breach proximately caused its damages[20] and must overcome any applicable defense or affirmative defense.[21] The parties' briefing

[20] If Gotham prevails on its due diligence theory, Gotham must prove Pedeco's alleged failure to use due diligence caused its damages. If Gotham prevails on its misrepresentation theory, Gotham could elect the remedy of voiding the policy and seek restitution of its payments under its equitable theories. *See supra* notes 11, 16. And as

before us and the *Gotham III* court of appeals fails to indicate that Gotham conclusively proved breach or damages or the conclusive application of a defense or affirmative defense. Therefore, we disagree with the court of appeals in *Gotham III* that there is no basis for Gotham's contract claims at this stage of the proceeding. *See* 368 S.W.3d at 638.

3. *Gotham I*

The only remaining holding regarding the contract claims in this trilogy of appeals is the court of appeals' holding in *Gotham I* that Pedeco suffered no loss because WRI reimbursed its expenses and was therefore not entitled to reimbursement under its indemnity insurance policy. __ S.W.3d at __. In light of our holding that Gotham may not pursue its equity claims, we may consider this prior holding regarding Gotham's contract claims, as Pedeco requests that we do. *See Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 182–83 (Tex. 2012) (considering an issue raised in the first appeal after the petition from the third appeal); TEX. R. APP. P. 53.3(c)(2).[22]

In arriving at its conclusion that Pedeco suffered no loss because WRI reimbursed it, the only authority on which the court of appeals relied is our opinion from *Paramount Fire Insurance Co.*

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addressed below, Gotham contends that regardless of the manner of Pedeco's breach, WRI reimbursed Pedeco's expenses and Pedeco thus suffered no loss for which insurance would reimburse it. As Gotham has yet to prevail on the liability aspect of its contract claim in this Court, we cannot yet assess the measure of recovery.

[21] For example, Pedeco raised in its motion for summary judgment that Gotham gave Pedeco no notice of its refusal to be bound by the policy within 90 days of learning full information regarding due diligence and Pedeco's working interest, as required by former article 21.17 of the Texas Insurance Code. *See* TEX. INS. CODE § 705.005. Other than the holding in *Gotham I* that Pedeco suffered no loss, s*ee infra* Part II.B.3, the parties' briefing here does not address any of the defenses they raised in *Gotham I*.

[22] Under docket equalization principles, our disposition of the issues in *Gotham III* indicates that we "stand[] in the shoes" of the *Gotham I* court of appeals and may consider its holdings that are challenged in this appeal. *See* TEX. R. APP. P. 41.3 cmt.

v. Aetna Casualty & Surety Co., 353 S.W.2d 841, 844–45 (Tex. 1962), where we held that an insured seller of a home that caught fire before closing suffered no loss because the buyer paid the seller the full contract price. __ S.W.3d at __. Regardless of the court of appeals' conclusion that *Paramount* applies here, we disagree with the court of appeals' analysis of the summary judgment record.

Our standards for reviewing summary judgments are familiar. Because the court of appeals affirmed summary judgment in favor of Gotham, we must examine the entire record in the light most favorable to Pedeco, indulging every reasonable inference and resolving any doubts in Pedeco's favor. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). If there is a genuine issue of material fact, summary judgment is inappropriate. TEX. R. CIV. P. 166a(c).

Here, the court of appeals in *Gotham I* held Pedeco suffered no loss based upon testimony from Pedeco's president and WRI's CEO that WRI had reimbursed Pedeco for its expenses in controlling the well—testimony the court of appeals viewed as unequivocal. __ S.W.3d at __. While this testimony may well be unequivocal, it was not the only testimony in the matter. WRI's CEO also testified that Pedeco and WRI had a series of agreements (covering matters not addressed by the joint venture agreements or joint operating agreements) under which WRI "would share with [Pedeco] in any drilling profits or drilling losses in the aggregate at the end of the year, based on turnkey prices." As to the expenses for controlling the H&O Well, he testified that under the arrangement between WRI and Pedeco, WRI "would be entitled to recover . . . 50 percent of the cost" of expenses incurred in controlling the H&O Well. This testimony is sufficient to raise a genuine issue of material fact as to whether Pedeco suffered a loss and was entitled to

reimbursement under its indemnity policy with Gotham. *See* TEX. R. CIV. P. 166a(c). Accordingly, summary judgment in favor of Gotham on Gotham and Pedeco's contract claims cannot be supported on the ground that Pedeco suffered no loss. Because the parties raised additional arguments in their first appeal regarding summary judgment on their contract claims, we remand to the court of appeals for further proceedings.

III. Conclusion

Gotham filed equity and contract claims, seeking a return of payments made to or on behalf of Pedeco because Pedeco allegedly failed to use due diligence and made misrepresentations regarding its working interest. Because several clauses in the policy address these matters, Gotham must proceed on its contract claim and may only rely on its equity claims if it prevails on its misrepresentation theory and elects the remedy of voiding the policy. We further hold that Gotham preserved its contract claim by raising it as an independent ground on appeal to affirm the same relief it had obtained in the trial court's judgment. We disagree with the court of appeals in *Gotham III* that the contract precludes Gotham from a recovery because several clauses address Gotham's ability to recover. And because we conclude genuine issues of material fact exist concerning any loss suffered by Pedeco, we remand for the court of appeals to consider the remaining grounds regarding Gotham and Pedeco's contract claims.

Eva M. Guzman
Justice

OPINION DELIVERED: March 21, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0483

ROSEMARIE PORRETTO AND RANDY W. WILLIAMS, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF SONYA PORRETTO, PETITIONERS,

v.

TEXAS GENERAL LAND OFFICE AND JERRY PATTERSON, IN HIS OFFICIAL CAPACITY AS TEXAS LAND COMMISSIONER, RESPONDENTS

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

Argued November 5, 2013

CHIEF JUSTICE HECHT delivered the opinion of the Court.

JUSTICE BOYD did not participate in the decision.

The principal issue before us is whether the State's repeated recharacterization of private property as public constitutes a compensable taking under Article I, Section 17(a) of the Texas Constitution.[1] Though the State's conduct is troubling, it is not a taking. We affirm the court of appeals on that issue,[2] but we reverse on other issues and remand the case to the trial court for rendition of judgment.

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

[2] 369 S.W.3d 276 (Tex. App.—Houston [1st Dist.] 2011).

I

A

From the late 1950s through the early 1970s, the Porretto family acquired 17 tracts totaling some 27 acres located between the Galveston Seawall and the Gulf of Mexico. The tracts were originally part of an 1838 conveyance of the east end of Galveston by the Republic of Texas to Michael B. Menard.[3] There was no Seawall then, of course, and the land conveyed was all dry, but much is now submerged, including some of the Porrettos' tracts. The Porrettos have operated one group of tracts as Porretto Beach, offering free access to the public, charging only for parking and concessions for beach amenities, like umbrellas, chairs, floats, and boats. The rest of the tracts, which the Porrettos call Porretto Beach West, are non-contiguous, undeveloped, and farther down the beach. All the property is now in Sonya Porretto's bankruptcy estate, and the trustee, Randy Williams, and Sonya's mother, Rosemarie, are petitioners here.[4] We refer to petitioners collectively as the Porrettos.

The State owns the coastal land submerged by the Gulf of Mexico.[5] Along the Gulf Coast,

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[3] *See City of Galveston v. Menard*, 23 Tex. 349, 357, 381 (1859).

[4] Henry and Rosemarie filed this suit in 2002. At that time, they owned the land, but in 2005, they sold it to their daughter, Sonya, and she joined the suit. Henry died before trial.

[5] *State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932) ("The rule long has been established in this state that the state is the owner of the soil underlying the navigable waters, such as navigable streams, as defined by statute, lakes, bays, inlets, and other areas within tidewater limits within its borders."); *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943) ("The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people."). The Legislature has recognized the State's ownership. See TEX. WATER CODE § 11.021(a) ("The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.").

there are two high tides daily. In 1958, we held in *Luttes v. State* that, based on Spanish and Mexican law applicable when Texas acquired its coastlands, the shoreline boundary of State-owned submerged land is the mean higher high tide line ("MHHT"), "the average of highest daily water computed over or corrected to the regular tidal cycle of 18.6 years."[6] The tidally submerged land up to the MHHT line is the "wet beach". Of course, water often reaches farther landward, to a line marked by vegetation or a change in terrain. This area, though sometimes submerged, is the "dry beach", which may be privately owned. The Texas coastline is constantly changing by accretion and avulsion, and thus the shoreline is always moving.[7]

The State contended in *Luttes* that the shoreline was much farther landward,[8] including the dry beach, and it has been reluctant to accept the line set in *Luttes*. Less than a year after that case was decided, the Legislature enacted the Open Beaches Act,[9] declaring it to be the public policy of this State that the public be allowed access to the Gulf across both the dry beach and the wet beach.[10]

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[6] 324 S.W.2d 167, 187 (Tex. 1958).

[7] *Severance v. Patterson*, 370 S.W.3d 705, 708 (Tex. 2012) ("Oceanfront beaches change every day. Over time and sometimes rather suddenly, they shrink or grow, and the tide and vegetation lines may also shift. Beachfront property lines retract or extend as previously dry lands become submerged or submerged lands become dry.").

[8] *Luttes*, 324 S.W.2d at 169 ("We are not certain as to the State's view of just what this line is in terms of practical determination, but the contention seems to be that it is either the highest—most landward—line reached by the waters on any one occasion that can be proved or perhaps the average of single highest annual lines for such years as to which proof is available.").

[9] Act of July 16, 1959, 56th Leg., 2nd C.S., ch. 19, 1959 Tex. Gen. Laws 108 (currently codified as TEX. NAT. RES. CODE §§ 61.001-.254).

[10] *Id.* § 1 ("It is hereby declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or such larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico, in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continuous right in the public.") (currently TEX. NAT. RES. CODE § 61.011(a)).

However, the Act did not mandate access across privately owned dry beach property without proof of some legal right,[11] and thus the declaration stopped short of a taking.[12] In *John G. and Marie Stella Kenedy Memorial Foundation v. Dewhurst*, which we decided in 2002, the State reasserted its pre-*Luttes* position that its ownership of the beach extends to the vegetation line, the highest reach of the water.[13] We again rejected that position and reaffirmed *Luttes*.[14] Just two years ago, in *Severance v. Patterson*, the State claimed a "rolling" public beachfront easement on the dry beach, in many respects indistinguishable from ownership. We rejected that claim, citing *Luttes*.[15]

B

Luttes firmly established in 1958 that the boundary between submerged land owned by the State and the dry beach is the MHHT line. For the area at issue here, that line is below the Seawall, and the property conveyed to the Porrettos lies on both sides of the line, some of it in the dry beach and some in the wet beach. From 1994 to 2008, the General Land Office vacillated in denying,

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[11] *Id.* § 2 ("In any action brought or defended under this Act or whose determination is affected by this Act a showing that the area in question is embraced within the area from mean low tide to the line of vegetation shall be prima facie evidence that: (l) the title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea; (2) there has been imposed upon the area subject to proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea.") (currently TEX. NAT. RES. CODE § 61.020(a)).

[12] *Severance*, 370 S.W.3d at 719 ("The [Open Beaches Act] does not alter *Luttes*. It enforces the public's right to use the dry beach on private property where an easement exists and enforces public rights to use State-owned beaches. Therefore, the OBA, by its terms, does not create or diminish substantive property rights. The statute cannot truly be said to create any new rights. In promulgating the OBA, the Legislature seemed careful to preserve private property rights by emphasizing that the enforcement of public use of private beachfront property can occur when a historic right of use is retained in the public or is proven by dedication or prescription.") (citations omitted).

[13] 90 S.W.3d 268, 284 (Tex. 2002).

[14] *Id.* at 281.

[15] *Severance*, 370 S.W.3d at 724 ("We have never held the dry beach to be encompassed in the public trust. *See Luttes* . . . . We hold that Texas does not recognize a 'rolling' easement.").

accepting, and ultimately conceding the Porrettos' ownership of the dry beach. The material events fall into five categories.

GLO's Renourishment and Recreation Leases to the City of Galveston. In 1994, the GLO, on behalf of the State, executed a ten-year lease of "submerged lands" to the City of Galveston for "the deposit of beach quality sand in and on said submerged land for beach replenishment and restoration". The lease covered a large area "adjacent to and along the Galveston Seawall".[16] The lease did not define "submerged lands" but called for a survey to determine "the line of highest annual tide", well landward of the MHHT line, thus including the dry beach. The survey, performed by Darrell Shine, located the highest annual tide line at the Seawall over most of the area. All of Porretto Beach West was included. The State executed a second lease of the same property to the City for 20 years "for the purpose of establishing and maintaining a public recreation area". Under the authority of that lease, the Galveston Park Board in 1999 authorized two concessionaires of its choosing to operate on Porretto Beach West.

GLO representatives' statements. In 1997, while the City's renourishment project was ongoing, the Park Board expressed concern to the GLO that part of the area covered by the Shine survey was privately owned and that the owners, not the Park Board, would be entitled to beach concession revenues. A GLO staff attorney responded in a letter as follows:

> As you are aware, the State, through the land office, has leased the replenished beach area in front of the Galveston Seawall to the City . . . . As you are further aware, the State does not recognize any claim of private ownership of land in front of the

[16] The lease appears to have contemplated that all the land gulfward of the Seawall was "submerged land", reciting that "[t]he uplands property littoral to the submerged lands subject to this lease are owned by the County of Galveston". In other words, the submerged land bordered on the Seawall.

> seawall. . . . The requirement of the park board that the concessionaire obtain consent of "certain adjacent property owners" . . . ascribe[s] some credence to these specious claims in derogation of the State position and are, therefore, not acceptable.

A few days later, the GLO senior deputy commissioner and general counsel wrote an op-ed article for the *Galveston County Daily News* setting out the State's position that it owned the "Seawall beaches" and that concession revenues belonged to the Park Board. "[A]ny attempt to assert private property ownership in front of the Galveston Seawall," the general counsel wrote, "will be opposed by the state."[17] In a later meeting with Park Board officials, the two GLO lawyers made clear that "[t]here was no question on the part of the GLO that there [were] no valid private ownership claims" to the land seaward of the Seawall, per the Shine survey. Much of that land, including the Porrettos' property, was dry beach.

The tax rolls. Part of the Park Board's concern was that property covered by the Shine survey was listed on the tax rolls in the names of private owners. At the State's request, the Galveston County Appraisal District changed its records to list the State as the owner of certain tracts, including part of Porretto Beach West. However, the Porretto family continued to pay the taxes, and the District continued to accept payments. In 2004, the District reversed the changes to its records.

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[17] The general counsel's article correctly acknowledged that "[f]or tidally influenced lands, the Texas Supreme Court has determined the actual boundary to be the line of 'mean high water' or 'mean higher high water,' depending on the date of the grant." But the article incorrectly stated that the Shine survey was based on mean high water when it was actually based on the highest annual tide. The article also misstated that the Court in *City of Galveston v. Mann*, 143 S.W.2d 1028 (Tex. 1940), "found that there had been no fast land in front of the seawall for a period in excess of 20 years". The Court made no such finding but merely accepted the stipulation of the City and the Attorney General "that after the seawall was built, about 1905, the high tide of the Gulf about twenty years ago came up to said seawall and constantly since said time all of the land lying on the Gulf side of the seawall at the place where the pier is intended to be built has been within the high tide waters of the Gulf." *Id.* at 1030. And, of course, *Mann* was decided before *Luttes*, when shoreline boundaries were finally determined.

Letters from the Land Commissioner and the Attorney General. In 1999, Sonya Porretto explored selling the property, then owned by her parents, but a potential buyer expressed concern about the GLO's claims. To clarify the GLO's position, Sonya met several times with the GLO, culminating in a meeting with the Land Commissioner himself in 2000. Responding to the issues she had raised, the Commissioner wrote her in 2001 that "the state does not claim title to natural accretion above the line of Mean High Tide in this particular area" and that he was "not aware of any claim by the State of Texas to the property your family claims (landward of the Mean High Tide line)". Meanwhile, Sonya had also raised her issues with the Attorney General's Office. A few days after the Land Commissioner letter, the Attorney General wrote that "[t]he State does not claim ownership of any property claimed by your father above the mean high tide line", although any land claimed "in front of the Galveston seawall . . . is probably subject to a public easement". Both letters appeared to be inconsistent with the GLO's position up to that point.[18] In any case, later that year, a contract to purchase the land was signed, but failed to come to fruition.

This litigation. In 2002, after Sonya Porretto's continued efforts to sell the property were unsuccessful, her parents sued the GLO and the Land Commissioner[19] to establish their ownership of the property conveyed to them and for damages for a taking. The plaintiffs did not limit their claims to the dry beach; their petition described the property in dispute as that which had been

[18] By referencing the "mean high tide line" rather than the MHHT line, the letters from the Land Commissioner and the Attorney General slightly understated the State's rightful ownership. The MHHT line is based only on the higher of the two daily high tides on the Texas coast and is therefore higher than the mean high tide line, which is based on both. In this area, the difference is about 0.1 foot vertically, *see* William Gardner Winters, Jr., *The Shoreline for Spanish and Mexican Grants in Texas,* 38 TEX. L. REV. 523, 530 (1960) (citing Texas Surveyors Ass'n, *Report of Riparian Boundary Committee* (Mar. 21, 1957)), and about five to ten feet horizontally.

[19] The plaintiffs also sued the Park Board and its executive director.

conveyed to them, on both sides of the MHHT line. The defendants denied the claims without limiting their denial to the wet beach. Notwithstanding the statements by the Land Commissioner and the Attorney General, who represented the defendants in the litigation, the defendants stated in a brief filed in 2003 that "the GLO asserts title to the disputed property and does so on behalf of the State of Texas."

But then, in 2004, the parties settled, with the GLO agreeing to provide "a letter confirming that the State of Texas claims no ownership interest in [Porretto Beach] above the mean higher high water line". Not long after the agreement was reached, the GLO refused to produce the letter, the settlement failed, and the litigation resumed.[20] Defendants' counsel wrote to the trial court that "the State of Texas, through its General Land Office, does claim title to the property at issue" (emphasis in the original).

The trial court dismissed the action in 2005, based on the defendants' assertion of immunity, but the court of appeals reversed and remanded in 2007.[21] The court wrote, contrary to the defendants' claims to the Porrettos' property in the trial court, that the defendants had not "controvert[ed] the Porrettos' allegations of ownership of the land in question, and have challenged the Porrettos' claims without regard to the truth of their claim of ownership."[22] In their motion for rehearing, the defendants took issue with the court's statement:

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[20] The letter was only one part of a settlement intended to facilitate development of Porretto Beach. The jury later found that the defendants had not failed to comply with the settlement.

[21] *Porretto v. Patterson*, 251 S.W.3d 701, 705 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

[22] *Id.* at 709.

> The majority opinion states that it is unclear whether the State claims the property at issue or disputes the Porrettos' title and notes the State Appellees' failure to present evidence on this point. However, such a showing was unnecessary. The Porrettos established the existence of a property dispute between the Porrettos and the State. The Porrettos' petition asserted that the State claimed title adversely to them, attaching the state-owned submerged land leases that evidenced the State's claim to own such land. The State Appellees did not challenge this allegation because it is true.

That motion was filed in January 2008. In May, following remand, defendants' counsel wrote plaintiffs' counsel that "the State does not claim title to any property [in Porretto Beach] that is above, or landward of, the mean higher high tide line." Referencing the 2001 letters from the Land Commissioner and the Attorney General, defendants' counsel stated that "the State's position has always been that it intended to claim only the state-owned submerged land", as reflected in the 2004 settlement. Counsel did not explain why, if that had always been the State's position, the GLO had refused to provide the letter to that effect promised in the settlement.[23]

C

The trial court granted summary judgment confirming the Porrettos' ownership of Porretto Beach and Porretto Beach West from the Seawall to the MHHT line. Following a bench trial, the court further declared the Porrettos to be the owners of the property seaward of the MHHT line, and held that the State's actions had resulted in a compensable taking. The court awarded the Porrettos $5.012 million as damages for the lost market value of the property taken, as found by a jury.

The court of appeals reversed and rendered, holding that the trial court should have dismissed

[23] The Porrettos added a claim for breach of the settlement agreement. The defendants contended at trial that their obligation to furnish a letter confirming the Porrettos' title above the MHHT line was never triggered because of the Porrettos' failure to perform their own obligations under the agreement. The jury failed to find that defendants breached the agreement.

the Porrettos' title claims for want of jurisdiction, and that the State's actions did not constitute a taking.[24] We granted the Porrettos' petition for review.[25]

II

A

Before we can determine whether the GLO's conduct constituted a compensable taking of the Porrettos' property, we must determine what property the Porrettos own. The answer is clear, and it was just as clear in 1994: the Porrettos own the property conveyed to them that lies landward of the MHHT line. The GLO has finally conceded this and now argues that because it has, no justiciable controversy remains, and the trial court therefore lacked jurisdiction over the issue. But given the GLO's tenacious dispute of the Porrettos' ownership before and during this litigation, in the face of *Luttes* and even after the Land Commissioner's and the Attorney General's written statements, the trial court was justified in resolving the issue once and for all. It erred, however, in awarding the Porrettos land seaward of the MHHT line, and the Porrettos concede that point. Under clear law and the parties' concessions, no title dispute remains. The law is equally well-settled that the Porrettos are entitled to judgment settling their title only against the Land Commissioner,[26] not

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[24] 369 S.W.3d 276, 286, 288-289 (Tex. App.—Houston [1st Dist.] 2011).

[25] 56 Tex. Sup. Ct. J. 612 (June 7, 2013).

[26] *See State v. Lain*, 349 S.W.2d 579, 581 (Tex. 1961) ("When suit for recovery of title to and possession of land, filed without legislative consent, is not against the state itself, but is against individuals only, the mere assertion by pleading that the defendants claim title or right of possession as officials of the state and on behalf of the state, will not bar prosecution of the suit. . . . One who takes possession of another's land without legal right is no less a trespasser because he is a state official or employee, and the owner should not be required to obtain legislative consent to institute a suit to oust him simply because he asserts a good faith but overzealous claim that title or right of possession is in the state and that he is acting for and on behalf of the state."); *Tex. Parks and Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 393-394 (concluding that State officials' claims of State ownership — although not a constitutional taking —

against the GLO.[27]

Finally, it is clear that the ownership of shorelands is not changed by artificially adding sand, which the City of Galveston did in its renourishment project. The State does not gain the dry beach by dumping sand on it, nor does it lose what was before the wet beach, even if the renourishment pushes the MHHT line farther seaward, which is usually the purpose of renourishment.[28]

B

The Porrettos argue that the GLO's claims have made it impossible for them to sell their property and therefore amount to a compensable taking. Specifically, the Porrettos point to the statements made by two GLO lawyers in 1997, the State's request for a change in the tax records to show it as the owner of the property, and the defendants' persistence in a position at the beginning of this litigation contradicted by previous statements of the Land Commissioner and the Attorney General. With respect to Porretto Beach West, the Porrettos also complain of the State's leases of the property to the City of Galveston for beach renourishment and public recreation.

The GLO lawyers' statements regarding the State's ownership of property above the MHHT line were simply not binding on the State. They were no more than expressions of their opinions,

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constituted "possession" for purposes of *Lain*, and remanding the case to the trial court to allow suit to proceed against "the governmental actors laying claim to the streambed") (citing *Lain*, 349 S.W.2d at 381-383); *see also id.* at 395 (Jefferson, J., concurring) ("In *Lain*, we made clear that a government actor is not immune from a trespass-to-try-title suit . . . .").

[27] *See id.* at 390 (holding that claims brought directly against the State to determine title to real property are barred by sovereign immunity).

[28] *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 414 (Tex. 1943) ("Accretions along the shores of the Gulf of Mexico and bays which have been added by artificial means do not belong to the upland owners, but remain the property of the State.").

opinions later contradicted by their superiors. Even if they had been statements on behalf of the GLO itself, such assertions of ownership would not have constituted a taking in these circumstances. In *Texas Parks and Wildlife Department v. Sawyer Trust*, we concluded that a state agency's assertions of ownership of property did not of themselves constitute a taking of the property when the agency had not attempted to take possession of the property.[29] The Porrettos' contention would be stronger if the GLO had authorized its lawyers to assert claims to the property in bad faith with the goal of obtaining a benefit to itself.[30] But even though the lawyers' statements injured the Porrettos, as the jury found, and were erroneous, they did not rise to the level of a taking.

Nor did the GLO's request to the taxing authorities to list the State as owner of the Porrettos' property. The decision to make the change rested with the taxing authorities. In *Hearts Bluff Game Ranch, Inc. v. State*, we concluded that the State's request that another government agency take action, without more, is not a taking because "[m]ere communications without authority are not actionable".[31]

Since reversing position in the trial court, the defendants have not explained the basis for their initial claim to ownership of the property above the MHHT line. But asserting and then abandoning a position in litigation is not itself a taking, especially when the assertion is unsuccessful.

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[29] 354 S.W.3d 384, 391-392 (Tex. 2011).

[30] *Cf. State v. Biggar*, 873 S.W.2d 11 (Tex. 1994) (holding that the State's denial of a routine easement exchange in order to minimize the cost of condemning a larger tract amounted to a taking); *Taub v. City of Deer Park*, 882 S.W.2d 824, 826–827 (Tex. 1994) (concluding that a city's failure to re-zone property was not a regulatory taking absent evidence that the city was acting for its own advantage); *Westgate Ltd. v. State*, 843 S.W.2d 448, 454 (Tex. 1992) (declining to address "whether a landowner may state a cause of action for inverse condemnation where the condemning authority acts in bad faith to cause economic damage to the landowner").

[31] 381 S.W.3d 468, 489 (Tex. 2012).

Besides these actions by the GLO, with respect to Porretto Beach West, the Porrettos argue that the Renourishment Lease and the Recreation Lease covering property the State does not own constituted a taking. But the "exclusive purpose" of the Renourishment Lease was "the deposit of beach quality sand in and on said submerged land for beach replenishment and restoration", something which benefitted the Porrettos and to which they did not object. The Recreation Lease, too, did not injure the Porrettos, since they were already using their property for public recreation, and they make no claim for damages based on the Park Board's actions. Though the leases may have involved a claim of ownership by the State, the State did not attempt to exercise possession or control of the property to the Porrettos' exclusion.

The Porrettos argue that "States effect a taking if they recharacterize as public property what was previously private property", quoting from the United States Supreme Court's opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[32] But the recharacterization to which the opinion referred was, the littoral owners argued, effected by a state court's interpretation, in an administrative appeal, of a state statute. The statement has no application here.

We are mindful that Article I, Section 17 of the Texas Constitution requires compensation for private property "damaged" as well as "taken". And we find troubling the defendants' continued assertion of claims it later abandoned, having been made aware of the Porrettos' contention that those claims were impeding the sale of the Porrettos' property. But as we have said, mere claims

[32] 560 U.S. 702 (2010) (plurality opinion) (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-165 (1980)) (concluding that the Florida Supreme Court's decision did not contravene the established property rights of petitioner's members).

do not rise to the level of action requiring compensation under the Constitution. We conclude that the Porrettos are not entitled to prevail on their taking claim.

III

Two issues remain.

First: The Porrettos challenge the constitutionality of the Open Beaches Act, contending that the City of Galveston's use of it to require a permit for sand scraping or removal operates ex post facto because they owned their property before the Act was passed. The court of appeals held that the Porrettos' as-applied challenge was not ripe because they have not shown that they have been denied the required permit or otherwise been refused permission for performing sand scraping.[33] The Porrettos have failed to show that any vested right has been injured or even threatened.[34] The court of appeals was correct.

Second: Porretto contends that the court of appeals erred by reversing the trial court's award of $19,349.52 in attorney fees and expenses as discovery sanctions against the defendants. Defendants agreed to produce documents requested by the Porrettos at the GLO's offices. While GLO lawyers did produce a substantial number of documents at the appointed time, they informed

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[33] 369 S.W.3d at 289 (citing *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-852 (Tex. 2000)); *see also Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex.1998) (generally speaking, in order for "as-applied" due process and equal protection challenges to be ripe in a land-use regulation case, there must be a "final decision" regarding the application of the regulations to the property at issue); *cf. City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 233 (Tex. 2011) (holding the availability of a statutory remedy, that plaintiff failed to pursue, precluded a takings claim for vehicles seized by the city) ("In general, for a federal takings claim to be ripe, the owner of the allegedly taken property must (1) obtain a final decision regarding the application of the regulations to the property at issue from the government entity charged with implementing the regulations, and (2) utilize state procedures for obtaining just compensation.").

[34] *See Gibson*, 22 S.W.3d at 852 ("A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass.").

the Porrettos' counsel that no search for all responsive documents in the GLO's records had yet been made, nor would one be made without further specification of documents requested. The Porrettos' counsel were forced to make a second trip to the GLO's offices to review other documents. The Porrettos moved for attorney fees and expenses as sanctions, and defendants did not respond. After a hearing, the trial court awarded the Porrettos the sanctions requested. Defendants then moved for reconsideration, the Porrettos responded, and the trial court conducted two additional hearings. The trial court refused to set aside its order.

Rule 196.3(c) provides that a party responding to a request for production "must either produce documents . . . as they are kept in the usual course of business or organize and label them to correspond with the categories in the request."[35] Defendants argue that they produced the requested documents by allowing them to be retrieved from the vast records kept by the GLO, and the court of appeals agreed.[36] But the GLO's production of some records and its acknowledgment that it had more somewhere, for which it had made no search, was no response to the request. The Porrettos argued, and the trial court could have found, that this was not a situation in which defendants had located potentially responsive documents, even though voluminous, for the Porrettos' review, but was instead a situation in which the defendants had made no reasonable effort to locate responsive documents. Defendants argued to the trial court that the discovery request came late in the litigation, that it was broad, that all the documents were eventually tendered, and that at worst the problem was a miscommunication. But the defendants did not seek a more specific process for

[35] TEX. R. CIV. P. 196.3(c).

[36] 369 S.W.3d 276, 289-290 (Tex. App.—Houston [1st Dist.] 2011).

production in response to the request, and did not even respond to the motion for sanctions. The sanction was well within the trial court's discretion.[37]

IV

We reverse the court of appeals' judgment dismissing the Porrettos' title claims and denying discovery sanctions, affirm the judgment in all other respects, and remand the case to the trial court for rendition of judgment in accordance with this opinion.

Nathan L. Hecht
Chief Justice

Opinion delivered: July 3, 2014

[37] *Cf. Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 78 (Tex. App.— Houston [14th Dist.] 2011, pet. denied) (concluding, without addressing the amount of the sanction, that the trial court did not abuse its discretion in basing an award on evidence indicating that litigant failed to produce all requested e-mails on a subject, and that litigant had communicated, at the outset of the search, that it did not intend to fully comply with an order issued to aid in discovery of e-mail); *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451, 458 (Tex. App.—San Antonio 1991, orig. proceeding) (holding that the trial court did not abuse its discretion in ordering party to provide more responsive answers).

IN THE SUPREME COURT OF TEXAS

NO. 12-0490

MAN ENGINES & COMPONENTS, INC. AND
MAN NUTZFAHRZEUGE AKTIENGESELLSCHAFT, PETITIONERS,

v.

DOUG SHOWS, RESPONDENT

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

Argued October 8, 2013

JUSTICE WILLETT delivered the opinion of the Court.

JUSTICE BROWN did not participate in the decision.

This breach-of-warranty case poses a fundamental question: Does the implied warranty of merchantability extend to purchasers of used goods? Our answer: It depends.

A manufacturer largely controls its own fate. When a manufacturer disclaims implied warranties, such express language necessarily applies downstream to subsequent purchasers, as Buyer #2 cannot tenably boast a greater warranty than that given to Buyer #1.

But some manufacturers, intentionally or inadvertently, do not expressly disclaim implied warranties. That scenario raises two questions:

1. Does resale of a used good automatically terminate any remaining implied-warranty obligation?

2. Does it make a legal difference if the used good is explicitly sold "as is"?

We answer "no" to the first question and, in this case, cannot reach the second.[1]

We take cases as they come, and given how this case was tried, we agree with the court of appeals that the downstream buyer was entitled to rely on the implied warranty of merchantability. We thus affirm the court of appeals' judgment.

I. Factual and Procedural Background

In 2002, Doug Shows purchased the *Caliente*, a used, fifty-foot yacht, through a broker, Texas Sportfishing, for $525,000. The *Caliente* was powered by high-performance inboard engines manufactured and sold by MAN Nutzfahrzeuge Aktiengesellschaft and its United States counterpart, MAN Engines & Components (collectively MAN).[2]

Prior to purchase, Shows had the engines inspected by Ace Marine Diesel (AMD), an authorized service dealer for MAN. At the time of purchase, Texas Sportfishing gave Shows a letter from AMD's president originally addressed to a broker. The letter, dated September 17, 2001, stated that a two-year express warranty applied to the engines "on everything" and an additional three-year warranty applied "on major components." In connection with the sale, Shows signed a "certification of acceptance of vessel" on Texas Sportfishing letterhead stating that the vessel was being sold "as is."

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[1] In implied-warranty cases, the issue is the condition of the product—not as sold by the prior buyer but as sold by the manufacturer. That said, would resale with an express "as is" provision limit a buyer's recourse against the manufacturer? The question, undeniably important, is unreachable here.

[2] MAN has a storied history of engine design: One of its employees, Rudolf Diesel, created the first diesel engine in the nineteenth century. W. ROBERT NITSKE & CHARLES MORROW WILSON, RUDOLF DIESEL: PIONEER OF THE AGE OF POWER 53, 77–80 (1965).

In June 2004, while Shows was fishing with friends off the Louisiana coast, the *Caliente*'s starboard engine failed because of a bad valve. Although the full two-year warranty had expired by that time, the additional three-year protection was still active. Shows filed a warranty claim only to discover that the parts involved were not "major components" covered by the warranty. Nonetheless, MAN issued Shows a check from its goodwill account for about $5,800 to help defray repair costs, which totaled slightly under $40,000.

A year later, the same engine failed, this time beyond repair. The failure resulted from the same bad valve. Again, Shows was told the damage was not covered by warranty. Shows replaced the engine and in June 2006 sued MAN for negligence, fraud, negligent misrepresentation, breaches of express and implied warranties, and deceptive trade practices. The jury found MAN liable only for breach of the implied warranty of merchantability and awarded Shows $89,967. The trial court, however, granted MAN's motion for judgment notwithstanding the verdict and issued a take-nothing judgment. The trial court concluded that Shows could not prevail on an implied-warranty theory because of either (1) lack of privity—Shows was a subsequent purchaser of the used yacht with no contractual relationship with MAN, or (2) disclaimer—MAN disclaimed any implied warranty at the time of first sale.

The trial court's disclaimer-based ground relied on a document that Shows unearthed through an internet search after the 2004 engine failure. It is a 2003 generic warranty issued by MAN that creates express warranties while expressly disclaiming implied warranties including the implied warranty of merchantability. It states: "The limited warranty herein set forth is the sole and exclusive warranty with respect to Series D 28 engines. There are no other warranties, expressed

or implied, including any warranties of merchantability or fitness for any particular purpose and all such other warranties hare [sic] hereby displaced." We refer to this disclaimer as "MAN's disclaimer" or the "express disclaimer," as opposed to the "as is" clause found in the contract between Shows and Texas Sportfishing.

The court of appeals reversed, holding that someone who buys goods knowing they are used may still rely on an implied warranty from the manufacturer to the original buyer, since the warranty passes with the goods.[3] The court of appeals relied on our 1977 decision in *Nobility Homes of Texas, Inc. v. Shivers*.[4] In that case, we allowed a mobile-home purchaser to pursue an implied-warranty claim against the manufacturer where the only intermediary between them was a retailer.[5]

The court of appeals refused to consider MAN's express-disclaimer defense, concluding that MAN failed to raise it as an affirmative defense in its pleadings and that the issue was not tried by consent.[6] The court of appeals did not consider the effect of the "as is" clause, because MAN did not raise this argument in the trial court or in the court of appeals.

II. Discussion

This case concerns the implied warranty of merchantability, which assures buyers that goods are, among other things, "fit for the ordinary purposes for which such goods are used."[7]

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[3] 364 S.W.3d 348, 352–55.

[4] 557 S.W.2d 77 (Tex. 1977).

[5] *Id.* at 81.

[6] 364 S.W.3d at 356.

[7] TEX. BUS. & COM. CODE § 2.314(b)(3).

MAN asserts that its express disclaimer of implied warranties negated Shows's implied-warranty claim.

Before reaching the substantive question whether implied warranties apply to used-good purchasers, we must first decide a procedural question: whether we can consider MAN's express-disclaimer defense. To answer that question, we must decide whether "express disclaimer" is an affirmative defense under Texas Rule of Civil Procedure 94.

A. "Express Disclaimer" Is An Affirmative Defense That Must Be Pleaded Under Rule 94.

The court of appeals held that MAN's express-disclaimer defense is, under Rule 94, an affirmative defense, which MAN waived by failing to plead it or to try it by consent. MAN argues that the court of appeals erred by concluding that "express disclaimer" is an affirmative defense.[8] We agree with the court of appeals: Disclaimer of implied warranties is an affirmative defense that cannot be raised on appeal if it was not raised in the trial court.[9] Rule 94 makes clear that affirmative defenses must be properly raised in pretrial pleadings:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.[10]

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[8] MAN pleaded "waiver," but does not argue here that pleading "waiver" qualifies as pleading "express disclaimer." Nor does MAN argue that the parties tried "express disclaimer" by consent. We therefore do not address those questions.

[9] 364 S.W.3d at 355.

[10] TEX. R. CIV. P. 94.

MAN first mentioned its express-disclaimer argument in its Motion for JNOV and Entry of Take-Nothing Judgment.

Disclaimer is an affirmative defense subject to Rule 94 requirements. Rule 94 provides a list of affirmative defenses and then adds a catch-all that sweeps in "any other matter constituting an avoidance or affirmative defense."[11] Disclaimer falls into this "any other matter" catch-all. The enumerated defenses share "the common characteristic of a bar to the right of recovery even if the general complaint were more or less admitted to."[12] Disclaimer performs a similar role, not rebutting the facts asserted by the plaintiff, but establishing an independent reason why the plaintiff should not recover.[13]

Like the defenses listed in Rule 94, the defense of disclaimer "is one of avoidance, rather than a defense in denial."[14] And like those listed, MAN's disclaimer defense does not challenge the factual allegations in Shows's complaint. Rather, it seeks to add another ingredient to the mix that would defeat the claim. In this way, disclaimer resembles expressly enumerated defenses.

Rule 94's purpose "is to give the opposing party notice of the defensive issue to be tried."[15] It is a rule of fairness that requires the defendant to identify affirmative defenses, involving facts distinct from the elements of the plaintiff's claim, so that the plaintiff may reasonably prepare to

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[11] *Id.*

[12] *Jakobsen v. Mass. Port Auth.*, 520 F.2d 810, 813 (1st Cir. 1975) (discussing Federal Rule of Civil Procedure 8(c)(1), the federal equivalent of Rule 94).

[13] *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 (Tex. 1991) (describing the nature of affirmative defenses in the context of a preemption defense).

[14] *Id.*

[15] *Land Title Co. of Dallas, Inc. v. F. M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980).

rebut or explain them.[16] Like Rule 94's enumerated defenses, disclaimer is an affirmative defense that must be pleaded, as several Texas decisions recognize.[17]

MAN failed to plead its express disclaimer of implied warranties. Rule 94 requires that affirmative defenses be raised before trial. An affirmative defense presents a "situation where a plaintiff cannot recover even if his claims are true because of some other fact that the defendant has pled as a bar."[18] Since an affirmative defense raises additional issues of fact, Rule 94 demands that it appear in a pretrial pleading. Otherwise, the fairness and efficiency facilitated by the rule would be defeated. Plus, if we read Rule 94 to allow for the post-trial raising of an affirmative defense, the rule would become meaningless, since it would do nothing more than other rules governing waiver of issues on appeal.

Accordingly, MAN cannot rely on its purported express disclaimer of implied warranties issued at the first sale unless it properly raised that defense in the trial court. The court of appeals held that MAN failed to plead the defense in the trial court, and MAN does not challenge that holding here. We therefore must affirm the court of appeals on this issue.

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[16] *Petroleum Anchor Equip., Inc. v. Tyra*, 419 S.W.2d 829, 835 (Tex. 1967) (quoting *Reid v. Associated Emp'rs Lloyds*, 164 S.W.2d 584, 585 (Tex. Civ. App.—Ft. Worth 1942, writ ref'd n.r.e.)).

[17] *See Am. Eurocopter Corp. v. CJ Sys. Aviation Grp.*, 407 S.W.3d 274, 291 (Tex. App.—Dallas 2013, pet. filed); *Great Am. Prods. v. Permabond Int'l*, 94 S.W.3d 675, 683 (Tex. App.—Austin 2002, pet. denied); *Johnston v. McKinney Am., Inc.*, 9 S.W.3d 271, 280–81 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *Sherwin-Williams Co. v. Perry Co.*, 424 S.W.2d 940, 949–50 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.).

[18] *Borders v. KLRB, Inc.*, 727 S.W.2d 357, 360 (Tex. App.—Amarillo 1987, writ ref'd).

Having disposed of MAN's express-disclaimer argument, albeit on procedural grounds, we reach the substantive issue: Did MAN's implied-warranty obligations terminate when the yacht engine was resold to Shows?

B. The Implied Warranty Of Merchantability, Unless Properly Disclaimed, Passes To Subsequent Purchasers.

In *Nobility Homes*, we said privity need not exist between an upstream defendant and a downstream plaintiff for the plaintiff to recover on an implied-warranty claim.[19] We agree with the court of appeals that *Nobility Homes* applies equally to used goods.

1. *Privity questions in warranty cases are decided by courts*

When the Legislature adopted the Uniform Commercial Code in 1960, it adopted Chapter 2 largely wholesale, with the exception of section 2.318,[20] which specifically reserves issues of privity to the judiciary:

> This chapter does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.[21]

Thus, we fashion the privity doctrine case by case under the common law. The issue in *Nobility Homes* was "whether a remote manufacturer is liable for the economic loss his product

[19] 557 S.W.2d at 81.

[20] The UCC version of section 2.318 provided a substantive privity doctrine, but the Legislature instead delegated such matters to the courts. *Garcia v. Tex. Instruments, Inc.*, 610 S.W.2d 456, 464 (Tex. 1980).

[21] TEX. BUS. & COM. CODE § 2.318.

causes a consumer with whom the manufacturer is not in privity."[22] In that case, Shivers bought a defective mobile home from a retailer, which had bought the mobile home from the manufacturer. Shivers and the manufacturer were not in privity, but Shivers sought to recoup his economic losses through an implied-warranty claim against the manufacturer. We gave him the go-ahead.

The difference between Shows and Shivers is the status of the product as new or used. In *Nobility Homes*, we did not distinguish between new and used goods, because the rationale driving our decision did not depend on the fate of the product between the time that it left the manufacturer's hands and the time that it was purchased by the plaintiff.

A merchant bound by the implied warranty of merchantability is obligated to ensure that the good is merchantable when it leaves the merchant. A downstream purchaser who seeks to recover for economic loss under an implied-warranty theory, whether he buys the product new or used, seeks to hold the merchant accountable only for the state of the product when it passed to the first buyer. We see no reason why the merchant's legally imposed duty to issue merchantable goods should automatically end when a good passes to subsequent buyers.

2. *The role of inspection in implied-warranty claims—patent defects vs. latent defects*

MAN cites *Chaq Oil Co. v. Gardner Machinery Corp.*[23] for the proposition that a buyer who knowingly purchases a used good and inspects it has effectively waived the implied warranty of merchantability. MAN points out that Shows had the yacht inspected before purchasing.

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

[23] 500 S.W.2d 877 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ).

In *Chaq Oil*, the buyer of a used crawler-tractor knew it was used and watched it operate prior to purchase.[24] After incurring costs for extensive repairs, the buyer filed an implied-warranty action against the immediate seller. The court of appeals barred the action: "Under Texas law no implied warranty of merchantability is appropriate in the case of goods purchased with the knowledge that they are used or second-hand."[25] We need not address the propriety of this holding in the context of an implied-warranty claim against the immediate seller. Insofar as the holding extends to an implied-warranty claim by a second-hand buyer against the original manufacturer, we disapprove of it. The buyer's knowledge that a good is used does not automatically erase an implied-warranty claim when a manufacturer makes a defective product. The defect doesn't rub off with use.

But inspection does play a role, because section 2.316(c)(2) provides that "when the buyer before entering into the contract has examined the goods . . . as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to [the buyer]."[26]

Here, the record shows that Shows had the engines inspected by AMD and the defect was not detected. An inspection by an authorized service dealer for the manufacturer of the good is a reasonable and prudent examination under the circumstances. The inspection did not waive the implied warranty of merchantability.

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[24] *Id.* at 877–88.

[25] *Id.* at 878.

[26] TEX. BUS. & COM. CODE § 2.316(c)(2).

3. *Problems of proof and multiplicity of claims*

MAN points to several supposed difficulties with allowing second-hand buyers to sue remote manufacturers for violating an implied warranty. MAN worries that manufacturers will not be able to effectively assert defenses like improper maintenance and use, since the interim owners of the good will not always be available to account for their stewardship over the product during their ownership.

We do not share this concern, which points principally to an evidentiary issue that can be resolved through the normal fact-finding process. After all, "[a] plaintiff in an implied warranty of merchantability case has the burden of proving that the goods were defective at the time they left the manufacturer's or seller's possession."[27] The plaintiff can offer direct proof of such a defect, or may offer circumstantial proof of such a defect by proving that the good was used properly and it nevertheless failed.[28] Thus, the wear and tear that plagues a good after it leaves the merchant is an obstacle for the plaintiff, not the defendant. If the plaintiff can make his case, we see no reason why the fortuity of a downstream sale should excuse a manufacturing defect.

MAN also expresses concern over multiple claims arising from multiple purchasers regarding the same good. This concern deserves some attention, since it played a lead role in the original genesis of the privity requirement in nineteenth-century England. In *Winterbottom v.*

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[27] *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989).

[28] *See id.* at 444–45.

Wright, the Court of Exchequer created a privity requirement, concerned that otherwise the floodgates would swing wide for "an infinity of actions" by those adversely affected by a good.[29]

But we long ago parted ways with the Court of Exchequer on this issue. In *Garcia v. Texas Instruments, Inc.*, we abolished privity requirements for implied-warranty, personal-injury actions.[30] We then dissolved the distinction regarding privity between personal-injury and economic loss in *Nobility Homes*: "The fact that a product injures a consumer economically and not physically should not bar the consumer's recovery."[31] Thus, our precedent has already settled the issue of multiple warranty claims for economic loss attached to a single good. We see no reason to depart from this position.

Moreover, forbidding a second-hand purchaser to sue the manufacturer might only trigger a laborious struggle back upstream until the manufacturer is held to account anyway. Even if the used-good purchaser could sue only the immediate seller for a manufacturing defect, the immediate seller can drag the next seller into the litigation as a third-party defendant, and so on until the manufacturer is forced into the tumult. This domino-style litigation offers nothing but waste.

As a matter of law, an implied warranty of merchantability, if not disclaimed, is born at the point of sale: "Unless excluded or modified [under section 2.316], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to

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[29] (1842) 152 Eng. Rep. 403, 404 (Exch.).

[30] 610 S.W.2d at 463–65.

[31] 557 S.W.2d at 81.

goods of that kind."[32] Regardless of how much use and abuse a product suffers at the hands of its owners, none of that can wear away the manufacturer's duty to place merchantable goods into the stream of commerce, and a subsequent owner may hold the manufacturer accountable for that duty with respect to defects.

4. *Warranty disclaimers where privity does not exist*

MAN contends it will unfairly burden manufacturers to allow second-hand purchasers to sue them for breach of implied warranties because manufacturers are unable to disclaim such warranties to downstream buyers. But, until barred by an applicable statute of limitations, the implied warranty remains with the good if the original buyer never resells it. Therefore, its continuing availability to a second-hand purchaser when the original buyer *does* resell it can hardly thrust an additional and unjustified burden upon the manufacturer. Rather, if the implied warranty did not pass with the good upon resale, the manufacturer would enjoy a fortuitous windfall.

In any event, manufacturers only face the specter of implied-warranty claims if they do not exclude or modify implied warranties, which Texas law undeniably permits.[33] MAN contends that allowing downstream purchasers to make implied warranty claims will render it impossible for manufacturers to disclaim implied warranties, since manufacturers cannot as a practical matter provide downstream purchasers with notice that implied warranties are being disclaimed under section 2.316. But this result only occurs if, under section 2.318, courts allow a buyer of used goods to sue a party "other than the immediate seller" for breach of the implied warranty. As we

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[32] TEX. BUS. & COM. CODE § 2.314(a).

[33] *Id.* § 2.316.

state above, a downstream purchaser cannot obtain a greater warranty than that given to the original purchaser, so if the manufacturer at the point of original sale makes a valid disclaimer of implied warranties, that disclaimer extends to subsequent purchasers. We have never held otherwise, nor do we do so today. In other words, implied warranties, as well as valid disclaimers of such,[34] move with the used good, by operation of law, from purchaser to purchaser.

C. Can An "As Is" Clause Negate An Implied-Warranty Claim By A Second-Hand Buyer Against The Manufacturer?

Under Texas law, "all implied warranties" are nullified by "as is" and similar language, "unless the circumstances indicate otherwise."[35] MAN contends that because Shows bought the used engine through Texas Sportfishing "as is," he necessarily shouldered, as we put it thirty-six years ago, "the entire risk as to the quality of the [good] and the resulting loss,"[36] thus precluding his implied-warranty claim. The "as is" buyer, MAN argues, does not assume the entire risk if he inherits rights under an implied warranty made between an earlier buyer and seller.

The parties have briefed how "as is" language operates in the non-privity context, and such disclaimers are common in the sale of used goods. Does section 2.316(c)(1)'s expansive language limit itself to "as is" clauses between the buyer and the immediate seller, or does "as is" language also bar claims against the manufacturer? And how does section 2.316(c)(1)'s introductory

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[34] Shows argues that MAN's disclaimer of implied warranties was invalid under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2308, a substantive issue we do not reach.

[35] Section 2.316(c)(1) states: "[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." TEX. BUS. & COM. CODE § 2.316(c)(1).

[36] *Mid Continent Aircraft Corp. v. Curry Cnty. Spraying Serv., Inc.*, 572 S.W.2d 308, 313 (Tex. 1978).

clause—"unless the circumstances indicate otherwise"—inform the statute's broad "all implied warranties" language?

The reach of an "as is" clause is important, but unfortunately, it is procedurally unreachable in this case. MAN did not plead that the "as is" clause barred Shows's implied-warranty claim or ever reference the clause in the trial court. MAN did reference section 2.316 of the UCC ("Exclusion or Modification of Warranties") in its JNOV motion, but did not expressly connect it to the "as is" clause. The reference to section 2.316 in the JNOV motion was only in reference to the argument that MAN's express disclaimer of implied warranties should apply, presumably under section 2.316(b), not that the "as is" clause found in another document excluded the implied warranty under section 2.316(c). Nor was the clause a basis on which the trial court granted JNOV. If MAN wanted judgment based on that clause, found in a form from a third party and not on its face purporting to apply to MAN,[37] we think it should have brought this separate ground to the attention of the trial court with "sufficient specificity to make the trial court aware" of the argument.[38]

Even if MAN's reference to section 2.316 in the JNOV motion was sufficient to raise the "as is" clause in the trial court, MAN did not raise that clause in the court of appeals. Rule 38.2(b)

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[37] The "as is" clause says nothing about the manufacturer or MAN in particular, and states instead "that the vessel is sold as a used vessel, 'AS IS' and 'WHERE IS' and no guarantee or warranty either express, implied or statutory is made either by the Seller or by Texas Sportfishing and Yacht Sales or any co-broker or any of their agents, servants or employees."

[38] *See* TEX. R. APP. P. 33.1 ("As a prerequisite to presenting a complaint for appellate review, the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint . . . .").

of the Rules of Appellate Procedure provides that "[w]hen the trial court renders judgment notwithstanding the verdict on one or more questions," as the trial court did here, "the appellee," which was MAN,

> must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict. Failure to bring forward by cross-point an issue or point that would vitiate the verdict or prevent an affirmance of the judgment waives the complaint.[39]

If MAN is now contending the "as is" clause was an independent ground for granting judgment notwithstanding the jury verdict, it should have made this argument to the court of appeals by cross-point.[40]

III. Conclusion

If the manufacturer validly disclaims implied warranties at the first sale, as is commonly done, that disclaimer carries with the good, just as the warranty otherwise would. Absent such disclaimer language, manufacturers do not escape liability merely because a good has transferred owners, and the purchaser of a used good can rely upon an implied warranty created at the time of first sale. The law imposes an obligation that merchants sell merchantable goods, and when they

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[39] *Id.* at 38.2(b).

[40] *See id.*; *see also* TEX. R. CIV. P. 324 ("When judgment is rendered non obstante veredicto or notwithstanding the findings of a jury on one or more questions, the appellee may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict . . . . The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof . . . ."); TEX R. APP. P. 53.2(f) (stating that when presenting issues to the Supreme Court, "[i]f the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals").

fall short of this standard, a second-hand buyer who suffers an economic loss from a defect has a right of recovery through an implied-warranty action.

In this case, Shows was entitled to recover on his implied-warranty claim. Accordingly, we affirm the court of appeals' judgment.

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Don R. Willett
Justice

OPINION DELIVERED: June 6, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0522

WASTE MANAGEMENT OF TEXAS, INC., PETITIONER,

v.

TEXAS DISPOSAL SYSTEMS LANDFILL, INC., RESPONDENT

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

Argued December 3, 2013

JUSTICE WILLETT delivered the opinion of the Court.

When the debate is lost,
slander becomes the tool of the loser.[1]

This defamation case specifically concerns libel (defamation in written form), but Socrates' perception of slander (defamation in spoken form) applies with no less force.

In 1995, Waste Management of Texas, Inc. (WMT) and Texas Disposal Systems Landfill, Inc. (TDS) competed for waste-disposal and landfill-services contracts with the cities of Austin and San Antonio. Fearing it was losing the bidding debate, WMT anonymously published a community "Action Alert" claiming that TDS's landfills were less environmentally sensitive than they actually were.

[1] This quote is widely, if not verifiably, attributed to Socrates, who taught Plato, who taught Aristotle, who taught Alexander the Great.

The right to speak freely is, of course, an enumerated right enshrined in both the Texas[2] and Federal[3] constitutions. But free speech is not absolute[4] and does not insulate defamation.

Today's case distills to this question: To what degree is WMT liable for libel? To answer that question, we consider three separate inquiries:[5]

1. Can a corporation even suffer reputation damages?

2. If so, are those damages economic or non-economic damages for purposes of the statutory cap on exemplary damages?

3. Does the evidence support the damages awarded by the jury?

[2] TEX. CONST. art. I, § 8.

[3] U.S. CONST. amend. I.

[4] The Texas Bill of Rights itself acknowledges that free speech is not inviolate. 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* . . . .") (emphasis added). Several Texas statutes likewise limit speech. *See, e.g.*, TEX. BUS. & COM. CODE §§ 17.01 *et seq*. (prohibiting a false going-out-of-business advertisement, and prohibiting deceptive advertising); TEX. ELEC. CODE §§ 253.151 *et seq*. (imposing contribution and expenditure limits in judicial elections). We offer no opinion on the constitutionality of these statutes.

[5] We distill from the numerous and varied issues raised by WMT the relevant ones necessary to dispose of this appeal.

The amici curiae[6] see this case as an overdue opportunity to scrap the traditional distinction between per se and per quod defamation,[7] citing many commentators[8] and jurisdictions[9] that lament the labels' needless opacity.[10] Amici believe eliminating the distinction would harmonize Texas defamation law and its application. But we need not consider these broader issues to decide today's case.[11]

We hold that a corporation may suffer reputation damages, and that such damages are non-economic in nature. Also, while the evidence in this case is sufficient to support the award of remediation costs, the evidence is *not* sufficient to support the award of reputation damages. Finally,

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[6] Amici supporting WMT include Belo Corporation, Dow Jones & Company, Inc., Fox Television Stations, Inc., NBC Universal Media LLC, News Corp., Reporters Committee for Freedom of the Press, Reuters America, Scripps Media, Inc., and the Texas Association of Broadcasters.

[7] Defamation per se (on its face) requires no proof of actual monetary damages, while defamation per quod (dependent on context and interpretation) does require such proof. *See Hancock v. Variyam*, 400 S.W.3d 59, 63–64 (Tex. 2013).

[8] *See, e.g.*, 1 ROBERT D. SACK, SACK ON DEFAMATION § 2.8.1 (4th ed. 2013) ("No concept in the law of defamation has created more confusion."); RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977) (describing the imprecise and anachronistic nature of the distinction); William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 848–49 (1960) ("[I]n this maze anyone can be forgiven for losing his way.").

[9] *See, e.g.*, *Hancock*, 400 S.W.3d at 64 (quoting *Salinas v. Salinas*, 365 S.W.3d 318, 320 n.2 (Tex. 2012)) ("[T]he damages a defamation *per se* plaintiff may recover is an issue 'courts have not resolved . . . in an entirely consistent manner.'"). For example, cases discarding the distinction between the different categories of defamation or abandoning the doctrine of presumed damages include *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239, 1242–43 (Kan. 1982); *Metromedia, Inc. v. Hillman*, 400 A.2d 1117, 1119 (Md. 1979); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 308, 313 (Mo. 1993); *W.J.A. v. D.A.*, 43 A.3d 1148, 1150, 1159–60 (N.J. 2012); *Smith v. Durden*, 276 P.3d 943, 945 (N.M. 2012); *Newberry v. Allied Stores, Inc.*, 773 P.2d 1231, 1236 (N.M. 1989); *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978).

[10] One First Amendment scholar puts it bluntly: "The ostensibly simple classification system . . . has gone through so many bizarre twists and turns over the last two centuries that the entire area is now a baffling maze of terms with double meanings, variations upon variations, and multiple lines of precedent." 2 RODNEY SMOLLA, LAW OF DEFAMATION § 7:1 (2d ed. 2010).

[11] Notably, we have used the phrase "per quod" as it relates to defamation law only once in the history of this Court. *See Hancock*, 400 S.W.3d at 64.

we agree that TDS is entitled to exemplary damages, but the amount, along with allowable pre- and post-judgment interest, must be recalculated. Accordingly, we affirm in part and reverse in part the court of appeals' judgment and remand to the court of appeals for further proceedings.

I. Background

In May 1995, TDS and the City of San Antonio began negotiating a contract for TDS to assume operations of San Antonio's Starcrest Transfer Station. The contract would have allowed TDS to haul San Antonio's waste from the Starcrest Station to TDS's landfill, starting in 1997. In 1996, the San Antonio City Council passed an ordinance authorizing the city manager to negotiate and execute a contract in accordance with the proposed agreement between San Antonio and TDS, which was attached and incorporated into the ordinance. But the parties had not yet executed a final contract by 1997—the originally proposed start date.

Concurrently with the San Antonio negotiations in 1996, the City of Austin issued a request for proposals, seeking bids from waste-disposal and landfill-services companies. TDS and WMT submitted bids and were selected to proceed to Phase II of the bidding process.

In early 1997, WMT anonymously published a community "Action Alert" memorandum, which was distributed to environmental and community leaders in Austin, including several Austin City Council members. WMT had hired a consultant, Don Martin, to draft the document. Martin gathered information from several WMT officials, who then approved, as TDS alleged, the document for publication. Martin sent the document to an Austin environmental advocate who then faxed it to a designated group of recipients. Martin focused the Alert on TDS's proposal with San Antonio regarding Starcrest Station.

The Alert effectively claimed that TDS's landfill was less environmentally sensitive than it actually was and as compared to other area landfills. Specifically, the Alert claimed that TDS's landfill in Travis County (1) had received an exception to federal environmental rules, (2) was operating without a fully synthetic liner, and (3) did not have a leachate collection system to prevent water that had come into contact with waste from contaminating groundwater. The Alert closed by urging readers to contact San Antonio city officials, Travis County officials, and the *San Antonio Express News* with any concerns.

TDS sued WMT in late 1997 for defamation, tortious interference with an existing or prospective contract, and business disparagement. TDS alleged that the Alert caused economic damages by delaying the execution of the San Antonio and Austin waste disposal contracts.[12] TDS sought compensatory and punitive damages and injunctive relief.

After TDS filed suit, WMT published a number of communications concerning TDS and its business. WMT sent a memorandum to the San Antonio Public Works Department, questioning whether the zoning ordinance of the Starcrest Station even permitted TDS to operate the Station. WMT also anonymously issued a memorandum to the San Antonio City Council and the Texas Natural Resource Conservation Commission contending that TDS's proposed contract would result in multiple permit violations. Finally, WMT issued a press release claiming TDS had "inspired" a protest demonstration and providing reasons why TDS should not be selected for the Austin

[12] TDS ultimately finalized its contracts with both Austin and San Antonio.

contract. TDS amended its original petition to include these publications that post-dated the original Action Alert.[13] TDS later added antitrust claims against WMT for its "attempt to monopolize."

The trial court considered motions for summary judgment and dismissed all of TDS's claims except for defamation.[14]

At trial, TDS requested an instruction on defamation per se and the related issue of presumed damages, but the trial court declined to charge the jury on either. The jury found that WMT's statements were false and that TDS had shown by clear and convincing evidence that WMT knew of their falsity or had serious doubts about their truth. The jury thus made an affirmative finding on actual malice, but it determined that TDS had suffered no actual damages as a result of the publication. The trial court entered a take-nothing judgment against TDS, which TDS appealed.

In a first appeal,[15] the court of appeals reversed, holding that the trial court erred by refusing to include a question about defamation per se in the charge. The court of appeals held that the trial

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[13] The causes of action in TDS's amended petition remained the same: defamation, business disparagement, and tortious interference with current and prospective contracts. WMT moved for partial summary judgment, arguing that these subsequent publications were unrelated to the Action Alert and could not be considered because the amended petition arrived after the respective limitations periods had run. TDS countered, asserting a continuing course of tortious conduct. The trial court ruled for WMT, holding that the amended petition added "new, distinct, and different transactions" that did not relate back to the grounds of liability alleged in TDS's original petition, namely the Action Alert. Liability thus could not rest on the later, time-barred publications. The trial court revisited this issue later, but again resolved it in WMT's favor.

[14] As discussed in note 13, *supra*, the trial court's order granting partial summary judgment to WMT did not fully dispose of the factual issues relating to TDS's claims based on the Action Alert, because the order concerned only whether limitations had run on the later publications. The trial court later granted summary judgment in WMT's favor on TDS's tortious interference claims based on the Action Alert, preserving the defamation and disparagement claims for trial. At the conclusion of the evidence, however, the trial court dismissed TDS's disparagement claim by directed verdict. And because TDS did not raise the dismissal of its disparagement claim in the first appeal—a fact TDS concedes—it is not now before us. For more discussion on the difference between business disparagement and defamation, *see infra* at 19–20.

[15] 219 S.W.3d 563.

court erred because there were underlying facts regarding whether the meaning and effect of WMT's words tended to affect TDS injuriously in its business. The court of appeals remanded the case for a new trial.

In the second trial, the trial court charged the jury on defamation per se and gave related instructions on presumed damages. The jury returned a verdict in favor of TDS, awarding it $450,592.03 for reasonable and necessary expenses, $0 for lost profits, $5 million for injury to reputation, and $20 million as exemplary damages based on the jury's finding that WMT published the defamatory statements with malice. The trial court applied the statutory cap to the jury's award of exemplary damages, treating the $5 million award for injury to reputation as non-economic damages, and rendered an exemplary damage award of $1,651,184.06. WMT appealed the trial court's judgment, and the court of appeals affirmed.[16]

The parties filed cross-petitions in this Court. In one issue, TDS contends the trial court erred by categorizing its reputation damages as non-economic damages for purposes of the statutory cap on exemplary damages. In ten issues, WMT asserts evidentiary and procedural defects. We first consider whether a for-profit corporation may recover for injury to reputation.

II. A Corporation May Recover Reputation Damages

WMT makes three arguments regarding reputation damages:

1. Corporations cannot suffer such damages.

2. Even if they could, reputational harm is a non-economic injury.

[16] No. 03-10-00826-CV, 2012 WL 1810215 (Tex. App.—Austin May 18, 2012) (mem. op., not designated for publication).

3. Here, the evidence was legally insufficient to sustain the jury's award of $5 million.

WMT argues in its brief that corporations cannot suffer reputation damages because corporations are not people. But WMT's position has not been entirely consistent. At oral argument WMT urged that corporations can *never* suffer reputation damages, but its Response Brief concedes that corporations *may* suffer some types of reputation damages: "lost profits, rehabilitative expenses, and diminished value of the corporation—are the only damages a corporate entity's reputation can sustain." In any event, we discern WMT's contention to be that defamation per se is an inherently personal tort, and that it was designed to address harm that only natural persons may suffer, such as mental anguish, sleeplessness, or embarrassment. We have never adopted such an interpretation. On the contrary, it is well settled that corporations, like people, have reputations and may recover for harm inflicted on them.[17]

Our 1943 decision in *Bell Publishing Co. v. Garrett Engineering Co.* concerned similar facts. In that case, the corporate plaintiff, Garrett, sued an individual, Dr. Gober, and Bell Publishing Company for publishing an allegedly libelous article.[18] The events leading up to the publication involved the City of Temple's decision whether it needed a municipally owned electricity provider.[19] Garrett executed with the city a contract in which Garrett agreed to provide its engineering services

[17] *See* note 35, *infra; see also* RESTATEMENT (SECOND) OF TORTS § 561 (1977) ("One who publishes defamatory matter concerning a corporation is subject to liability to it . . . if the corporation is one for profit, and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it."); *id*. § 561 cmt. b ("A corporation for profit has a business reputation and may therefore be defamed in this respect.").

[18] 170 S.W.2d 197, 199–200 (Tex. 1943).

[19] *Id.* at 200.

if the city decided to build a power plant or purchase the existing privately owned plant.[20] Garrett submitted plans and estimates to the city, held conferences with city officials, and prepared drawings of the necessary buildings and equipment.[21] The city commission then ordered a bond election to be held on financing the project.[22] In response, Dr. Gober wrote an article for the *Temple Daily Telegram*, published by defendant Bell.[23]

Dr. Gober addressed his article to the residents of Temple, and generally suggested a call to action to "thresh[] out and definitely determin[e] whether or not Temple really needs this proposed utility."[24] Dr. Gober also proposed a "sit-down strike."[25] The article also stated, "[T]here is no person connected with [Garrett Engineering] who is a practical engineer, or who holds a degree of engineering. I am reliably informed that [Garrett] has never done any similar work, and by that I mean that it has never constructed such plant for any other city."[26]

Garrett sued Gober and Bell for libel, alleging that statements in the article were false, made with malice, damaged its reputation, and injured the company financially.[27] The jury found that (1) Garrett did employ at least one person who was an engineer, (2) while Garrett had not built a

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 201 (italics omitted).

[27] *Id.*

similar plant for a city, it had supervised the construction of such a plant, and (3) Garrett's damages amounted to $15,000.[28] The trial court entered judgment against both defendants based on the jury's findings.[29] On appeal, the court of appeals, while agreeing the statements were libelous and unprivileged, reversed and remanded for a new trial because the trial court failed to instruct the jury to consider only the damages that resulted from the false statements.[30]

We agreed with the court of appeals that the statements were libelous per se.[31] We considered the law of defamation: "[L]anguage which concerns a person engaged in a lawful occupation 'will be actionable, if it affects him therein in a manner that may as a necessary consequence, or does as a natural or proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained.'"[32] We held that Garrett's corporate claims for defamation per se were actionable.[33] And after examining whether Dr. Gober's statements were privileged or truthful, we upheld the jury's findings and the trial court's judgment entered against both defendants.[34]

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[28] *Id.* at 202.

[29] *Id.*

[30] *Bell Publ'g Co. v. Garrett Eng'g Co.*, 154 S.W.2d 885, 887 (Tex. Civ. App.—Galveston 1941) *aff'd*, 170 S.W.2d at 197.

[31] *Bell Publ'g Co.*, 170 S.W.2d at 202.

[32] *Id.* (quoting *Mo. Pac. Ry. v. Richmond*, 11 S.W. 555 (Tex. 1889)).

[33] *Id*.

[34] *Id*. at 204–05. However, we also affirmed the court of appeals's judgment remanding the case to the trial court for a new trial because the trial court should have instructed the jury to award only damages for the statements that it found to be false. *Id*. at 206–207.

We have reaffirmed three times *Bell*'s holding that a corporation may be libeled,[35] including just last year, and see no persuasive reason to abandon that settled precedent. Likewise, we decline to apply our defamation jurisprudence any differently when the statements amount to per se defamation. In such cases, "our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish."[36] If false and disparaging statements injure a corporation's reputation, it can sue for defamation per se just like flesh-and-blood individuals.

III. A Corporation's Reputation Damages are Non-Economic Damages for Purposes of the Statutory Cap on Exemplary Damages

In its sole issue, TDS argues that the trial court erred by categorizing the jury's award of injury to reputation as non-economic damages instead of economic damages, which would result

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[35] As noted in our prior line of cases involving corporate defamation, we distinguish between a corporation and a business—only the former may sue for defamation. *See, e.g.*, *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013) ("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) ("[A] corporation, as distinguished from a business, may be libeled."); *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960) (citations omitted) ("[T]he very wording of the libel statute precludes its application to a business. It does not alter the situation that a corporation may be libeled or that a partnership may be libeled."); *Bell Publ'g Co.*, 170 S.W.2d at 203 ("[S]tatements complained of by [Garrett Engineering Co.] impute to it a lack of technical skill and practical experience on its part to perform its contract or to carry on its business and that such inescapable imputations tended to damage plaintiff's business and were actionable.").

We have noted that this type of defamation is one "of the owner of the business and not of the business itself," and that the damages are "of the owner, whether the owner be an individual, partnership or a corporation." *Matthews*, 339 S.W.2d at 893. Our most instructive piece on the distinction between the owner and the business may be found in *Matthews* in which we analyzed the two in light of the libel statute at issue in that case. There, the libel statute defined defamation as affecting "the memory of the dead," "one who is alive," "him," "any one," and "such person." *Id*. (citation omitted). Relying on our prior precedent and the Restatement, we held that while the very wording of the libel statute precluded its application to a business, it did not change the applicability to a corporation. *Id.* (citing *Bell Publ'g Co.*, 170 S.W.2d 197; RESTATEMENT OF TORTS § 561 (1938)). We further noted that the defamation specifically injures the reputation of the owner, *id*.—in other words, not the owner's business. Thus, applying our prior holdings to this case we discern the publication to be defamatory of TDS (the owner) and not the landfill-services operations (the business), and the resulting damages are those TDS suffered as the owner *of* the business.

[36] *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002).

in a higher allowable statutory cap on exemplary damages. TDS contends that reputation damages of a for-profit corporation are economic damages because the text of the 1995 version of the statutory cap did not specifically define non-economic damages, and because it did not expressly exclude reputation damages from the definition of economic damages. TDS says the Legislature defined economic damages as "compensatory damage for pecuniary loss," and several courts of appeals have defined pecuniary loss as "including money and everything that can be valued in money." Even *Black's Law Dictionary* defines the term as "[a] loss of money or of something having monetary value."[37] Thus, TDS concludes, a corporation's reputation damages are economic under the 1995 text, because they are (1) not specifically defined as non-economic damages, (2) not expressly excluded from the definition of economic damages, and (3) can be specifically valued in money. We disagree.

Section 41.008(b) states:

> Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
>
> (1) (A) two times the amount of economic damages; plus
>
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
>
> (2) $200,000.[38]

[37] BLACK'S LAW DICTIONARY 1030 (9th ed. 2009).

[38] TEX. CIV. PRAC. & REM. CODE § 41.008(b).

Section 41.008(b) remained unchanged as a result of a 2003 amendment.[39] Section 41.001(4) was amended. In 1995, Section 41.001(4) read as follows:

> "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.[40]

The crux of TDS's argument is that Section 41.001 did not specifically define "non-economic damage"—nor did it expressly exclude injury to reputation from economic damage.

In 2003, the Legislature amended Section 41.001(4) and added an entirely new subsection:

> Section 41.001(4) as amended in 2003
>
> "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.[41]
>
> Added 2003 subsection
> "Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, *injury to reputation*, and all other nonpecuniary losses of any kind other than exemplary damages.[42]

TDS avers that the 2003 amendment "recharacterized reputation damages as non-economic," and that we should focus on what the 1995 statute intended—that a for-profit corporation's injury

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[39] The 2003 amendment to the Civil Practice and Remedies Code is inapplicable here, given that TDS filed suit in 1997.

[40] Act of April 6, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 109 (current version at TEX. CIV. PRAC. & REM. CODE § 41.001(4)).

[41] TEX. CIV. PRAC. & REM. CODE § 41.001(4).

[42] *Id.* § 41.001(12) (emphasis added).

to reputation must be economic because those damages are pecuniary loss and not expressly excluded by the statute's text. We decline to adopt such an interpretation.

Section 41.001(4) defines "economic damages" as "compensatory damages for pecuniary loss." Compensatory damages may be divided into two other categories: pecuniary harm and non-pecuniary harm.[43] So is injury to reputation a pecuniary loss for purposes of Section 41.001(4)? We think not.

Injury to one's person, by pain or humiliation, is not analogous to pecuniary loss.[44] Stated differently, money does not equate to peace of mind.[45] However, damages awarded for this class of injury are classified as compensatory damages.[46] So the tendency to confuse the character of the *harm* with that of the *remedy* is understandable. To be certain, compensatory damages offer a pecuniary remedy for the non-pecuniary harm that a plaintiff has suffered or will likely suffer later.[47]

Non-pecuniary harm includes damages awarded for bodily harm or emotional distress.[48] Similar to general damages, these non-pecuniary damages do not require certainty of actual monetized loss.[49] Instead, they are measured by an amount that "a reasonable person could possibly

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[43] *See* RESTATEMENT (SECOND) OF TORTS §§ 905, 906 (1979).

[44] 1 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 1:4 (3d ed. 2004).

[45] *Id*.

[46] *Id*.

[47] *See id*. (citations omitted).

[48] RESTATEMENT (SECOND) OF TORTS § 905 (1979).

[49] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 373 (1974) (White, J., dissenting); 2 DAN B. DOBBS, LAW OF REMEDIES § 8.1(4) (2d ed. 1993); RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1977); *id.* § 905 cmt. i (1979).

estimate as fair compensation."[50] Conversely, damages for pecuniary harm do require proof of pecuniary loss for either harm to property, harm to earning capacity, or the creation of liabilities.[51] One leading commentator contrasts pecuniary and non-pecuniary harm this way:

> Plaintiffs prove three basic elements of recovery in personal injury actions. (1) Time losses. The plaintiff can recover loss or [sic] wages or the value of any lost time or earning capacity where injuries prevent work. (2) Expenses incurred by reason of the injury. These are usually medical expenses and kindred items. (3) Pain and suffering in its various forms, including emotional distress and consciousness of loss.[52]

Professor Dobbs's first two categories concern pecuniary losses, while his third involves non-pecuniary losses. Applying his categorical delineations for a personal injury to this case, injury to reputation falls into the third category as a non-pecuniary loss, because it is neither time lost nor an expense incurred.

The Second Restatement, in defamation per se cases, also considers injury to reputation to be a non-pecuniary harm.[53] In cases of ordinary defamation the Restatement requires proof of economic or pecuniary loss that reflects a loss of reputation.[54] Said another way, the Restatement generally requires proof of an economic loss that was occasioned by a non-economic injury like

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[50] *See* RESTATEMENT (SECOND) OF TORTS § 905 cmt. i.

[51] *Id*. § 906.

[52] 2 DOBBS, LAW OF REMEDIES § 8.1(1) (footnotes omitted).

[53] RESTATEMENT (SECOND) OF TORTS § 905 cmt. a (1979).

[54] *Id*. § 575 cmt. b (1977).

slander.[55] But the Restatement takes a special position in defamation per se cases, viewing injury to reputation as a general damage, non-pecuniary harm.[56]

Finally, the draft Third Restatement also classifies injury to reputation as a non-economic harm. The draft Third defines "economic loss" as the "pecuniary damage *not* arising from injury to the plaintiff's person. . . ."[57] By negative implication, then, non-economic loss is pecuniary damage *arising from* injury to the plaintiff's person. Convincingly, the draft Third also recognizes that sometimes an economic loss will actually be considered a personal injury if emotional harm is involved that causes pecuniary loss:

> Wrongs that might seem to cause only economic loss are sometimes regarded otherwise because the law takes an expansive view of what counts as a personal injury. Defamation, for example, is regarded as inflicting a kind of personal injury: harm to the plaintiff's reputation. If a defendant inflicts emotional harm on the plaintiff, and causes the plaintiff to suffer consequent pecuniary loss, it is likewise a case of personal injury covered not here but in Restatement Third, Torts: Liability for Physical and Emotional Harm.[58]

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[55] *See id*.

[56] *Id.* § 905 cmt. a (1979).

[57] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 2 (Tentative Draft No. 1, 2012) (emphasis added).

Sections 1 through 5 of the draft Restatement Third were approved by the membership of the American Law Institute at the 2012 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative. *Proceedings at 89th Annual Meeting: American Law Institute*, 89 A.L.I. PROC. 22–47 (2012). According to the Institute: "Once it is approved by the membership at an Annual Meeting, a Tentative Draft or a Proposed Final Draft represents the most current statement of the American Law Institute's position on the subject and may be cited in opinions or briefs . . . until the official text is published." *Overview, Project Development*, THE AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=projects.main (last visited April 25, 2014). Section 2 of the draft Third is consistent with our analysis today.

[58] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 2 cmt. a (Tentative Draft No. 1, 2012).

According to the draft Third, if harm to one's reputation is "a kind of personal injury," it may not be considered an economic loss "because the law takes an expansive view of what counts as a personal injury."[59]

Thus, both the Restatements and commentators recognize the distinction between the non-pecuniary injury and the pecuniary remedy.

Our cases likewise treat an individual's reputation damages as non-economic.[60] In *Bentley v. Bunton*, a local district judge brought a defamation action against a host and co-host of a call-in talk show televised on a public-access television channel.[61] For months, the host of the show had accused the local judge of being corrupt.[62] The trial court rendered judgment in favor of the judge, finding that the host's statements were conclusively proven to be false and defamatory.[63] The jury awarded $7 million to the judge for mental anguish damages.[64] The court of appeals affirmed the judgment against the host but reversed the judgment against the co-host.[65] We granted both parties' petitions for review. Importantly, we noted that mental anguish damages and reputation damages, such as those in *Bentley*, were non-economic damages.[66]

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[59] *See id*.

[60] *Bentley*, 94 S.W.3d at 605.

[61] *Id*. at 566–67.

[62] *Id*.

[63] *Id*. at 567.

[64] *Id*. at 576.

[65] *Id*. at 577.

[66] *Id.* at 605.

Though the plaintiff in *Bentley* was an individual, our conclusion focused on the nature of the damage suffered, not on whether the plaintiff was an individual or a corporation. We did not strictly cabin our opinion to an individual's reputation damages. We said generally: "*Non-economic damages like these* [mental anguish, character, and reputation damages] cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment."[67]

Just last year, we reaffirmed that an individual's reputation damages are non-economic damages in *Hancock v. Variyam*.[68] In that case, Variyam was the Chief of the Gastroenterology Division of the Texas Tech University Health Sciences Center (the "Division").[69] Hancock worked as an associate professor under Variyam's supervision.[70] After a dispute arose between the two about Hancock's care of patients, Hancock sent a letter to the Chair of the Division, the Dean of the School of Medicine, a Division colleague, and the entity reviewing the Division's application for accreditation for its gastroenterology fellowship.[71] Hancock wrote that Variyam had a "reputation for lack of veracity" and "deals in half truths, which legally is the same as a lie."[72] Subsequently,

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

[68] 400 S.W.3d at 65.

[69] *Id*. at 62.

[70] *Id*.

[71] *Id*.

[72] *Id*. at 62–63.

the Division's fellowship was not accredited and the Chair of the Department removed Variyam as Chief of the Division.[73] Variyam sued Hancock for defamation.[74]

Regarding damages, we held: "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)."[75]

Our decisions in business disparagement cases bolster our conclusion here.

We have previously noted the distinction between business disparagement and defamation cases. To recover for business disparagement "a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in *special damages* to the plaintiff."[76] In *Forbes*, we noted the similarity between the two claims, but that one difference is that one claim seeks to protect reputation interests and the other seeks to protect economic interests against pecuniary loss.[77] That is, a plaintiff seeking damages for business disparagement must prove special damages resulting from the harm;[78] to hold otherwise

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[73] *Id*. at 63.

[74] *Id*.

[75] *Id*. at 65.

[76] *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) (citing *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987)) (emphasis added).

[77] *Id.*

[78] *Id.*

would subvert a fundamental element of the tort. In contrast, in a defamation case a plaintiff may recover for both general and special damages.[79]

As we explained in *Hancock*, and reaffirm today, general damages in defamation cases "are non-economic damages such as for loss of reputation" while special damages "are economic damages such as for lost income."[80] These delineations remain constant, too, for business disparagement—a tort that seeks to protect the economic interests and which expressly requires a showing of special damages. To a certain extent, then, a defamation claim allows a plaintiff to recover that which would not be recoverable under business disparagement—namely, for a non-economic injury such as injury to reputation—because disparagement only seeks to protect the plaintiff's economic interests while defamation seeks to protect the plaintiff's reputation.[81]

* * *

We see no sound basis to depart from our settled precedent treating reputation damages as non-economic damages. Thus, in line with our prior decisions, and the consensus of the Restatement and other commentators on the nature of reputation damages, we hold that, for purposes of the previous version of Section 41.001(4),[82] damages for injury to reputation are non-economic damages. Therefore, the trial court did not err when it calculated the statutory cap on exemplary

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[79] *See Hancock*, 400 S.W.3d at 65–66.

[80] *Id.* at 65.

[81] We note that in situations such as this one, a corporate plaintiff may recover under either a business disparagement or defamation claim—being limited only to economic damages under the former, but having no such limitation under the latter, assuming all other elements are satisfied.

[82] Because the amended version of the statute expressly defines reputation damages as non-economic damages, this specific issue will not likely arise in the future.

damages by classifying TDS's reputation damages as non-economic damages. However, for reasons discussed below, we reverse the jury's award of $5 million for reputation damages because the evidence is legally insufficient to support such an award, without evidence of actual damages to TDS's reputation.

IV. The Evidence Was Legally Sufficient to Support the Award of Remediation Costs, But Not the Award of Reputation Damages

WMT contends that the evidence was legally insufficient to support the jury's award to TDS of $5 million in reputation damages, $450,592.03 in remediation costs, and $20 million in exemplary damages.

A party will prevail on its legal-sufficiency challenge of the evidence supporting an adverse finding on an issue for which the opposing party bears the burden of proof if there is a complete absence of evidence of a vital fact or if the evidence offered to prove a vital fact is no more than a scintilla.[83] More than a scintilla exists when the evidence as a whole rises to a level enabling reasonable and fair-minded people to have different conclusions.[84] However, if the evidence is so weak that it only creates a mere surmise or suspicion of its existence, it is regarded as no evidence.[85]

In conducting a legal-sufficiency review, we consider the evidence in the light most favorable to the judgment, crediting evidence that a reasonable fact finder could have considered

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[83] *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

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

[85] *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

favorable and disregarding unfavorable evidence unless the reasonable fact finder could not.[86] We indulge every reasonable inference that supports the trial court's findings.[87]

In *Gertz v. Robert Welch, Inc.*, the United States Supreme Court held that the First Amendment restricts the damages that a private individual can obtain from a media defendant for defamation that involves a matter of public concern.[88] Specifically, the Supreme Court held that, unless the plaintiff shows actual malice (*i.e.*, knowledge of falsity or reckless disregard for the truth), the First Amendment prohibits awards of presumed and punitive damages for defamatory statements.[89] The Supreme Court has continued to follow this reasoning for private plaintiffs.[90] But the Supreme Court has left open the question of whether presumed or punitive damages are constitutional when there is actual malice and presumably no proof of actual harm in cases such as *Gertz*.[91] That isn't to say that the Supreme Court would completely disallow presumed damages, as the Restatement notes: "In case the Court should hold that nominal damages cannot be recovered

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[86] *City of Keller*, 168 S.W.3d at 807.

[87] *Id*. at 822.

[88] 418 U.S. at 350.

[89] *See id*. at 349.

[90] *See, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310–11 (1986) ("[S]ome form of presumed damages may possibly be appropriate [when an injury is likely to have occurred but is difficult to establish]."); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986) ("[T]he state interest [in preserving private reputation] adequately supports awards of presumed and punitive damages—even absent a showing of actual malice.") (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)) (quotations omitted and second brackets supplied)).

[91] RESTATEMENT (SECOND) OF TORTS § 620 cmt. c (1977).

in the absence of proof of actual harm, it seems most likely that the restriction will not be held to apply when the defendant had knowledge of the falsity or acted in reckless disregard of it."[92]

A. Actual Malice

As a public figure, TDS was required to prove that WMT published the Action Alert with actual malice.[93] A statement is published with actual malice if it is made with "knowledge of, or reckless disregard for, the falsity" of the statement.[94] Such statements are not constitutionally protected.[95] To determine whether a statement is made with knowledge of, or reckless disregard for, the falsity, we must consider the factual record in full.[96]

WMT raises several points against the jury's actual malice finding. It contends that (1) the record shows TDS failed to establish the Action Alert's authors' subjective states of mind regarding their reckless disregard for the falsity; (2) the technical, jargon-filled statements, without an explanation of their meaning, cannot be reasonably understood, and thus cannot form a basis for actual malice; and (3) ambiguous semantical differences in the language cannot form a basis for actual malice.[97]

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[92] *Id.*

[93] The parties do not challenge the trial court's determination that TDS is a public figure and the issue is one of public concern.

[94] *Bentley*, 94 S.W.3d at 591.

[95] *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

[96] *Bentley*, 94 S.W.3d at 591.

[97] WMT also argues that the trial court erroneously excluded evidence based on hearsay grounds that WMT asserts would have shown that it was not acting with actual malice; instead, it argues, the evidence would have shown that the statements in the Action Alert were reports of views held by others. We disagree. We review a trial court's

First, WMT argues that TDS did not carry its burden in establishing by clear and convincing evidence that the Action Alert's authors, Don Martin and Al Erwin, "entertained serious doubts as to the truth" of the publication—thereby revealing their reckless disregard for the truth.[98] WMT alleges that "[o]ther than the direct testimony of Martin and Erwin . . . there was no evidence regarding Martin's or Erwin's state of mind at the time of the Action Alert." But WMT's argument inaccurately presents the issue by not giving credit to the first prong of the actual-malice test: whether Martin had actual knowledge of the falsity. Martin's own testimony conclusively established that he was aware of the falsity. Specifically, Martin testified that he knew TDS's landfill complied with the Environmental Protection Agency rules, and that he knew it would be false to say otherwise. Martin stated that he intended for readers to think that TDS had a "loophole" around such environmental rules. Martin also said that he wanted readers to think TDS's landfill was less environmentally safe. In addition, WMT officials involved with Martin had the same understanding of both the text of the Alert and the falsity it carried with it. Thus, we think the record contains legally sufficient evidence that Martin and WMT published the Action Alert with knowledge of the falsity. Consequently, we need not consider the alternative basis for actual malice,

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exclusion of evidence for abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (per curiam). The trial court determined that the evidence was expert-opinion evidence not subject to the public record exception of the hearsay rule, TEX. R. EVID. 803(8)(A). Because the trial court, at the time, had limited knowledge of the qualifications of the authors of the opinion testimony, and had limited knowledge of the reliability of such testimony, we cannot say that it abused its discretion by excluding the evidence. Even assuming the exclusion was in error, it was harmless because the testimony excluded was in some form effectively obtained from other sources. WMT thus does not show that the exclusion of evidence probably resulted in the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). We therefore agree with the court of appeals that the trial court did not reversibly err by excluding the evidence.

[98] *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

as WMT advances, which questions whether Martin or WMT acted in reckless disregard of the falsity.[99]

Second, WMT contends that the technical, jargon-filled statements in the Alert cannot form a basis to establish actual malice. WMT cites two cases in support of its argument.[100] But neither of these cases rise to the level of responsibility here. Under these facts, Martin and WMT knew of the falsity of the Alert. Both knew that claiming that TDS's landfill had received an exception to EPA rules was false. Both knew that the language in the Alert was not simply inaccurate or made in error; instead, both parties knew it to be incorrect and specifically drafted the language to prevent TDS from obtaining the Starcrest station contract. Thus, the statements in this case are not the type that represent "the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies."[101] The statements here—concerning whether TDS's landfill had received an "exception" to EPA rules, or whether TDS accepted hazardous waste—require no technical expertise, and are not simply inaccurate or easily misunderstood; there was evidence they were specifically made to mislead and injure TDS's reputation.

Finally, WMT asserts that ambiguous semantical differences in the language cannot form a basis for actual malice. Principally, WMT argues that the Alert's use of the word "exception" over "alternative" is legally insufficient to support an actual-malice finding. WMT relies on *Time, Inc.*

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[99] Actual malice exists where a statement is made with "knowledge of, *or* reckless disregard for, the falsity." *Bentley*, 94 S.W.3d at 591 (emphasis added).

[100] *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485 (1984); *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556 (5th Cir. 1997).

[101] *Bose Corp.*, 466 U.S. at 513.

v. Pape, contending that the Alert is subject to a "number of possible rational interpretations," which does not create a fact issue on malice for the jury to decide.[102] We disagree. This is not a case of "an understandable misinterpretation of ambiguous facts."[103] Martin and WMT specifically chose the language and drafted the Alert to have negative effects on TDS's business. Martin engineered the Alert's language to influence the reader into thinking that TDS's landfill was operating under an exception to EPA rules and that it was less environmentally safe compared to other area landfills.

We think the evidence is legally sufficient on the issue of whether WMT published the Alert with knowledge of the falsities it contained. We now turn to the sufficiency of the evidence to support the damages awarded by the jury based on its finding of actual malice.

B. Damages

The damages issue is one of constitutional dimension. In *Gertz*, the Supreme Court cautioned that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."[104] Referring to presumed damages in defamation per se cases, the Court held that state law may set a lesser standard of culpability than actual malice for holding a media defendant liable for defamation of a private plaintiff.[105] The Court

[102] 401 U.S. 279, 290 (1971).

[103] *Bentley*, 94 S.W.3d at 596.

[104] 418 U.S. at 349.

[105] *Id*. at 349–50.

noted, however, that under any lesser standard a plaintiff can recover "only such damages as are sufficient to compensate him for actual injury."[106]

Although the Court's analysis only considered such damages where the defendant was *not* shown to have acted with actual malice,[107] unlike the case here, we extended the Court's reasoning in *Gertz* and applied it to cases in which the defendant *was* found to have acted with actual malice. Such was the case in *Bentley v. Bunton*, which involved an award of non-economic damages.[108] We held that the First Amendment requires appellate review of non-economic damage awards, because any recovery should only compensate the plaintiff for actual injuries and not be a disguised disapproval of the defendant.[109] *Bentley* stated: "Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish."[110] Even while recognizing that non-economic damages cannot, by their nature, be determined with mathematical precision and that juries must "have some latitude in awarding such damages,"[111] we were equally clear that such damages are not immune from no-evidence review on appeal. We held that the evidence must be

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[106] *Id.* at 350.

[107] *Cf. id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 620 cmt. c (1977) (quoting *Gertz*, 418 U.S. at 349) ("[I]t is possible that the Court will hold that the Constitution requires proof of actual harm as a necessary requisite for the existence of any liability for defamation, 'at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.'").

[108] *See* 94 S.W.3d at 576.

[109] *Id.* at 605.

[110] *Id.* at 604.

[111] *Id.* at 605.

legally sufficient as to both the existence and the *amount* of such damages, that "[j]uries cannot simply pick a number and put it in the blank," and that instead the amount must fairly and reasonably compensate the plaintiff for his injury.[112] We held under this standard that there was no evidence to support the $7 million in mental anguish damages awarded by the jury, because this amount was excessive, unreasonable, and "far beyond any figure the evidence can support."[113]

In today's case, we must determine whether there was any evidence to support the jury's award in favor of TDS for $450,592.03 in remediation costs and $5 million in reputation damages, and $20 million in exemplary damages, which the trial court statutorily reduced to $1,651,184.06. We hold that the evidence is sufficient to support the award of remediation costs and exemplary damages, but there is no evidence to support the amount awarded for reputation damages.

1. Reputation Damages

The extent of TDS's evidence of injury to its reputation was the testimony of its chief executive officer, Bob Gregory, who testified that TDS's reputation was "priceless." Gregory later estimated that the value of TDS's reputation was in the range of $10 million. At oral argument, when asked what evidence would quantify TDS's reputation damages, TDS directed us to three separate exhibits in the record that it contended support the $10 million figure. We can find no relationship between the exhibits and the $10 million estimation.

[112] *Id.* at 606 (quoting *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996)).

[113] *Id.* at 607.

The first exhibit cited by TDS contains 271 pages of invoices for consulting and attorney expenses, carrying costs and depreciation expenses on equipment,[114] "estimated profits," value of time spent, supplies, mileage expenses, and the like. In other words, the first exhibit refers to no evidence quantifying TDS's injury to its reputation. Even Mr. Gregory conceded in his deposition that the first exhibit is a summary of his calculations of "lost profits . . . and additional expenses caused by the Action Alert." These special damages, however, are not the sort of general damages that necessarily flow from such a defamatory publication.[115] TDS in fact asked for separate damages for its lost profits and certain expenses in jury question five, in addition to general damages for loss of reputation in question 7. The jury found no lost profits that might correspond to actual loss of reputation going forward.

The second and third exhibits are similarly uninstructive. They concern only the alleged decrease in TDS's "base business"—TDS's business irrespective of the Austin and San Antonio contracts. But none of these exhibits evidences any actual injury to TDS's reputation either; instead, they only depict comparisons of the growth (or decline) of local landfill service businesses. They do not reveal any quantity of damages to TDS's reputation. Indeed, TDS conceded at oral argument that these figures are only "indicators . . . that give credence to Mr. Gregory's estimates." We cannot agree with TDS's position that these exhibits quantify any amount of reputation damages. The evidence must support the amount awarded by the jury; it must not be an "indicator" that

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[114] The equipment at issue involved equipment purchased to operate the Starcrest station. TDS was unable to use the equipment at the station because of a delay, so it capitalized its carrying costs and depreciation costs.

[115] *Cf. Gertz*, 418 U.S. at 373 (White, J., dissenting); 2 DOBBS, LAW OF REMEDIES § 7.2(3); RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1977).

supports the estimates offered by the corporate executive. Without any supporting evidence of actual damages for injury to its reputation, TDS is entitled only to nominal damages in accordance with our decisions on presumed damages in defamation per se cases.[116]

We recognize that assessing injury to reputation is an inexact measurement, but the jury is not unconstrained in its discretion.[117] Awards must both be fair and compensate the plaintiff for the injury, and must not amount to "disguised disapproval of the defendant."[118]

Here, we cannot say that the amount awarded by the jury any more fairly and reasonably compensates TDS for its injury to reputation than it appears to be disapproval of WMT's conduct. There was no evidence that $5 million would reasonably and fairly compensate TDS for damage to its reputation, and we accordingly hold that this award cannot be sustained.

2. Remediation Costs

WMT also challenges the sufficiency of the evidence of TDS's remediation costs. Specifically, WMT contends that TDS cannot show that the Alert caused TDS's remediation costs. On the contrary, TDS's evidence of damages consisted of 271 pages of invoices, expenses, time spent on curative work, supplies, mileage, etc. This type of evidence does not support the award for reputation damages, as we discussed above, but it does provide some evidence of the remediation costs TDS incurred as a result of the Alert. TDS's witnesses, including its chief executive officer,

[116] *See, e.g.*, *Hancock*, 400 S.W.3d at 65.

[117] *See Saenz*, 925 S.W.2d at 614.

[118] *See Bentley*, 94 S.W.3d at 605.

Bob Gregory, testified that TDS's staff devoted more than $700,000-worth of time[119] and $450,592.03 in out-of-pocket expenses to remedy the Alert's effects.

Although the Alert failed in its purpose to compensably tarnish TDS's image, its publication and the resulting fallout still caused TDS to incur out-of-pocket consultant expenses—expenses that would not have been incurred but for the Alert—which are detailed by the invoices submitted by the consultants. These are exactly the type of special damages one would incur in remedying the effects of a publication similar to the one present here. Therefore, we hold that evidence is sufficient to support the jury's award of remediation costs and affirm that portion of the verdict.

3. Exemplary Damages and Pre- and Post-Judgment Interest

Because the evidence was sufficient to support the jury's finding of actual malice and because TDS established actual damages for its remediation costs, TDS is entitled to exemplary damages.[120] We note, however, that because the evidence was insufficient to support part of the actual damages awarded by the jury, the calculation of exemplary damages allowable by statute is necessarily affected.[121] Accordingly, we reverse the court of appeals' judgment affirming the exemplary damages awarded by the trial court and remand the case to the court of appeals for it to reconsider the amount of exemplary damages.

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[119] WMT also challenges this aspect of TDS's evidence of remediation costs, but the jury only awarded TDS its actual, out-of-pocket expenses, to the penny. Because the jury could have reasonably disregarded TDS's evidence of staff time spent managing the effects of the Alert, so shall we. *See City of Keller*, 168 S.W.3d at 811. We therefore limit our discussion to the amount awarded by the jury.

[120] *See 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).

[121] *See* TEX. CIV. PRAC. & REM. CODE § 41.008(b).

We now turn to the trial court's award of both pre- and post-judgment interest. Because we determine here that the amount of the final judgment rendered by the trial court is not supported by the evidence, we also remand this case to the court of appeals for it to revisit the issue of judgment interest. One might think the recalculation is relatively straightforward, but more is involved. The answer becomes more complicated where, as here, the trial court awarded both pre- and post-judgment interest—both of which are affected by the amount of the final judgment. Another important factor comes into play and asks whether, on appeal, TDS moved for and was granted any extensions of time, because judgment interest does not accrue for the period of any extension.[122] Because our decision today necessitates a review and recalculation of the allowable exemplary damages and pre- and post-judgment interest amounts, we remand to the court of appeals and instruct it to either recalculate the respective amounts or, if necessary, remand to the trial court for further proceedings consistent with this opinion.

V. Conclusion

Summing up:

- A for-profit corporation may recover for injury to its reputation.
- Such recovery is a non-economic injury for purposes of the statutory cap on exemplary damages in the pre-2003 version of the Civil Practice and Remedies Code.
- The evidence here was legally insufficient to support the award of reputation damages, but the evidence *was* sufficient to support the award of remediation costs and thereby exemplary damages.

[122] TEX. FIN. CODE § 304.005(b) (Post-judgment interest does not accrue "[i]f 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 . . . .").

Accordingly, we affirm in part and reverse in part the court of appeals' judgment. TDS is entitled to actual damages of $450,592.03 for its remediation costs, and nominal damages for injury to its reputation. Moreover, because the jury's finding of actual malice is amply supported by the evidence and because TDS submitted sufficient evidence of actual damages, TDS is entitled to exemplary damages. We remand to the court of appeals for it to reconsider the amount of exemplary damages and pre- and post-judgment interest awards in light of this decision.

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Don R. Willett
Justice

OPINION DELIVERED: May 9, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0563

ALLEN CHADWICK BURBAGE, PETITIONER AND CROSS-RESPONDENT,

v.

W. KIRK BURBAGE AND BURBAGE FUNERAL HOME,
RESPONDENTS AND CROSS-PETITIONERS

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

Argued January 9, 2014

JUSTICE GREEN delivered the opinion of the Court.

In this defamation case, a jury assessed compensatory and exemplary damages against Allen Chadwick Burbage (Chad) for ten statements defaming his brother, W. Kirk Burbage (Kirk). The trial court also permanently enjoined Chad from making similar statements. We are presented with three issues: (1) whether any defamatory statements fell within a qualified privilege; (2) whether evidence supports the jury's damage awards; and (3) whether the trial court abused its discretion by issuing the permanent injunction. Because we hold that Chad failed to preserve error in the charge, we do not reach the issue of qualified privilege. We also hold that the permanent injunction operates as an impermissible prior restraint on freedom of speech. Accordingly, we affirm those parts of the

court of appeals' judgment. But, on damages, we hold that no evidence supports the compensatory damage award. We reverse that part of the court of appeals' judgment.

I. Factual and Procedural Background

Kirk owns and operates the Burbage Funeral Home, a centuries-old family business, in Worcester County, Maryland. Chad is Kirk's older brother. Chad and Kirk's grandmother, Anna Burbage, managed the funeral home from her husband's death in the 1940s until her death in 1985. In her will, Anna left the funeral home and all of its assets to Kirk.

Anna bequeathed the land for the Burbage family cemetery to her children, Richard Burbage, Sr., Chad and Kirk's father, and Jean Burbage Prettyman. Although primarily a family cemetery, Anna and Richard gave permission for burial or entombment of several non-family members. Richard died in 1991; in his will, he left his 50% undivided interest in the family cemetery property to Chad and Kirk's mother, Virginia Burbage Markham, but the will was never probated. Virginia conveyed this interest to Kirk by quitclaim deed in 2003. Chad felt Kirk obtained the funeral home and the family cemetery interest through manipulation, first of Anna and later of Virginia.

Although the origin of the strife between Chad and Kirk remains unclear, the "Farm Property," a 23-acre tract that Virginia inherited from Richard in 1991, aggravated any existing discord. The potential sale of the property ultimately aligned Virginia's four children against each other: Chad and Patrice Burbage Lehmann wanted to sell, while Kirk and his brother, Keith, demurred. Throughout 2006 and 2007, Chad exchanged heated emails with Kirk's attorney. In late 2007 and early 2008, Chad created a website, www.annaburbage.org, to air his grievances with Kirk.

Chad placed several posters around town to publicize the website. The website contained the following allegations:

- "Anna Burbage ('Miss Anna') was a victim of Elder Abuse. The Abuser was her grandson, Kirk Burbage and others."

- "Virginia Burbage Markham was the principal of Stephen Decatur High School serving northern Worcester County Maryland. At the present time, she is being abused by her son, Kirk Burbage, of the Burbage Funeral Home. She is currently a victim of ELDER as well as FAMILY ABUSE."

- "The methods [of abuse] include: lies, trespassing, grand larceny, will tampering/undue influence, gifts with the intent to control his mother, discrediting fellow siblings, deceptively misrepresenting the contents of legal documents requiring the signature of the ABUSED for personal gain and to cover up land fraud and involving the ABUSED ELDER in Cemetery Land Fraud implicating several families including Shirley and Brice Phillips of the Phillips Crab House."

- "Kirk Burbage has also been known to abuse the dead, specifically his cousin, Anne Prettyman Jones."

Chad also sent letters to Shirley and Brice Phillips, family friends of the Burbages who had earlier obtained permission to place a mausoleum in the Burbage cemetery. The letters espoused a common interest in settling property rights to the cemetery but stated,"You currently have no title or right to be in the Burbage Family Cemetery." Chad made the following statements in the letters:

- "Kirk Burbage has committed numerous abuses to family members."

- "We are the victims of the selfish, greedy and unlawful actions of Kirk Burbage."

- "Kirk Burbage of the Burbage Funeral Home with the assistance of his attorney Robert McIntosh have fraudulently misrepresented rights which Kirk Burbage does not have . . . ."

- "Kirk Burbage fraudulently obtained a Quit Claim [deed] from our mother by what is believed to be elder abuse . . . ."
- "Kirk Burbage and the Burbage Funeral Home violated Maryland law by not having a license to operate a cemetery . . . ."
- "Kirk Burbage did commit fraud."

Kirk and the Burbage Funeral Home sued Chad for defamation in Bastrop County.[1] Chad appeared pro se. The trial court submitted ten questions—one for each of the statements reproduced above—asking the jury whether Chad had proven that the statements were substantially true. The jury answered "no" to all questions. The court also asked questions on compensatory and exemplary damages for Kirk and, separately, for the Burbage Funeral Home. The court instructed the jury that all statements were defamatory per se because each statement either leveled a criminal charge or tended to cause injury to the funeral home's business or to Kirk's profession. The jury awarded Kirk $6,552,000: $250,000 for past injury to reputation; $2,500,000 for future injury to reputation; $1,000 for past mental anguish; $1,000 for future mental anguish; and $3,800,000 in exemplary damages. The jury awarded the Burbage Funeral Home $3,050,000: $50,000 for past injury to reputation; $1,000,000 for future injury to reputation; and $2,000,000 in exemplary damages. The trial court also permanently enjoined Chad from future defamatory speech in a four-page list of prohibited topics (tied to the ten defamatory statements).

Chad appealed. The court of appeals reduced the exemplary damages to $750,000 under Texas Civil Practice and Remedies Code section 41.008(b), upheld the other damage awards, and

[1] Chad was a resident of Bastrop County, Texas at the time the lawsuit was filed. *See* TEX. CIV. PRAC. & REM. CODE § 15.017.

vacated the injunction. ___ S.W.3d ___, ___ (Tex. App.—Austin 2011, pet. granted) (mem. op.). Each party petitioned for review; we granted both petitions. 57 Tex. Sup. Ct. J. 53 (Nov. 22, 2013).

II. Qualified Privilege and Charge Error

We first address Chad's contention that qualified privilege barred Kirk's recovery based on Chad's defamatory statements to the Phillipses. If Chad's statements were privileged, the jury's answers on damages would rest upon invalidly submitted theories of liability. We hold that, even if the privilege applied, Chad failed to preserve jury charge error on this point.

A. Chad's Qualified Privilege Claim

The common law provides a qualified privilege against defamation liability when "communication is made in good faith and the author, the recipient or a third person, or one of their family members, has an interest that is sufficiently affected by the communication." *Cain v. Hearst Corp.*, 878 S.W.2d 577, 582 (Tex. 1994). We have recognized that defamation actions necessarily inhibit free speech and, thus, the qualified privilege offers an additional safeguard, even in cases of private, non-political speech. *See id.* The privilege operates as an affirmative defense in the nature of confession and avoidance; the defendant bears the burden of proving privileged publication unless the plaintiff's petition affirmatively demonstrates privilege. *Denton Pub. Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970). If a defendant establishes the privilege, the burden shifts to the plaintiff to prove that the defendant made the statements with actual malice. *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970). Actual malice, in the defamation context, means "the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true." *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 772 (Tex. 1994) (per curiam). Qualified privilege

presents a question of law when the statements at issue employ unambiguous language and where the facts and circumstances of publication are undisputed. *Fitzjarrald v. Panhandle Pub. Co.*, 228 S.W.2d 499, 505 (Tex. 1950).

Of the ten statements that the trial court found defamatory per se, Chad made six of those statements in letters to the Phillipses, while four appeared on the web site or posters. Chad argues that a qualified privilege protects his communication with the Phillipses because both he and they had an interest "sufficiently affected by the communication." The Phillipses obviously had an interest, Chad suggests, in whether Kirk had the right to sell them a mausoleum and whether any other Burbage family members objected to interring the Phillipses at the family cemetery. Chad contends that the court of appeals erred when it found the letter unprotected by the "common-interest privilege"; specifically, Chad objects to the court of appeals' suggestion that "antithetical" interests cannot form the basis for a qualified privilege. 2011 WL 6756979, at *9. While the court of appeals seized on the "common-interest" language, which Chad sometimes used in briefing, our case law identifies the affirmative defense at issue here as qualified privilege.[2]

The trial court submitted the ten statements—four unprivileged and six potentially privileged—for the jury to determine if each statement was substantially true at the time it was made. On damages, the trial court submitted broad-form questions that incorporated the jury's answers for

[2] *Compare Cain*, 878 S.W.2d at 582 (privileging communication when made "in good faith and the author, the recipient or a third person, or one of their family members, has an interest that is sufficiently affected by the communication"), *with* RESTATEMENT (SECOND) OF TORTS § 596 (1977) (describing the common-interest privilege, which arises when "circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know").

all ten statements. If the qualified privilege applied to any statements, then, the broad-form damages questions incorporated both valid and invalid bases for liability. Such commingling may result in harmful error. *Cf. Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000) (reversing for new trial due to erroneous commingling of valid and invalid liability theories in a single broad-form liability question). To obtain reversal due to such a charge error, Chad must have preserved the error at trial. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003) ("[A]ny complaint to a jury charge is waived unless specifically included in an objection."). We now turn to this preservation question.

B. Preservation of Charge Error

The court of appeals held that Chad waived any claim of error in the submission of potentially privileged statements because he "did not object in the trial court to the submission of broad-form damages questions." ___ S.W. 3d at ___ (citing *In re B.L.D.*, 113 S.W.3d at 349). In *In re B.L.D.*, we held that the court of appeals erred by reviewing a jury charge complaint when the parties did not object at trial to the form of submission. 113 S.W.3d at 349, 355. Chad suggests that this case differs because he raised an objection on qualified privilege, which preserved error in any derivative damages question. Kirk responds that Chad must specifically object to the damages question's form, not merely to the underlying liability issue. Kirk further argues that even Chad's qualified privilege objection failed to preserve error.

1. Charge Error Based on Valid and Invalid Liability Theories

"It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law." *Casteel*, 22 S.W.3d at 388. Thus, in *Casteel*, we required a new trial when a timely and specific objection preserved the issue of erroneous commingling of valid and

invalid theories of liability in a broad-form liability question, such that the appellate court could not determine whether the jury based its verdict on an improperly submitted theory. *Id.* (citing TEX. R. APP. P. 61.1). Extending this principle in *Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002), we determined that a broad-form damages submission mixing valid and invalid elements of damages created the same type of harmful error. And in *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 225 (Tex. 2005), where evidence supported the jury's negligence finding but *not* its malicious credentialing finding, we held that the trial court committed harmful error by submitting an apportionment question which allowed the jury to consider malicious credentialing. We explained that "[e]ven if the jury *could* still have made the same apportionment of fault [without considering malicious credentialing], the error in the question is nevertheless reversible because it effectively prevents [the appellant] from complaining on appeal that they *would not* have done so." *Id.* at 226.

We continue to adhere to these principles. Yet in addition to the common animating principle of properly instructing the jury in the law, these cases share another link: *some* timely and specific objection. *Romero*, 166 S.W.3d at 229; *Harris Cnty.*, 96 S.W.3d at 232; *Casteel*, 22 S.W.3d at 387. In other words, in situations where a party does not raise a *Casteel*-type objection, that party surely cannot raise a *Casteel* issue when it failed to preserve a claim of an invalid theory of liability that forms the basis of a *Casteel*-type error. If we allowed litigants to raise a *Casteel* issue with no valid objection, either to liability or submission form, those litigants could use a post-trial motion to raise a lack of evidence on the liability question, thus bypassing the crucial step of allowing the trial judge to correct any errors in the charge.

In *Romero*, we declined to address whether the appellant must object both to the lack of evidence to support submission of a jury question *and* the form of the submission, because in that case the appellant did both. 166 S.W.3d at 229 & n.55 (acknowledging the difficult question of whether an additional broad-form objection is required) (citing *Pan E. Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988)). But whether or not an objection to *both* is required, *some* timely and specific objection must raise the issue in the trial court. *See Thota v. Young*, 366 S.W.3d 678, 691 (Tex. 2012) (requiring "some objection to the charge," whether to evidentiary support or to form, to preserve error for appellate review). Here, Chad objected based on qualified privilege, but he made no objection to the form of submission. If Chad's initial objection on qualified privilege did not preserve error, we need not address whether a further *Casteel*-type objection is required.

2. Specific Objections

Our rules of procedure establish the preservation requirements to raise a jury-charge complaint on appeal. *Id.* at 689. The complaining party must object before the trial court and "must point out distinctly the objectionable matter and the grounds of the objection." TEX. R. CIV. P. 274; *see also* TEX. R. APP. P. 33.1. Under Rule of Civil Procedure 274, "[a]ny complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." TEX. R. CIV. P. 274. As a general rule, preservation requires (1) a timely objection "stating the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context," and (2) a ruling. *See* TEX. R. APP. P. 33.1. Stated differently, the test ultimately asks "whether the party made the trial court aware of the complaint,

timely and plainly, and obtained a ruling." *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).

Importantly, the "purpose of Rule 274 is to afford trial courts an opportunity to correct errors in the charge by requiring objections both to clearly designate the error and to explain the grounds for complaint." *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987); *see Payne*, 838 S.W.2d at 243 (Mauzy, J., dissenting) ("Only by proper objection does a litigant afford the trial court sufficient opportunity to correct defects in the charge."). We apply these rules to Chad's objection.

3. Chad's Objection

The following dialogue occurred at the formal charge conference:

> Mr. Cagle:[3] I'm not sure if this is an objection. I apologize, Your Honor. But the matter of in the amended-- defendant's amended-- first amendment to the original response, defendant has requested that there be a qualified privilege relative to the letter, and the reason for the qualified privilege is it represents common interests, a continuation of a prior judicial proceeding in Maryland and a continuation of trying to resolve matters of mutual concern between the parties of the cemetery.
>
> The Court: All right. Do you have a requested instruction that you're asking the Court to consider and to include in the charge?
>
> Mr. A. Burbage: I have-- it seems as though it would-- it would require the-- a question in the line after-- after you find that the statement inflammatory, then there would be a question do you find the statement blah-blah-blah was false at the time it was made as it related to--
>
> The Court: All right. Anything further on that? On that particular issue is there anything further?

[3] The record states that Mr. Cagle, Kirk's attorney, initially made the objection. The reproduction in Kirk's brief on the merits instead attributes the objection to Chad. Indeed, it makes more sense in context that Chad made the initial objection. We decline to attach importance to this potential record error because we find either objection insufficient to preserve error.

Mr. A. Burbage: No. It was-- it's been mentioned in the testimony.

The Court: All right. The objection is overruled. The requested instruction is denied.

Chad claims that the trial court erred in submitting liability questions on the potentially privileged statements. Therefore, Chad's objection needed to communicate to the trial court that it was improper to submit Questions 5 through 10 (on statements in the Phillips letters) to the jury. The objection does raise the subject of the qualified privilege. But, crucially, the objection must apprise the trial court of the error alleged such that the court has the opportunity to correct the problem. *See Wilgus*, 730 S.W.2d at 672. When the trial court asked Chad whether he had a requested instruction, Chad responded only with a request for a question that appears to address the falsity of the statements themselves. As Chad has argued, a qualified privilege may still apply even when the statements are false. *See O'Neil*, 456 S.W.2d at 898. It is unclear what Chad hoped to accomplish by requesting an additional question if he wanted the court to withhold Question 5 through 10 from the jury.[4] And it is uncertain even to which questions Chad referred (presumably Questions 5 through 10, but the word "inflammatory," which Chad uses to describe the placement of his proposed question, appears nowhere in the charge). Quite simply, Chad has not provided a

[4] We cannot safely engage in assumptions about what Chad might have meant. Whether the statements were false and Chad knew of their falsity—compared with the jury's actual finding that the statements were not substantially true—would have relevance to the question of whether Chad acted with actual malice. But the trial court gave the incorrect common law definition of malice, Chad did not object to the incorrect malice definition, and, as Chad argues, the burden on actual malice falls to Kirk, not Chad. Such a confusing objection, raised during the crucial charge conference, could not have apprised the trial judge that Chad objected to the submission of the offending questions. Chad explained his desire more coherently at a hearing on his request for findings of fact and conclusions of law, but at that point it was too late.

specific objection indicating the alleged error in the charge and allowing the trial court the opportunity to correct the error.

We note that when Chad wanted to object to a specific question at the charge conference, he did so. *Before* the objection on qualified privilege at issue here, Chad objected to Question 10 because it duplicated elements of Questions 7 and 8. The trial court initially sustained this objection (although it reversed that ruling at the end of the charge conference). Chad's objection to qualified privilege, in order to preserve error, needed to distinctly raise the issue of withdrawing Questions 5 through 10 from the jury. By its language, it does not do this. And it would make little sense for Chad to raise an objection to qualified privilege to eliminate Questions 5 through 10 when, only moments before, he eliminated Question 10 only because it was duplicative of Questions 7 and 8, *not* because the Questions 7 and 8 were improper to submit to the jury. With this in mind, we cannot conclude that Chad's intent to remove Questions 5 through 10 was "apparent from the context." TEX. R. APP. P. 31.1(a)(1)(A). We hold that Chad's objection was insufficiently specific and did not preserve his claim of error in the submission of Questions 5 through 10.

Our procedural rules are technical, but not trivial. We construe such rules liberally so that the right to appeal is not lost unnecessarily. *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 388 (Tex. 2008). But when an objection fails to explain the nature of the error, we cannot make assumptions. Preservation of error reflects important prudential considerations recognizing that the judicial process benefits greatly when trial courts have the opportunity to first consider and rule on error. *In re B.L.D.*, 113

S.W.3d at 350 (citing *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999)). Affording courts this opportunity conserves judicial resources and promotes fairness by ensuring that a party does not neglect a complaint at trial and raise it for the first time on appeal. *Id*. (citing *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (per curiam)). Nor may we stray from these rules because Chad represented himself at trial. *See Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978).

4. Application

Chad argues that the court impermissibly combined valid and invalid theories of liability when the broad-form damages question incorporated privileged statements. Chad did not make a *Casteel*-type objection to form; thus, to preserve error, Chad *must* have raised some specific objection to the submission of Questions 5 through 10. *See In re B.L.D.*, 113 S.W.3d at 349–50 (holding that a complaint to a jury charge was waived because it was not specifically included in an objection). He did not. Thus, we hold that Chad's failure to object waives his right to complain of the charge on appeal.

III. Damages

We next consider the jury's compensatory and exemplary damage awards. The jury awarded Kirk and the Burbage Funeral Home $3,802,000 in compensatory damages and $5,800,000 in exemplary damages, but the court of appeals reduced exemplary damages to

$750,000.[5] After reviewing the record, we hold that no evidence supports the amount of compensatory damages and, consequently, exemplary damages cannot stand.

A. Compensatory Damages

Chad argues that the jury's $3.8 million award lacks evidentiary support and offends the First Amendment. Specifically, Chad contends that the $3.5 million awarded for *future* damages punishes Chad for his speech, rather than fairly compensates Kirk for his injury. Kirk responds that Texas law presumes damages for defamatory per se statements and ample evidence supports the jury's awards. Kirk suggests that trust-based businesses like funeral homes suffer greatly from the mere insinuation of unseemly acts. Further, Kirk argues that non-media defendants like Chad fail to present the same First Amendment concerns as media defendants.

Our legal-sufficiency review standards are well established. On an issue where the opposing party bears the burden of proof, we sustain a legal-sufficiency challenge to an adverse finding if our review of the evidence demonstrates a complete absence of a vital fact, or if the evidence offered is no more than a scintilla. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Ltd.*, 434 S.W.3d 142, 156 (Tex. 2014). More than a scintilla exists when the evidence would enable reasonable and fair-minded people to reach different conclusions. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). We regard evidence that creates a mere surmise or suspicion of a vital fact as, in legal effect, no

[5] Chad does not specifically challenge the $2,000 awarded as mental anguish damages. Therefore, we do not address those damages.

evidence. *Id.* We consider the evidence in the light most favorable to the judgment, "crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005).

Texas law presumes that defamatory per se statements cause reputational harm and entitle a plaintiff to general damages such as loss of reputation and mental anguish. *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002) (plurality opinion). But this presumption yields only nominal damages. *See Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012) (per curiam). Beyond nominal damages, we review presumed damages for evidentiary support. *See Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013).

In addition to the legal sufficiency of evidence, we have recognized an imperative that appellate courts determine whether any evidence supports the *amount* of jury damages. *See Bentley*, 94 S.W.3d at 606. In *Bentley*, a judge sued for defamation after a call-in talk show host repeatedly made on-air imputations of corruption. *Id.* at 566–67. The jury assessed $7 million in damages for mental anguish and $150,000 in reputation and character damages. *Id.* at 605. We recognized that the inherent difficulty in quantifying such noneconomic damages necessarily allows the jury latitude. *Id.* Yet this latitude has limits; latitude does not "give [the jury] carte blanche to do whatever it will, and this is especially true in defamation actions brought by public officials." *Id.* Even in a case outside the realm of media defendants and public officials, judicial review of jury discretion remains important to protect free speech. *See id.* We must ensure that noneconomic damages compensate for

actual injuries and are not simply "a disguised disapproval of the defendant." *Id.*; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[T]he private defamation plaintiff who establishes liability under a less demanding standard than [knowledge of falsity or reckless disregard for the truth] may recover only such damages as are sufficient to compensate him for actual injury.").

Before turning to the evidence, we must delimit our review. The jury charge sets the standard. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) ("[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge."). Questions 11 and 12 asked what sum of money "would fairly and reasonably compensate" for injuries sustained. The trial court instructed the jury that "[y]ou must make a finding of at least nominal damages for injury to reputation in the past." In response, the jury awarded $300,000 to Kirk and the Burbage Funeral Home. But on *future* reputation damages, the court instructed the jury to determine the appropriate compensation for injury "that, in reasonable probability, [Kirk] will sustain in the future" (and did not require the jury to find at least nominal damages). The jury awarded a combined $3.5 million in response. We must conduct a meaningful appellate review of the jury's determination of an amount that "would fairly and reasonably compensate" for the loss.

With these principles in mind, we turn to the evidence. Chad and Kirk vigorously disagree about the defamation's effect on the Burbage Funeral Home's business. The court of appeals upheld the large compensatory damage award in part because the funeral home

"had a market value of at least $3 million and . . . this value would likely be lost because of Chad's statements." ___ S.W.3d at ___. The court stated that Kirk was not required to substantiate the value with documentary evidence. *Id.*

Although we agree that the jury generally has broad latitude in determining damages, we find no evidence of actual injury in the record. To begin, we cannot credit the purported value of the funeral home business (leaving aside that this does not reflect actual damage to reputation). Kirk reluctantly offered a questionable estimate of the funeral home's value:

> Q. If you sold the funeral home today, what would the value of that funeral home be-- of the business, as an ongoing business?
>
> A. I never had any intention nor do I have any interest in selling the funeral home, so I never really-- if I had to throw something out there and just-- this is just from experience with hearing about other firms, but I don't-- I don't really know. I'd say a few million dollars.

This estimate is practically and linguistically troubling. Practically speaking, Kirk admits in the previous sentence that he does not know the value, and the phrase "if I had to throw something out there" qualifies his response. We require *some* concrete basis for an estimate. *Cf. Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 159–61 (Tex. 2012) (concluding that speculative and conclusory testimony, lacking in demonstrable factual explanation, could not support an award of damages based on diminished market value of a home in a permanent nuisance claim). And Kirk's language adds ambiguity. How many is a few? The court of appeals interprets this as at least $3 million, but this is not clear: definitions of "few" vary. *See, e.g.*, AMERICAN HERITAGE COLLEGE DICTIONARY 505 (3d. ed. 2000) ("[b]eing more than one but indefinitely small in number"); RANDOM HOUSE

DICTIONARY OF THE ENGLISH LANGUAGE 712 (2d. ed. 1987) ("not many but more than one"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 843 (1961) ("not many persons or things").

We recently addressed an analogous situation in *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Ltd.*, 434 S.W.3d 142 (Tex. 2014). In that case, the key evidence of injury to Texas Disposal Systems' reputation was its CEO's testimony estimating the value of its reputation at $10 million, and three exhibits purportedly supported that testimony. *Id.* at 160. The exhibits estimated lost profits and evidenced a decrease in "base business." *Id.* First, we held that damages such as lost profits "are not the sort of general damages that necessarily flow from such a defamatory publication." *Id.* Then, we stated that the "evidence must support the amount awarded by the jury; it must not be an 'indicator' that supports the estimates offered by the corporate executive." *Id.* Turning to this case, Kirk provided even less evidence than the "indicators" we found insufficient in *Waste Management.* Kirk's ballpark estimate of the Burbage Funeral Home's value does not equate to evidence of actual damages for injury to the business's reputation.[6]

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[6] Furthermore, the purported evidence on the value of the business blurs the lines between the torts of business disparagement and business defamation. In *Waste Management*, we noted "the similarity between the two claims, but that one difference is that one claim seeks to protect reputation interests and the other seeks to protect economic interests against pecuniary loss." 434 S.W.3d at 155 (citing *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003)). The publication at issue in that case was defamatory of the *owner* of the business, and not the landfill-services business *itself*. *Id.* at 150–51 n.35. In other words, defamation injures the reputation of the owner, not the owner's business. *Id.* In a defamation per se claim, general damages are presumed, while special damages are not; special damages, on the other hand, are an essential element of a business disparagement claim. *Id.* at 155. We distinguish between "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)." *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013).

Turning back to this case, Kirk seems to seek damages to the business, rather than damages for loss of the

The record contains only speculative evidence that the value, if established, "would likely be lost," as the court of appeals found. *See* ___ S.W.3d at ___. Questioned whether the defamation could destroy the funeral home's reputation, Kirk said: "[P]otentially. In my opinion." Kirk said the value would be "zero" only when questioned on what would happen if the funeral home was "run out of business." Keith, Kirk's brother, testified that, in a small community, such allegations "can ruin that entire business." A theoretical possibility, however, is a far cry from a likely event.

Similarly speculative evidence supports the actual impact on the funeral home. Kirk testified that some customers, including customers with previous business at the funeral home, cancelled pre-paid contracts:

> Q. Since these allegations have been made, have you had people who have cancelled those?
>
> A. Yes, I have.
>
> Q. Even as recently as last week?
>
> A. Yes, sir.
>
> Q. Have you ever asked them why they're cancelling it?
>
> A. Couldn't bring myself to.

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business's reputation. This fine distinction matters. If Kirk desired damages to protect the economic interests of the Burbage Funeral Home, a business disparagement claim provides the correct vehicle. *See Forbes*, 124 S.W.3d at 170. And, whether under defamation or business disparagement, we require a plaintiff requesting special damages to prove those damages. *See Hancock*, 400 S.W.3d at 66. Here, the type of damages Kirk seeks, economic damages, are distinct from the noneconomic damages that are presumed in a defamation per se case. Kirk did not plead these special damages and certainly has not proven them. Kirk could have brought business disparagement or defamation claims (or both), but in any case his proof will not suffice for recovery of special damages.

Q. Are you afraid its because of these accusations?

A. Yes.

In *Hancock v. Variyam*, a doctor claimed that the submission of a defamatory letter to an accrediting body, which later denied the doctor accreditation, provided evidence of reputation damages. 400 S.W.3d at 70. This Court held 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.'" *Id.* at 70–71 (quoting *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997)). Similarly, the jury cannot reasonably infer that defamation caused the cancellations when the cancellations could have occurred for any number of reasons. Indeed, Kirk admitted that he did not ask why the customers cancelled, only that he was "afraid" it was because of accusations.

Some evidence does suggest community awareness of and discussion of Chad's statements. And Chad, in earlier menacing letters, suggested that the statements would have "significant repercussions." But in terms of *actual* impact of the defamation—the basis for which the damage award compensates—Kirk offered only vague testimony:

Q. How would you say that these accusations have affected your reputation in the community? Do you still have one?

A. I'd like to think that I do. I'd like to think that there's those people that know me and-- that truly know me and that they're going to give it credence. Sure, they're going to listen up, because they'd be stupid not to, but I'd like to believe that-- you know, that it-- that it doesn't affect everybody. I'd like to believe that.

Q. But you don't know.

A. No, I don't know.

Kirk's mother, Virginia, when asked about the impact on the Burbage family name, said "I'm sure it could hurt some, but I think most people would not believe it." Further, Kirk's testimony undermines the scope of the impact on him, personally:

Q. You don't advertise with your photo anywhere or your name anywhere?

A. No, sir.

Q. Have there been any newspaper articles about you in conjunction with the funeral home or community service?

A. Not that I can recall anyway.

Q. Are you the only funeral director there at the Burbage Funeral Home?

A. No. There are three others.

Q. Are you-- are you-- Anna Burbage was the face of the Burbage Funeral Home; is that right?

A. In her lifetime.

Q. Are you considered the face of the Burbage Funeral Home?

A. I don't know if I would be considered the face because I don't meet with a lot of the families any more unless it's a family that I know. That's what I have the other directors to do. I'm a lot more behind the scenes.

The court of appeals distinguished *Bentley* as a public-official case. ___ S.W.3d at ___. While the concern for baseless jury awards has stronger resonance in public-official cases, such concerns are not absent here. The evidence does not show actual loss of reputation, that anyone believed the defamation, that the Burbage Funeral Home suffered an actual loss, or even the funeral

home's actual value. On the record here, we hold that no evidence supports the jury's award of $3.8 million in actual damages. We reverse the judgment of the court of appeals in part.

B. Exemplary Damages

A party may not recover exemplary damages unless the plaintiff establishes actual damages. *Hancock*, 400 S.W.3d at 71. Because we hold that no evidence supports the jury's award of actual damages, exemplary damages are not available. *See id.*

IV. Prohibitive Injunction

As part of its final judgment, the trial court permanently enjoined Chad from "publishing, disseminating or causing to be published or disseminated, . . . to third-parties by any means, . . . any statement or representation that states, implies or suggests in whole or part" any of four pages of forbidden topics. The injunction tracks the language of the ten defamatory statements, and for many statements the injunction lists numerous ways Chad may run afoul of the court's order. For instance, Chad may not assert that he or *any* third party suffered from *any* of Kirk's selfish, greedy, or unlawful actions. This extraordinarily broad prohibition on future speech need not detain us long. Prohibitive injunctions of future speech that is the same or similar to speech that has been adjudicated to be defamatory operate as impermissible prior restraints on free speech.[7] *Kinney v. Barnes*, ___ S.W.3d ___, ___ (Tex. 2014). Under *Kinney*, the trial court's prohibitive injunction cannot stand. Therefore, we affirm that part of the court of appeals' judgment.

[7] A mandatory injunction requiring the removal or deletion of posted speech that has been adjudicated defamatory is not a prior restraint on speech. *Kinney v. Barnes*, ___ S.W.3d ___, ___ (Tex. 2014). But here the injunction did not require Chad to remove or delete any previously-made defamatory statements. Although Chad published several defamatory statements to his website and on posters, the website was only operative for approximately four months and the posters had been removed by trial.

V. Conclusion

Chad failed to preserve for appeal his complaint of the jury charge; thus, we do not reach whether a qualified privilege protected any of Chad's statements. We therefore affirm in part the court of appeals' judgment. We do, however, hold that no evidence supports the jury's award of compensatory damages, and that exemplary damages cannot stand. We reverse that part of the court of appeals' judgment and render judgment that Kirk and the Burbage Funeral Home take nothing as compensatory and exemplary damages on their defamation claims. *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009) (recognizing that "where the record shows as a matter of law that the plaintiff is entitled only to nominal damages, the appellate court will not reverse merely to enable him to recover such damages" and instead rendering a take-nothing judgment). However, we do not reach mental anguish damages because Chad made no challenge in this Court. Finally, we hold that the prohibitive injunction impermissibly restrains speech; therefore, we affirm that part of the court of appeals' judgment.

_____

Paul W. Green
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0604

HIGHLAND HOMES LTD., PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

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

Argued November 7, 2013

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE BROWN joined.

JUSTICE DEVINE filed a dissenting opinion, in which JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE BOYD joined.

Rule 42(a) of the Texas Rules of Civil Procedure provides that when its requirements are met, "[o]ne or more members of a class may sue . . . as representative parties on behalf of all".[1] It often happens that many class members do not personally appear in the action in any way,[2] and Rule 42 prescribes procedures to ensure that those whose claims are settled or adjudicated *in absentia* are

[1] TEX. R. CIV. P. 42(a). The rule is similar to Rule 23 of the Federal Rules of Civil Procedure.

[2] *See* Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It as Unclaimed Property?*, 70 U. PITT. L. REV. 511, 514 (2009) ("It is not uncommon in class action settlements for a significant amount of the settlement checks to never be cashed.").

afforded due process. Such procedures include court approval of class representatives and class counsel, notice to class members, and court approval of a proposed settlement after an opportunity to be heard.[3] When the rule is followed, class representatives may assert—and agree to disposition of—claims on behalf of the class, including claims on behalf of absent members.[4]

Under the Texas Unclaimed Property Act ("the Act"),[5] as we shall explain more fully, property that goes unclaimed for three years may be presumed abandoned and must then be delivered to the Comptroller to hold for the owner. The issue in this case is whether damages and settlement proceeds claimed by class representatives on behalf of absent members are nevertheless unclaimed property, presumed abandoned, and therefore subject to the Act. In other words, does the Act prohibit what Rule 42 permits—the disposition of absent class members' claims by their representatives with court approval? We hold that the Act, by its own terms, does not apply.

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[3] TEX. R. CIV. P. 42(a)(4) (class representatives), 42(c)(2) (notice to certified class), 42(e) (approval of settlement, after the requisite notice, hearing, and findings), 42(e)(4)(A) (class members' right to object to settlement), 42(g) (appointment of class counsel).

[4] *Taylor v. Sturgell*, 553 U.S. 880, 894, 904 (2008) (recognizing that "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions," but refusing to extend nonparty preclusion); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (noting a recognized, limited exception—to the general rule that a judgment "does not conclude the rights of strangers to [the] proceedings"—in "class" or "representative" suits, but refusing to extend nonparty preclusion to white firefighters challenging employment decisions made under a consent decree in a civil rights action), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1074, 1076-1077, codified at 42 U.S.C. § 2000e-2(n); *Hansberry v. Lee*, 311 U.S. 32, 41-44 (1940) (noting a recognized, albeit imprecisely defined exception allowing judgments in "class" or "representative" suits to "bind members of the class or those represented who were not made parties" but refusing to extend nonparty preclusion to an injunctive decree enforcing a restrictive covenant agreement); *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 450 (Tex. 2007) ("Basic principles of res judicata apply to class actions just as they do to any other form of litigation.") (citations omitted).

[5] TEX. PROP. CODE §§ 71.001-76.704.

Accordingly, we reverse the judgment of the court of appeals[6] and affirm the judgment of the trial court.

I

Petitioner, Highland Homes, Ltd., a homebuilder in the Austin, Dallas-Fort Worth, Houston, and San Antonio areas, employs hundreds of subcontractors. In 2003, Highland Homes began docking subcontractors' pay if they did not furnish proof of adequate general liability insurance coverage. Highland Homes contends that the deductions were to cover its own increased exposure from working with uninsured subcontractors. But in 2006, one subcontractor, Benny & Benny Construction Company, sued, alleging that Highland Homes had represented it would use the paycheck deductions to obtain liability insurance covering the subcontractor. Highland Homes denied Benny & Benny's claim but clarified its policy for the future.

In 2009, Benny & Benny amended its pleadings to add another subcontractor, Richard Polendo, and together they asserted claims on behalf of a class of more than 1,800 other subcontractors from whose pay Highland Homes had deducted amounts for insurance before clarifying its policy. The trial court certified the class under Rule 42(b)(3),[7] found Benny & Benny and Polendo to be adequate class representatives, appointed their lawyers as class counsel, and adopted a trial plan. Highland Homes appealed, but while the appeal was pending, the parties settled, subject to notice to the class and the trial court's review and approval.

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[6] 417 S.W.3d 478 (Tex. App.—El Paso 2012).

[7] TEX. R. CIV. P. 42(b)(3).

The proposed terms were as follows. Highland Homes agreed to pay Benny & Benny $28,000 and to refund to the settlement class—members who did not opt out[8]—the total amounts withheld, plus each member's pro rata share of the difference between that total and $3,672,000 (less the amount for opt-outs). Highland Homes was to prepare from its records a list of class members with last known addresses and the amounts withheld from each. An administrator designated by the parties would then use computer software and other means to update the addresses. With the trial court's approval, formal notice would be sent to class members at the addresses thus determined, describing the claims being made on their behalf in the action, setting out the settlement terms, informing members of their rights, offering them the opportunity to opt out of the class, and setting a hearing for final approval of the settlement. If the settlement was finally approved, Highland Homes would issue refunds checks, sending them to existing subcontractors as it would their paychecks or by mailing checks to former subcontractors last known addresses.

The parties recognized that despite these efforts, some class members would not be located, and that others might refuse refunds. The class representatives agreed, on behalf of the settlement class members, that refund checks not negotiated within 90 days of issuance would be void, and that those and other undistributed refunds—referred to in the settlement as "unclaimed funds"—would be given to The Nature Conservancy ("the Conservancy") as a *cy pres* award.[9] The Conservancy is

[8] Also excluded were persons with whom Highland Homes had already settled, its employees, and class counsel.

[9] The phrase, *cy pres*, "derives from the Norman-French phrase, *cy pres comme possible*, meaning 'as near as possible.'" Wilbur H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 269 (2014). The Restatement (Third) of Trusts explains the *cy pres* doctrine as follows: "Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the

a well-known, nonprofit, charitable organization operating worldwide and in Texas, whose stated mission is "to conserve the lands and waters on which all life depends."[10] According to Highland Homes, the Conservancy was chosen because it "share[s] Highland Homes' vision of green building and commitment to the environment." The State points out another connection—that Highland Homes' president was on the Conservancy's Texas volunteer board of trustees. In any event, Highland Homes received no tax deduction or other benefit from the award,[11] and the appropriateness of the Conservancy as the beneficiary of the award is not at issue.

Class representatives—again, on behalf of settlement class members—acknowledged that Highland Homes denied all liability in the action and agreed to a global release of Highland Homes and its affiliates[12] from liability on all claims either brought or that could have been brought. The parties agreed to use their best efforts to obtain judicial approval of their agreement, and that if it was substantively altered, a party adversely affected could terminate the agreement.

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charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose." RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). In the class action context, *cy pres* refers to awards "to an entity that resembles, in either composition or purpose, the class members or their interests" when "direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07, cmt b (2010). Despite the *Principles'* endorsement of such awards, *id*. § 3.07, issues regarding their legality and propriety have been raised. *See Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., statement respecting denial of certiorari). We have not had occasion to address such issues, and none is raised in this case.

[10] *About Us: Vision and Mission*, THE NATURE CONSERVANCY, http://www.nature.org/about-us/vision-mission/-index.htm (last visited August 22, 2014).

[11] Highland Homes was authorized to deduct from the award any administration expenses that exceeded $30,000. It has made no such claim.

[12] Those affiliates were Horizon Homes, Ltd., Sanders Custom Builder, Ltd., Highland Homes–Houston, Ltd., Sanders Custom Builder–Houston, Ltd., Highland Homes–San Antonio, Ltd., and Highland Homes–Austin, Ltd.

In 2010, the parties presented their agreement to the trial court, which ordered that a detailed notice of the proposed settlement be mailed to class members at the addresses determined by the administrator. Of the 1,849 notices sent, 346 were returned as undeliverable, and 121 were re-mailed to different or forwarding addresses. After a final hearing, the trial court found that this notice was "the best . . . practicable under the circumstances", was "reasonable . . . fair, adequate, and sufficient", and "fully complie[d]" with Rule 42. The court also found that the settlement was "reasonable, fair, just, . . . adequate, [and] in the best interest of the Settlement Class Members, and that it satisfie[d] [Rule 42] and other applicable law". Finally, the court determined "that Plaintiffs and Class Counsel . . . have adequately represented the interests of the Settlement Class".[13]

Only eight class members requested exclusion. One explained that it had "suffered no losses from Highland Homes", and another stated that it did not "wish to participate in this legal matter." The trial court approved the settlement and rendered final judgment accordingly, "binding on all parties to the Settlement Agreement and on all Settlement Class Members . . . includ[ing] all . . . who did not timely request exclusion from the Settlement Class".

Aware that the State had once challenged a *cy pres* award as violative of the Unclaimed Property Act,[14] the parties notified the Attorney General of their proposed award of undistributed refunds to the Conservancy. Shortly after judgment was rendered but before it became final, the State intervened to object to the award, arguing that the undistributed residue should be retained for three

[13] Highland Homes paid class counsel's fee, set by the trial court at $1.8 million, over and above the $3,672,000 it paid the settlement class.

[14] *State v. Snell*, 950 S.W.2d 108 (Tex. App.—El Paso 1997, no writ).

years and then paid to the Comptroller to hold for any owners who eventually surfaced. The trial court refused to modify the judgment, and the State appealed.

The court of appeals agreed with the State that Section 74.308 of the Act prohibits the imposition of a 90-day deadline for negotiating settlement checks, and that Section 74.309 prohibits the *cy pres* award.[15] The court reversed and remanded the case to the trial court with instructions to strike those provisions from the settlement, and to order the claims administrator to hold undistributed refunds—totaling $465,557, according to the State—for three years and then remit them to the Comptroller.[16]

We granted Highland Homes' petition for review.[17]

II

The Unclaimed Property Act defines property that is presumed abandoned and prescribes a process for reporting and delivering it to the Comptroller to be held perpetually for the owner. Two provisions, Sections 74.308 and 74.309, are aimed at preventing evasion of the Act. Under Section

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[15] 417 S.W.3d 478, 488 (Tex. App.—El Paso 2012).

[16] *Id.* at 488.

[17] 56 Tex. Sup. Ct. J. 864 (Aug. 23, 2013). The plaintiffs did not participate in the proceedings in the court of appeals. The State argues that because Highland Homes has now disclaimed any interest in settlement funds, it lacks standing to complain of the court of appeals' modification of the settlement and the judgment predicated on it. But "[a] final judgment which is founded upon a settlement agreement reached by the parties must be in strict or literal compliance with that agreement". *Vickrey v. Am. Youth Camps, Inc.*, 532 S.W.2d 292, 292 (Tex. 1976) (per curiam) (citations omitted). It should go without saying that when a party agrees to one judgment and a materially different one is rendered, the party is personally aggrieved and has standing to complain. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) ("For standing, a plaintiff must be personally aggrieved . . . ."). The *cy pres* award was a significant part of the settlement, and we cannot assume that Highland Homes would have reached the same agreement without it.

74.308, a recovery of property cannot be barred before the statutorily prescribed time passes for the property to be presumed abandoned—three years. The section states:

> § 74.308. Period of Limitation Not a Bar
>
> The expiration, on or after September 1, 1987, of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.[18]

Section 74.309 broadly prohibits any method of circumventing the Act. It states:

> § 74.309. Private Escheat Agreements Prohibited
>
> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.[19]

The State argues that these provisions prohibit the *cy pres* award in this case. Specifically, under Section 74.308, the 90-day period for negotiating settlement checks does not preclude a presumption that amounts not paid to class members are abandoned, and Section 74.309 prohibits the diversion of settlement funds to the Conservancy.

But under the Act's express terms, neither provision applies in the circumstances before us. Chapter 74 of the Property Code, where the provisions are found, "applies to a holder of property

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[18] TEX. PROP. CODE § 74.308.

[19] *Id.* § 74.309.

that is presumed abandoned under Chapter 72, Chapter 73, or Chapter 75."[20] Under Chapter 72—of the three, the only one involved in this case[21]—a "holder" is a person "in possession of property that belongs to another" or "indebted to another"[22] and tangible or intangible personal property is presumed abandoned

> if, for longer than three years:
>
> (1) the existence and location of the owner of the property is unknown to the holder of the property; and
>
> (2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.[23]

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[20] *Id.* § 74.001(a); *accord id.* § 72.001(d) ("A holder of property presumed abandoned under this chapter is subject to the procedures of Chapter 74.").

[21] Chapter 75 "applies to mineral proceeds". *Id.* § 75.001(b). No mineral proceeds or depositories are involved in this case. Chapter 73 applies to "property held by financial institutions", the title of the chapter, and defines a "holder" as "a depository", *id.* § 73.001(a)(4)—that is, "a bank, savings and loan association, credit union, or other banking organization", *id.* § 73.002. The dissent argues that Section 73.102 in the chapter, defining when a check is presumed to be abandoned, nevertheless applies to all holders of checks. *Id.* § 73.102 ("A check is presumed to be abandoned on the latest of: (1) the third anniversary of the date the check was payable; (2) the third anniversary of the date the issuer or payor of the check last received documented communication from the payee of the check; or (3) the third anniversary of the date the check was issued if, according to the knowledge and records of the issuer or payor of the check, during that period, a claim to the check has not been asserted or an act of ownership by the payee has not been exercised."). We think the application of that section is limited along with the rest of the chapter. *See* TEX. GOV'T CODE § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . title (caption) . . . ."). Moreover, even if Section 73.102 applied, it would not nullify the class representative's authority. Having the authority on behalf of the class to arrange for payments of claims by check in the first place, the class representative also had the authority to prescribe the terms under which the checks would be paid.

[22] TEX. PROP. CODE § 72.001(e)(1), (3).

[23] *Id.* § 72.101(a). In *Melton v. State*, 993 S.W.2d 95, 98 (Tex. 1999), we stated that "'unknown,' as used in section 72.101(a) of the Property Code, does not mean completely unidentified."

Thus, Sections 74.308 and 74.309 apply only to a person who has property that the owner has not claimed or exercised ownership over for more than three years. In this case, the State asserts that the settlement administrator is holding payments owned by settlement class members.

The State's argument assumes that absent class members have neither asserted claims nor exercised acts of ownership in the litigation. But they have—through the class representatives. On behalf of all class members, including absent members, the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims. Class representatives' actions are those of class members, and are therefore binding on class members, including absent class members, so long as the requirements of due process are met. The United States Supreme Court has explained those requirements as follows:

> If [a] State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.[24]

[24] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985) (footnote and citations omitted).

The judgment approving the settlement agreement in this case met all these conditions, and the State does not contend otherwise. The judgment approving that settlement is binding on all settlement class members.

Section 74.308 provides that a limitation on the time for initiating or enforcing a claim does not prevent property from being presumed abandoned. But that provision is inconsequential here. The property—settlement payments on refund claims—cannot be presumed abandoned, not because of the 90-day limitation on negotiating settlement checks, but because the property was not unclaimed. To the contrary, this property was claimed by the owners—all settlement class members—through their representatives. For the same reason, Section 74.309 does not apply in these circumstances. Chapter 74 does not apply when a claim to property has been asserted or an act of ownership exercised. It is of no consequence that several owners have not *collected* their property within the time period to which they agreed through class representatives. An owner need not actually *collect* his property to rebut the presumption of abandonment and render the Act inapplicable; he need only *claim* it. Nor is the settlement's labeling of undistributed refunds as "unclaimed funds" determinative; the refunds were, in fact, claimed.

The following example illustrates the flaw in the State's argument. Suppose Benny & Benny had never asserted class claims, had settled its own claims on the same terms, and then had decided to tear up the $28,000 settlement check in hopes of getting more business from Highland Homes. Surely the State could not insist that Highland Homes was nevertheless obligated to pay the $28,000 to the Comptroller until Benny & Benny broke down and took it. Suppose Benny & Benny made the same decision for Polendo, acting as his attorney-in-fact. The Act would not apply in either instance

because Benny & Benny and Polendo claimed the property, and thus it could not be presumed abandoned. The example is not far-fetched. One class member requested exclusion from the class because it had not been injured and another because it did not want to participate. Under Rule 42, the absent settlement class members participated in the litigation and settlement through their representatives as fully as the representatives did in person. The absent members agreed to the 90-day limitation on taking property they claimed, just as the class representatives individually did, and are as fully bound.

Furthermore, the settlement administrator no longer has property belonging to the settlement class members and is not indebted to them because they have agreed, through class representatives, to exercise their right to payment under the settlement agreement within 90 days. With court approval, class representatives were no less authorized to negotiate and agree to the terms of settlement than they were to agree to the amounts paid. Thus, the settlement administrator is no longer a "holder" to which Chapter 74 applies.

The State concedes that the Act would not apply to class settlement payments made only on application of class members, rather than mailed to last known addresses. "Because the unallocated funds are not owned by any identified individual," the State explains, "the Act would not apply . . . ."[25] We agree with the State's conclusion but not its reason. As noted above, one requirement for property to be presumed abandoned under the Act is that "the existence and location of the owner of the property is unknown to the holder of the property".[26] Class members in the situation the State

[25] State of Texas Brief on the Merits at 45.

[26] TEX. PROP. CODE § 72.101(a)(1).

posits certainly meet this requirement and are thus those for whom the Act's protections are intended. They own property in the same sense as the class members in this case, and most importantly, they ordinarily agree, through class representatives, to release all claims against the settling parties. If anything, the opposite of the State's argument should be true: the better the identification of class members, the fewer instances in which the Act applies. But class members who are hard to identify are no less owners of claims that class representatives are authorized to prosecute, settle, and release than are those class members who are easy to identify. Whether settlement payments are mailed to class members or must be applied for, the Act is inapplicable for the same reason: absent class members have asserted claims and exercised ownership through their class representatives. In both situations, there is no holder of abandoned property.

In support of its position the State cites several cases involving other states' laws in which the courts rejected a holder's efforts to retain property, pending the owner's compliance with specified conditions, rather than deliver it to the state as unclaimed.[27] In each of these cases, a potential future holder of property attempted to limit the conditions under which a potential future claimant to that property would be able to obtain it, an attempt held to be in derogation of the jurisdiction's unclaimed property law. Here, the settlement agreement does not purport to govern future claims to as-yet unidentified property—rather, it itself establishes the class's claim to

[27] *See Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 546 (1948) (insurer sought to retain life insurance benefits until proof of entitlement made); *State by Furman v. Jefferson Lake Sulphur Co.*, 178 A.2d 329, 333-339 (N.J. 1962) (corporation sought to retain dividends until claimed); *Screen Actors Guild, Inc. v. Cory,* 154 Cal. Rptr. 77, 79-80 (1979) (union sought to retain unclaimed royalty checks); *People ex rel. Callahan v. Marshall Field & Co.,* 404 N.E.2d 368, 371-374 (Ill. App. Ct. 1980) (merchant sought to retain gift cards).

reimbursement. The State also relies on a prior decision of the court of appeals[28] and a recent decision of the Fifth Circuit,[29] both of which concluded that *cy pres* awards in class actions violate the Unclaimed Property Act. In neither case did the court appear to consider the arguments we find persuasive here. To the extent the two cases conflict with our decision today, they are disapproved.

The State's argument for the application of the Unclaimed Property Act in these circumstances cannot succeed unless class representatives' authority to act for class members under Rule 42 is disregarded. For that reason, the argument fails. The State warns that *cy pres* awards can be abused when they are nothing more than a judicial giveaway of private property, while Highland Homes and its *amici curiae* plead that *cy pres* awards benefit deserving, charitable causes. We need not take sides on this disagreement today. Though the State seems to consider the award to the Conservancy inappropriate, it does not make that challenge, assuming that it could. We agree with the State, however, that trial courts must be careful in class actions to protect class interests and scrutinize settlements. No one suggests that the trial court in this case failed in that responsibility.

[28] *State v. Snell,* 950 S.W.2d 108, 113 (Tex. App.—El Paso 1997, no writ).

[29] *All Plaintiffs v. All Defendants,* 645 F.3d 329, 331-332 (5th Cir. 2011).

* * * * *

Accordingly, the judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

Nathan L. Hecht
Chief Justice

Opinion issued: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0604

HIGHLAND HOMES LTD., PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

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

JUSTICE DEVINE, joined by JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE BOYD, dissenting.

The Unclaimed Property Act (UPA) protects the property rights of identifiable owners whose property cannot be delivered or returned because the owner cannot be found. *Melton v. State,* 993 S.W.2d 95, 97-98 (Tex. 1999). Generally, when those circumstances persist for three years, the property in the possession of another is presumed abandoned by its owner and must be turned over to the State for safekeeping under the UPA. TEX. PROP. CODE § 72.101. The State then assumes responsibility for holding the property until the rightful owner can be located. *Id.* § 74.304.

Texas Rule of Civil Procedure 42, on the other hand, "is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment." *Sw. Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). As a mere procedural device, the class-action rule is not intended "to enlarge or diminish any substantive rights or obligations of any parties to a civil action" but to facilitate the efficient adjudication of such rights and obligations. *Id.* Here, however, the Court uses our class-action rule to diminish the substantive property rights of the

missing property owners and in so doing also marginalizes the UPA's public policy concerns. Because the Court's application of Rule 42 conflicts with the UPA's explicit language, I respectfully dissent.

As the Court acknowledges, the UPA prohibits private limitation and escheat agreements that seek to evade the process for reporting and delivering abandoned property to the State. *See* ___ S.W.3d at ___ (quoting TEX. PROP. CODE §§ 74.308-.309). Section 74.308 states that a contractual limitation period cannot be used to defeat the abandoned-property presumption and thus circumvent the UPA:

> The expiration [] of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the comptroller.

TEX. PROP. CODE § 74.308. Section 74.309 prohibits private escheat agreements that seek to divide funds among locatable interest holders, while disenfranchising owners who cannot be found, and generally prohibits the circumvention of the unclaimed property process through the diversion of funds by any method:

> An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.

Id. § 74.309. Highland and the class representative negotiated a settlement of the class claims that included the following *cy pres* provision for the disposition of any class members unclaimed share of the settlement fund:

> The parties agree to a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate the settlement check within ninety (90) days of its issuance. The amount of these unclaimed funds will not be paid to individual Class Members. Such *cy pres* distribution shall be made to the Nature Conservancy, a non-profit, charitable organization operating in Texas.

In my view, the above provision includes both a limitation period and private escheat agreement prohibited under the UPA.

The Court apparently agrees that the UPA would invalidate the settlement agreement's 90-day limitation period and private escheat provision, if it applied to the agreement. The Court concludes, however, that Highland is no longer a "holder" of any identified class member's property and that the settlement agreement does not concern abandoned property, and thus, the UPA does not apply. The Court reasons that unclaimed settlement funds have not been abandoned because the class representative has exercised ownership over the property on the class members' behalf by entering into the agreement with Highland. Such reasoning renders the statutory prohibitions against private escheat agreements and contractual time limits meaningless. Section 74.308 expressly prohibits prospectively setting contractual time limits on when property can be claimed, and section 74.309 expressly prohibits private agreements that divert prospective property interests to someone other than the true owner.

While I agree that the class representative exercised authority over the class claims and was authorized to settle, its authority did not extend to the subsequent disposition of the settlement checks, which are the individual class members' property rights created under the settlement agreement. Quite simply, the class representative lacked authority to claim, spend, or give away any other class member's settlement check. The Court mistakenly conflates the representative's authority over the class claims with the settlement proceeds it negotiated on behalf of the individual

class members. Because the class representative could not assert any missing class member's ownership interest in the fund or cash their individual checks, in my view, it did not exercise ownership over such property. When the property went unclaimed, it was abandoned within the UPA's meaning, notwithstanding the *cy pres* provision. Remarkably, the Court's explanation is that the "'unclaimed funds' . . . were, in fact, claimed," ___ S.W.3d at ___, even though the class representative lacked authority to endorse the checks or otherwise claim the funds belonging to another class member.

The Property Code provides that property is presumed abandoned (and thus subject to the UPA) if "for longer than three years," no claim has been asserted or act of ownership exercised. TEX. PROP. CODE § 72.101(a). Because the property interest here is represented by a check, the question is when does the three-year period begin to run on a check. For purposes of the UPA and the three-year period, at least, a check represents a property right that is distinct from the underlying obligation or transaction it represents. Property Code section 73.102 specifically addresses the commencement question, stating that the period begins running on the date (1) "the check was payable," (2) "the issuer or payor of the check last received documented communication from the payee," or (3) "the check was issued." At the earliest then, the three-year period commenced when the checks were issued.

Now the Court argues that Chapter 73 of the Property Code does not apply in this case because it applies only to "holders" that are "depositories," such as a bank, credit union or the like, *see* ___ S.W.3d at ___ n.21, but Chapter 73 does not say that. Although parts of Chapter 73 specifically address depositories as holders, section 73.102 does not. It discusses checks—and the abandonment of checks—in terms of the conduct and knowledge of the "issuer" or "payor," rather

than the conduct or knowledge of the depository on which the checks are drawn. That only makes sense, of course, because for purposes of unclaimed property, the bank has no way of knowing whether a customer has written a check and if so, to whom, until the payee presents the check for payment. Section 73.102 can only apply to (and therefore define the three-year period for) scenarios in which the issuer/payor is the "holder," not the depository.

The Court ultimately concludes that the unclaimed checks are not abandoned property because the class representative has asserted a claim or exercised a right of ownership over the class members' claims by negotiating the class settlement. *See* ___ S.W.3d at ___ (noting that "the class representatives asserted claims for refunds in the litigation, controlled the prosecution of those claims as owners, negotiated the terms for settling the claims, asserted claims for payments under the settlement agreement, and then released all claims"). But that all occurred before the three-year period for determining abandonment of the checks even commenced. The assertion of a claim or the exercise of an act of ownership occurring *before* the three-year period begins is, I submit, meaningless. Because the class representative asserted a claim or exercised ownership, if at all, before the checks were issued, and because the class representative cannot assert a claim or exercise ownership over the checks *after* they were issued, the checks must be presumed abandoned under section 72.101(a), if not cashed within three years.

The UPA prevents individuals or entities that hold property belonging to others from prospectively contracting for the disposition of such property, if unclaimed by the rightful owner. Thus, for example, landlords, banks, utilities, and insurance companies cannot contract for the future disposition of unclaimed funds owed to their respective tenants, customers, or policyholders in circumvention of the UPA. The Court here, however, imbues the class representative in class-action

litigation with special power to make such disposition. The UPA does not permit this exceptional treatment.

The Act clearly prohibits parties from making an agreement that prevents "money or property from being presumed abandoned." TEX. PROP. CODE § 74.308. But the Court reasons that this case does not concern abandoned property and thus does not implicate the UPA because the parties have previously agreed to the disposition of unclaimed property. The UPA's prohibitions against contractual time limits and private escheat agreements are meaningless, however, if they can be manipulated so easily. It makes no sense to hold that the UPA, which prohibits contractual limitations on unclaimed property and the presumption of abandonment, does not apply when the parties have agreed to the future disposition of unclaimed property. Contrary to the Court's analysis, such an agreement is not an exercise of ownership over the unclaimed property and does not prevent a presumption of abandonment.

No other court has taken such a fanciful approach to private escheat agreements. *See Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 546 (1948) (rejecting forfeiture of life insurance proceeds in favor of New York's unclaimed property law); *People ex rel. Callahan v. Marshall*, 404 N.E.2d 368, 373 (Ill. App. Ct. 1980) (rejecting contractual time limitations on gift cards and credit memoranda in favor of Illinois' unclaimed property law); *Div. of Unclaimed Prop. v. McKay Dee Credit Union*, 958 P.2d 234, 240 (Utah 1998) (finding that Utah's unclaimed property law takes precedence over statute allowing businesses to purge debt records). For example, a California appellate court struck down a provision in a contract between a health insurer and its subscribers, requiring the subscribers to cash their claim checks within six months or forfeit their right to the funds. *Blue Cross of N. Cal. v. Cory*, 120 Cal. App. 3d 723, 739-40 (Cal. Ct. App. 1981). The court

reasoned that "[California's UPA], as a law established for a public reason, cannot be contravened by a private agreement." *Id.* at 740. Similarly, the court reasoned that a union representative, acting on behalf of union members, could not agree to divert the value of individual members' royalty checks into an account for the union's general benefit, if the checks were not cashed within a designated time. *Screen Actors Guild, Inc. v. Cory*, 91 Cal. App.3d 111, 115-16 (Cal. Ct. App. 1979). And despite the approval of a majority of shareholders, the New Jersey Supreme Court struck down an amendment to a corporation's charter that allowed the corporation to retain stock dividends if they went unclaimed for three years. *State by Furman v. Jefferson Lake Sulphur Co.* 178 A.2d 329, 338-39 (N.J. 1962), *cert. denied*, 370 U.S. 158 (1962). The court reasoned that even with the assent of shareholders, the amendment violated New Jersey's UPA, because a corporation cannot alter its charter to give itself powers that are "obnoxious to any applicable general law or to public policy." *Id.* at 335-36.

The Court attempts to distinguish these cases by suggesting that the class members' property interests here were conditional and thus subject to forfeiture under the settlement agreement, unlike the shareholder's right to a dividend check, the union member's right to the royalty check, or the insured's right to a benefits check. ___ S.W.3d at ___ & n.27. I fail to see how the class members' property interests here are any different or why they are entitled to any less protection under our UPA. Highland acknowledged in the settlement agreement that it "owed" the identified class members the funds represented by the checks and that, if a check were "not negotiated within ninety (90) days of its issuance, the funds owed to that class member [would] be considered 'unclaimed funds.'" The agreement provided further for "a *cy pres* distribution of unclaimed funds owed to class members that cannot be located or who fail to negotiate within ninety (90) days of [the check's]

issuance." The agreement thus acknowledges the members' property interests and seeks to redirect those interests under the *cy pres* provision. Although parties generally have the right to contract as they see fit, they do not have the right to make agreements that violate the law or public policy. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 129 & n. 11 (Tex. 2004). This agreement violates the law because the parties have substantively agreed to the redisposition of future, unclaimed property—a private escheat agreement prohibited by the UPA.

Finally, the Court argues that the UPA should not apply because it intrudes on the class representative's authority to act for class members under Rule 42. ___ S.W.3d at ___. Again, I disagree. As already discussed, the class representative's authority extends to the settlement of the class claims but not to the disposition or forfeiture of the individual class member's vested property rights. The class action rule may authorize the representative to settle the class member's claim, but it does not authorize the representative to take away the member's share of that settlement once it has vested.

I question whether the Court would be so favorably disposed to the class representative's power to redistribute unclaimed settlement proceeds if such proceeds were payable to the representative rather than a charity. I suspect that the Court's analysis is influenced more by where the unclaimed funds end up than by how they got there. Why should money escheat to the State, if a charity can benefit from unclaimed settlement proceeds? The problem, as I see it, is two fold. First, and foremost, under the terms of this settlement agreement, the money belongs to the missing class members, not to Highland or the class representative. The missing parties' property rights can only be preserved if the State is permitted to act as their custodian under the UPA. Second, even if this were an appropriate case for a *cy pres* distribution (and I do not believe it is), the *cy pres*

distribution here is contrary to existing law on the subject.

As to this latter point, the Court acknowledges the State's warning that *cy pres* awards "can be . . . nothing more than a judicial giveaway of private property" but suggests that the State either lacked standing to challenge the appropriateness of the award in this case or waived the complaint. ___ S.W.3d at ___. Again, I disagree. The State has standing to, and did in fact, challenge the *cy pres* distribution to The Nature Conservancy in both the court of appeals and this Court. *See In re Lease Oil Antitrust Litig.* 570 F.3d 244, 250-51 (5th Cir. 2009) (determining that State of Texas had "direct, substantial, legally protectable interest" to challenge *cy pres* distribution in class action suit); *see also* Brief for Respondent at 40 ("The requisite nexus between the mission of the *cy pres* recipient and the purpose of the class action is absent here.").

Cy pres distributions in class actions are appropriate when there is money remaining in a settlement fund after identifiable class members have been compensated. *Klier v. Elf Atochem N. Am.*, Inc., 658 F.3d 468, 474-75 (5th Cir. 2011). Typically, this might occur when a defendant does not have sufficient information or resources to determine the precise size of the class or the identity of its members and thus relies on a claims-form process to qualify membership. In that situation, any unallocated surplus in the settlement fund might appropriately be disposed of under a *cy pres* provision. *See, e.g., Wilson v. Sw. Airlines, Inc*., 880 F.2d 807, 813 (5th Cir. 1989) (allocating remainder of settlement fund where 500 potential class members were notified, but only 228 proved their right to the fund by filling out a claim form and all 228 were fully compensated). In this case, however, all of the identifiable class members were not compensated.

Highland used its business records to precisely tailor the size of the settlement fund, reserving the right to reduce the fund by the amounts attributable to class members who opted-out. Highland

then used these same records to issue checks to each settling class member, who under the settlement agreement were designated as the owners of their particular share of the fund and were issued checks representing that share. The *cy pres* provision then subsequently forfeited that property interest if the class member did not cash the issued check within 90 days. Highland did not require, nor need, the class members to prove their right to the fund as Highland possessed all the relevant information in its own business records. It therefore allocated the entire fund to identifiable class members by issuing each of them a check for the specific amount owed. There accordingly was no unclaimed surplus to which an appropriate *cy pres* distribution could attach.

Even had there been a surplus, the *cy pres* provision in this agreement was clearly inappropriate for yet another reason. In class actions, the doctrine of *cy pres* is supposed to distribute funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *Klier,* 658 F.3d at 474. At the very least, the *cy pres* distribution should "reasonably approximate" the class members' interests. *In re Lupron Mktg. & Sales Practices Litig.* 677 F3d 21, 33 (1st Cir. 2012). Whether the *cy pres* distribution reasonably approximates the class members' interests is determined by analyzing a number of factors such as the purposes of the underlying statutes violated, the nature of the class members' injury, the class members' characteristics and interests, the geographical scope of the class, the reasons why the settlement funds have yet to be claimed, and the relationship of the *cy pres* recipient to the class. *Id.* at 33.

The Court acknowledges that The Nature Conservancy was chosen as the *cy pres* recipient because it "share[s] Highland Homes' vision of green building and commitment to the environment." ___ S.W.3d at ___ (alteration in original). But Highland's vision or preferences are irrelevant

because the settlement fund does not belong to Highland. It belongs to the class members whose claims created the fund. *See Klier,* 658 F.3d at 474 ("The settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members.") (citing *Principles of the Law of Aggregate Litigation*, 2010 A.L.I. § 3.07 cmt. b). As much as I respect and admire the mission of The Nature Conservancy, I fail to see its connection to the subcontractors' suit, which alleged that Highland misrepresented that liability insurance would be provided for uninsured subcontractors through payroll deductions.

The UPA provides that property is presumed abandoned if ownership is not exercised for a period of three years. It requires that such property be turned over to the State. The UPA further prohibits contracts that seek to limit the presumptive period or otherwise dispose of unclaimed property through private escheat agreements. In this regard, the Act prohibits agreements that "divert funds" or "divide funds . . . among locatable" persons or use "any other method for the purpose of circumventing the unclaimed property process." TEX. PROP. CODE § 74.309. Highland and the class representative agreed "to a cy pres distribution of unclaimed funds owed to class members" who, although known, could not be found to cash their settlement checks within 90 days of issuance. I agree with the court of appeals that this *cy pres* provision is essentially a private escheat agreement prohibited by the UPA. 417 S.W.3d 478, 486-87 (Tex. App.–El Paso 2012). I accordingly would affirm the court of appeals' judgment. Because the Court does not, I respectfully dissent.

_____

John P. Devine
Justice

Opinion Delivered: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0617

UNION CARBIDE CORPORATION, PETITIONER,

v.

DAISY E. SYNATZSKE AND GRACE ANNETTE WEBB, INDIVIDUALLY AND AS REPRESENTATIVES AND CO-EXECUTRIXES OF THE ESTATE OF JOSEPH EMMITE, SR., JOSEPH EMMITE, JR., DOROTHY A. DAY, VERA J. GIALMALVA AND JAMES R. EMMITE, RESPONDENTS

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

Argued October 10, 2013

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

JUSTICE LEHRMANN filed a dissenting opinion.

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

This interlocutory appeal concerns an asbestos-related injury suit in which Union Carbide Corporation filed a motion to dismiss based on the plaintiffs' alleged failure to timely serve a statutorily compliant physician report. The Multi-District Litigation pretrial court denied the motion. On interlocutory appeal the court of appeals affirmed. It held that the plaintiffs did not file a

compliant report, but that the report requirement was unconstitutionally retroactive as applied to the plaintiffs' claims.

We agree with the court of appeals that a statutorily compliant report was not filed. But we disagree that, as applied in this case, the report requirements are unconstitutional. Accordingly, we reverse the judgment of the court of appeals and render judgment dismissing the suit.

I. Background

Joseph Emmite, who died in June 2005, worked as an insulator at Union Carbide for nearly forty years before he began receiving disability in 1979. At that time, Joseph had numerous health issues including a kidney disorder that required steroid therapy, a torn biceps muscle, and chronic fatigue, weakness, and vertigo. He was hospitalized twice during the last year of his life. His last hospitalization was in May 2005, because of edema, or swelling, in his legs. His medical history reflected, among other matters, that Joseph had been unable to walk for two years because of a deteriorated hip joint, he was unable to feed himself, he had dementia, and he had previously been diagnosed as having asbestosis. X-rays, an ultra-sound, and a computerized tomography performed during his final hospitalization showed lung calcifications that were most likely due to asbestos exposure. Dr. Prince was called in as a consulting pulmonologist and diagnosed him as having pulmonary asbestosis. When Joseph died on June 15, 2005, his death certificate listed the cause of death as "Alzheimer's disease/dementia." In June 2007, the representatives of Joseph's estate and his surviving children (the Emmites)[1] filed a wrongful death suit against Union Carbide and thirty-

[1] The plaintiffs are Daisy E. Synatzske and Grace Annette Webb, individually and as representatives and co-executrixes of the estate of Joseph Emmite, Sr., Joseph Emmite, Jr., Dorothy A. Day, Vera J. Gialmalva, and James R. Emmite.

seven other defendants.[2] As to Union Carbide the Emmites alleged that Joseph was exposed to asbestos throughout his work life there and the long-term exposure caused him to develop asbestosis, which in turn was a cause of his death.

Chapter 90 of the Texas Civil Practice and Remedies Code was enacted by the 79th Legislature in 2005, signed by the Governor in May 2005, and became effective on September 1 of that year. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Gen. Laws 169; *see* TEX. CIV. PRAC. & REM. CODE §§ 90.001–012. Chapter 90 applies to actions commenced after its effective date and requires claimants—persons alleged to have suffered an asbestos-related injury and any persons seeking recovery of damages for or arising from the injury or death of the exposed person—to serve each defendant with a physician report meeting certain requirements. TEX. CIV. PRAC. & REM. CODE §§ 90.001, 90.006. Thus, Chapter 90 was law before Joseph died, although it did not apply to suits filed during the more than two months between his death and September 1, 2005. *Id.* §§ 90.001–012. Because the Emmites did not file suit until 2007, Chapter 90 applies to their claims.

In order to meet Chapter 90's requirements, the Emmites attached a report by Dr. Richard Kradin to their original petition. Union Carbide responded with a motion to dismiss in which it

[2] The other defendants are no longer parties. They were AMF Incorporated; The Anchor Packing Company; Aqua-Chem, Inc. (d/b/a Cleaver-Brooks Division); A.W. Chesterton Company; Bondex International, Inc.; Carborundum Company, n/k/a Industrial Holdings Corporation; Certainteed Corporation; Crown Cork & Seal Co., Inc.; Foster Wheeler Corporation; Garlock, Inc.; Georgia Pacific Corporation; General Electric Company; General Refractories Company; Grefco, Inc.; Henry Vogt Machine Company; Ingersoll-Rand Company; Owens-Illinois, Inc.; Rapid American Corporation; Riley Power, Inc.; Triplex, Inc.; Ametek, Inc.; Uniroyal, Inc.; Viacom, Inc.; Westinghouse Electric Corporation; Wyatt Industries Inc.; Zurn Industries, Inc.; Bechtel Corporation; Fluor Corporation; Fluor Enterprises, Inc.; Mundy Industrial Maintenance, Inc.; Natkin & Company; Parsons Energy & Chemicals Group Inc.; Resco Holding, Inc.; Santa Fe Braun, Inc.; and Trinity Construction Company, Inc.

asserted that the report did not meet Chapter 90's requirements. The Emmites, in turn, served Union Carbide with a report authored by Dr. J.D. Britton.

In September 2007, the MDL pretrial court[3] (the MDL court or trial court) held a hearing on Union Carbide's motion to dismiss. At the hearing Union Carbide argued that the Emmites' claims should be dismissed because neither Dr. Kradin's report nor Dr. Britton's report complied with Chapter 90, primarily because neither report referenced pulmonary function testing showing that Joseph suffered functional pulmonary impairment.[4] The trial court denied the motion to dismiss orally, but did not deny it by written order.

Union Carbide moved for reconsideration and the trial court conducted a hearing on that motion. In its motion and at the hearing, Union Carbide reiterated its position that the suit should be dismissed because Chapter 90 required pulmonary function testing and testing was neither performed on Joseph nor mentioned in a physician's report. The Emmites informed the court that they were seeking an amended death certificate showing asbestosis as a cause of death. In light of the Emmites' representations, the trial court left the record open for six weeks and indicated that

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[3] *See* TEX. CIV. PRAC. & REM. CODE § 90.010.

[4] A section 90.003 report must:

> verif[y] that the exposed person has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing showing:
>
> > (i) forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or at or above 65 percent; or
> >
> > (ii) total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal or below 80 percent of predicted.

Id. § 90.003(a)(2)(D). If a claimant's pulmonary function test results do not meet the requirements of section 90.003(a)(2)(D), a physician's report meeting the requirements of section 90.003(c) may be substituted. That section requires the physician's report to include, among other matters, "the specific pulmonary function test findings on which the physician relies to establish that the exposed person has restrictive impairment." *Id.* § 90.003(c)(3).

Union Carbide's motion would be granted if the death certificate was not amended during that time to reflect asbestosis as a cause of death.

Six weeks later, the Emmites again served Union Carbide with Dr. Britton's report and asserted for the first time that the report complied with section 90.010(f)(1)—the "safety valve" provision of Chapter 90 which provides an alternative from the report standards in section 90.003—even though the Emmites had declined to rely upon that section at the November hearing.[5] The trial court held another hearing in January 2008. At that hearing the Emmites informed the court they were still awaiting the amended death certificate, but they had learned in discovery that Joseph had pulmonary function tests performed during his employment with Union Carbide and, using those pulmonary function testing results in conjunction with Dr. Britton's report, they were now proceeding under the safety valve provision in section 90.010(f)(1). They also requested a full evidentiary hearing as required by section 90.010(g) for claimants proceeding under the safety valve provision. The court granted the Emmites' request for an evidentiary hearing and also granted Union

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[5] To comply with the "safety valve" provision a claimant must serve a report that:

> (A) complies with the requirements of Sections 90.003(a)(2)(A), (B), (E), and (F) and 90.003(b) or Sections 90.004(a)(1), (2), and (4) and 90.004(e); and
>
> (B) verifies that:
>
> > (i) the physician making the report has a physician-patient relationship with the exposed person;
> >
> > (ii) pulmonary function testing has been performed on the exposed person and the physician making the report has interpreted the pulmonary function testing;
> >
> > (iii) the physician making the report has concluded, to a reasonable degree of medical probability, that the exposed person has radiographic, pathologic, or computed tomography evidence establishing bilateral pleural disease or bilateral parenchymal disease caused by exposure to asbestos or silica; and
> >
> > (iv) the physician has concluded that the exposed person has asbestos-related or silica-related physical impairment comparable to the impairment the exposed person would have had if the exposed person met the criteria set forth in Section 90.003 or 90.004.

Id. § 90.010(f)(1).

Carbide's request to depose Dr. Suzanne McClure, the doctor who signed Joseph's death certificate. The evidentiary hearing was deferred until after the deposition.

Dr. McClure was injured in an automobile accident and Union Carbide was unable to depose her until September 2009. After taking her deposition, Union Carbide renewed its motion to dismiss. The Emmites responded by arguing that the renewed motion was untimely and Union Carbide waived its right to seek dismissal by engaging in discovery after the previous hearing. They also attached a report dated October 28, 2009, from Dr. Joseph Prince, a pulmonologist who treated Joseph just before he died. The Emmites asserted that Dr. Prince's report complied with the safety valve requirements.

The trial court held a fourth hearing in November 2009 to address the renewed motion to dismiss. Following that hearing, but before the court ruled, the Emmites filed an amended version of Dr. Prince's report. In the amended report Dr. Prince explained that he served as Joseph's treating physician immediately before his death, he had reviewed Joseph's medical records and occupational and exposure histories, and he opined that (1) Joseph had pulmonary asbestosis, (2) Joseph's debilitated state would have made pulmonary function testing difficult, and (3) Joseph had asbestos-related impairment comparable to the criteria in Chapter 90. In December 2009, the trial court held a fifth hearing, following which it signed an order denying Union Carbide's motion to dismiss.[6]

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[6] In support of its ruling, the MDL court found that:

> (1) Joseph worked as an insulator for approximately 39 years at the Union Carbide Texas City facility;
> (2) The autopsy findings revealed asbestosis that had resulted in severe pulmonary fibrosis and the cause of death was the combined effects of retained asbestos fibers;
> (3) Texas Civil Practice and Remedies Code sections 90.003 and 90.004 do not adequately assess Joseph's pulmonary impairment due to physical and mental limitations from which he suffered;

Union Carbide filed an interlocutory appeal from the denial of its motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(11). On appeal it asserted that the trial court abused its discretion by considering reports and evidence other than the initial reports of Drs. Kradin and Britton because the Emmites neither moved for nor showed good cause for an extension of time to file additional reports. It also contended that even if the trial court properly considered the later-filed report of Dr. Prince, that report failed to comply with the safety valve requirements because Joseph's pulmonary function test results did not show that he had pulmonary function impairment, Dr. Prince testified that the tests were normal, and Dr. Prince did not utilize the test results in reaching his conclusion that Joseph demonstrated pulmonary impairment. The Emmites argued that the court of

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(4) Shortly before his death Joseph suffered from physical and mental limitations, which made it impossible for him to take a pulmonary function test;
(5) Had Joseph been physically and mentally capable of performing a pulmonary function test, the results would have demonstrated pulmonary impairment greater than that required under Texas Civil Practice and Remedies Code section 90.003;
(6) Due to Joseph's physical and mental limitations, severe asbestosis, and death, the medical criteria set forth in Texas Civil Practice and Remedies Code section 90.003 do not adequately assess Joseph's physical impairment caused by exposure to asbestos;
(7) Dr. Prince is a qualified, board-certified pulmonary specialist who served Joseph as his last treating physician;
(8) In his report and testimony, Dr. Prince verified that pulmonary function testing had been previously performed on Joseph, and that he interpreted the results;
(9) Other than cross-examination of Dr. Prince at his deposition, Union Carbide offered no evidence, either by way of live expert testimony, depositions, or fact witnesses to contradict the findings of Dr. Prince;
(10) Dr. Prince had no history of working as a litigation consultant. The testimony and opinions offered by Dr. Prince were at all times credible, reliable and uncontroverted;
(11) Joseph's case presents unique and extraordinary physical and medical characteristics justifying denial of Union Carbide's Motion to dismiss;
(12) Joseph's family produced sufficient credible evidence to allow a finder of fact to reasonably find that his asbestos impairment was comparable to the impairment that an exposed person would have had if the exposed person met the criteria set forth in section 90.003.

appeals did not err in considering all of the evidence presented throughout the pretrial process, that Dr. Prince's report was fully compliant with the requirements of section 90.010(f)(1), and if that section imposed a requirement of pulmonary function testing demonstrating pulmonary impairment, it violated the Texas Constitution's prohibition against retroactive laws as it applied to them.

In an en banc decision on rehearing, the court of appeals held that the MDL court properly considered all of the Emmites' physician reports, section 90.010(f)(1) requires pulmonary function testing to have been performed on the person allegedly injured, and the testing must have been relevant to the physician's diagnosis of functional pulmonary impairment. *Union Carbide Corp. v. Synatzske*, 386 S.W.3d 278, 307 (Tex. App.—Houston [1st Dist.] 2012, pet. granted). After noting that Dr. Prince testified that he did not use Joseph's pulmonary testing results in reaching his diagnosis, the appeals court concluded that his report did not satisfy the requirements of section 90.010(f)(1)(B)(ii). *Id.* at 297. Then, referencing *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010), the court held that as applied to the Emmites' claims, section 90.010(f)(1)(B)(ii) violated the Texas Constitution's prohibition against retroactive laws. *Id.* at 307.

We begin by reviewing the relevant provisions of Chapter 90.

II. Civil Practice and Remedies Code Chapter 90

As noted previously, Chapter 90 of the Texas Civil Practice and Remedies Code was enacted by the 79th Legislature in 2005, signed by the Governor in May 2005, and became effective on September 1 of that year. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Gen. Laws 169; *see* TEX. CIV. PRAC. & REM. CODE §§ 90.001–012. By enacting Chapter 90, the Legislature sought to address an asbestos litigation crisis which it found was "costly to employers, employees,

litigants, and the court system." Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1(d), (h), 2005 Tex. Gen. Laws 169. The Legislature's stated purpose in enacting the legislation was to protect

> the right of people with impairing asbestos-related . . . injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to asbestos . . . but have no function or physical impairment from asbestos-related . . . disease.

Id. § 1(n). To accomplish its purpose, the Legislature

> (1) adopt[ed] medically accepted standards for differentiating between individuals with nonmalignant asbestos-related . . . disease causing functional impairment and individuals with no functional impairment;
> (2) provided a method to obtain the dismissal of lawsuits in which the exposed person has no functional impairment, while at the same time protecting a person's right to bring suit on discovering an impairing asbestos-related . . . injury; and
> (3) creat[ed] an extended period before limitations begin to run in which to bring claims for injuries caused by the inhalation or ingestion of asbestos . . . to preserve the right of those who have been exposed to asbestos . . . but are not yet impaired to bring a claim later in the event that they develop an impairing asbestos-related . . . injury.

Id.

Chapter 90 created physician report requirements for claimants. TEX. CIV. PRAC. & REM. CODE §§ 90.003, 90.010(f)(1). Section 90.003 requires claimants suing for non-cancerous, asbestos-related injuries to serve each defendant with a detailed occupational and exposure history, a detailed medical and smoking history of the exposed person, and a physician's report which includes a verification that the physician conducted a detailed physical examination. *Id.* §§ 90.003(a)(2)(A), 90.003(b).[7] The report must include the details of those histories and verify that ten years have

[7] Section 90.003(a)(2) requires a claimant asserting a non-cancerous, asbestos-related injury claim to serve each defendant with

> (2) a report by a physician who is board certified in pulmonary medicine, internal medicine, or

elapsed between the initial exposure and the physician's diagnosis. *Id.* § 90.003(a)(2)(B). Section 90.003 also requires the physician's report to verify that the exposed person has a statutorily

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> occupational medicine and whose license and certification were not on inactive status at the time the report was made that:
>
> (A) verifies that the physician or a medical professional employed by and under the direct supervision and control of the physician:
>
> (i) performed a physical examination of the exposed person, or if the exposed person is deceased, reviewed available records relating to the exposed person's medical condition;
>
> (ii) took a detailed occupational and exposure history from the exposed person or, if the exposed person is deceased, from a person knowledgeable about the alleged exposure or exposures that form the basis of the action; and
>
> (iii) took a detailed medical and smoking history that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;
>
> (B) sets out the details of the exposed person's occupational, exposure, medical, and smoking history and verifies that at least 10 years have elapsed between the exposed person's first exposure to asbestos and the date of diagnosis;
>
> (C) verifies that the exposed person has:
>
> (i) a quality 1 or 2 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing:
>
> (a) bilateral small irregular opacities (s, t, or u) with a profusion grading of 1/1 or higher, for an action filed on or after May 1, 2005;
>
> (b) bilateral small irregular opacities (s, t, or u) with a profusion grading of 1/0 or higher, for an action filed before May 1, 2005; or
>
> (c) bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or
>
> (ii) pathological asbestosis graded 1(B) or higher under the criteria published in "Asbestos-Associated Diseases," 106 Archives of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982);
>
> (D) verifies that the exposed person has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing showing:
>
> (i) forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or at or above 65 percent; or
>
> (ii) total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal or below 80 percent of predicted;
>
> (E) verifies that the physician has concluded that the exposed person's medical findings and impairment were not more probably the result of causes other than asbestos exposure revealed by the exposed person's occupational, exposure, medical, and smoking history; and
>
> (F) is accompanied by copies of all ILO classifications, pulmonary function tests, including printouts of all data, flow volume loops, and other information demonstrating compliance with the equipment, quality, interpretation, and reporting standards set out in this chapter, lung volume tests, diagnostic imaging of the chest, pathology reports, or other testing reviewed by the physician in reaching the physician's conclusions.

TEX. CIV. PRAC. & REM. CODE § 90.003(a)(2).

specified threshold level of asbestos-related functional pulmonary impairment as demonstrated by pulmonary function testing. *Id.* § 90.003(a)(2)(D). The statute specifies a threshold level of impairment by requiring the pulmonary function testing to demonstrate that the exposed person has

> forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or at or above 65 percent; or total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal or below 80 percent of predicted.

Id. § 90.003(a)(2)(D).[8] Further, the report must verify that the medical findings and impairment were not more likely the result of causes other than asbestos exposure, as well as include copies of all the test results and other medical documents the physician relied upon in reaching the physician's medical conclusions. *Id.* § 90.003(a)(2)(E)-(F). In the event a claimant's pulmonary function test results do not meet the requirements of section 90.003(a)(2)(D)(i) or (ii), section 90.003(c) permits the required physician's report to use different criteria for verifying that the exposed person has restrictive impairment from asbestosis. *Id.* § 90.003(c). But under that section the physician still must identify the specific pulmonary function test findings on which the physician relies to establish that the exposed person has restrictive functional impairment. *Id.* § 90.003(c)(3).

Chapter 90 includes an alternative safety valve impairment provision for situations in which an exposed person can demonstrate asbestos-related impairment, but cannot satisfy the criteria in section 90.003. *See id.* § 90.010(f)(1),(j). The safety-valve provision applies "only in exceptional

[8] "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests. TEX. CIV. PRAC. & REM. CODE § 90.001(9). "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration. *Id.* § 90.001(10). "Plethysmography" means the test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume change. *Id.* § 90.001(22).

and limited circumstances." *Id.* Section 90.010(f) mandates a physician report demonstrating the physician considered the individual physical, occupational, and medical history requirements of the person allegedly injured by asbestosis, and also requires the physician to rule out non-asbestos causes and include all appropriate documentation. *Id.* §§ 90.003(a), 90.010(f)(1)(A). A safety-valve physician report must also show that

> (i) the physician making the report has a physician-patient relationship with the exposed person;
> (ii) *pulmonary function testing has been performed on the exposed person and the physician making the report has interpreted the pulmonary function testing*;
> (iii) the physician making the report has concluded, to a reasonable degree of medical probability, that the person has radiographic, pathologic, or computed tomography evidence establishing bilateral pleural disease or bilateral parenchymal disease caused by exposure to asbestos or silica; and
> (iv) the physician has concluded that the exposed person has asbestos-related . . . physical impairment comparable to the impairment the exposed person would have had if the exposed person met the criteria set forth in Section 90.003.

Id. § 90.010(f)(1)(B) (emphasis added).

There are additional requirements for claimants proceeding under section 90.010(f): the MDL court must find that

> (A) the report and medical opinions offered by the claimant are reliable and credible;
> (B) due to unique or extraordinary physical or medical characteristics of the exposed person, the medical criteria set forth in Section[] 90.003 do[es] not adequately assess the exposed person's physical impairment caused by exposure to asbestos . . . ; and
> (C) the claimant has produced sufficient credible evidence for a finder of fact to reasonably find that the exposed person is physically impaired as the result of exposure to asbestos . . . to a degree comparable to the impairment the exposed person would have had if the exposed person met the criteria set forth in Section 90.003.

Id. § 90.010(f)(2). The MDL court must permit a reasonable time for discovery and conduct an evidentiary hearing before considering whether the requirements of section 90.010(f)(2) have been

met. *Id.* § 90.010(g). The court is required to make written findings and to specifically identify "(1) the unique or extraordinary physical or medical characteristics of the exposed person that justify the application of this section; and (2) the reasons the criteria set forth in Section[] 90.003 . . . do not adequately assess the exposed person's physical impairment caused by exposure to asbestos." *Id.* § 90.010(h).

Chapter 90 imposes timing requirements for claimants to serve the required physician reports as well as a procedural structure for defendants to move for dismissal if a compliant report is not filed. A claimant proceeding under section 90.003 must serve the defendant with a compliant report not later than thirty days after the defendant's answer or appearance. *Id.* § 90.006(a). If the claimant either fails to serve any report or serves a report that does not comply with section 90.003, a defendant may, within thirty days of being served (or if no report was served, within thirty days of the date the report was due), file a motion to dismiss. *Id.* § 90.007(a). A claimant may then respond within fifteen days by either filing a compliant report or amending a previously filed but non-compliant report. *Id.* § 90.007(b).

If the court determines that the motion to dismiss is meritorious, dismissal by written order is mandatory, "except as provided by section 90.010(d) or (e)." *Id.* § 90.007(c). Section 90.010(e) in turn requires dismissal for failure to serve a report that complies with section 90.003 unless the claimant meets the safety valve provisions. *Id.* § 90.010(e). The court is also permitted, "on the motion of a party showing good cause," to alter the timing requirements for serving motions, responses, or reports. *Id.* § 90.007(e).

As is readily apparent from the foregoing in Chapter 90, the Legislature focused on physical, functional impairment and sought to preserve resources for those persons who could demonstrate such impairment due to asbestos exposure. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1(n), 2005 Tex. Gen. Laws 169, 170. To achieve this goal it adopted medically accepted standards for differentiating between individuals with nonmalignant asbestos-related disease causing functional pulmonary physical impairment and individuals exposed to asbestos but who did not have such impairment. *Id.* The Legislature selected functional pulmonary impairment as the dividing line between those who could pursue asbestos-related injury claims[9] and those who could not. In order to establish an objectively determinable distinction between the two types of claimants, it mandated a "medically accepted standard"—pulmonary function testing—as a key component of the required physician report. *See* TEX. CIV. PRAC. & REM. CODE §§ 90.001(23), 90.003(a)(2)(D), 90.003(a)(2)(c), 90.010(f)(1)(B)(ii).

Having reviewed the statutory construct, we move to the merits. We begin by considering whether the Emmites timely filed physician reports.

III. Timeliness of the Reports

Union Carbide argues that the trial court erred by considering any of the Emmites' reports other than the two reports filed before the September 14, 2007 hearing. We disagree.

Union Carbide does not dispute the timeliness of the physician reports of Dr. Kradin, attached to the Emmites' original petition, or the initial report of Dr. Britton, served in response to

[9] "Asbestos-related injury" means personal injury or death allegedly caused, in whole or in part, by inhalation or ingestion of asbestos. *Id.* § 90.001(2).

Union Carbide's initial motion to dismiss. Rather, it argues that any further reports were untimely because they were filed more than fifteen days after the motion to dismiss was filed, and the Emmites never moved for an extension of time. *See id.* §§ 90.007(b), (e).

Union Carbide's initial motion to dismiss was premised on the lack of a report meeting section 90.003(a)'s requirements. As previously noted, the trial court orally denied the motion, but did not sign a written order. And because the court ruled in their favor, the Emmites had no reason to move for an extension of time or to supplement their physician reports.

In its motion for reconsideration, Union Carbide argued, among other things, that the absence of references to pulmonary function testing in the Emmites' physician reports made them non-compliant with both section 90.003 and the alternative safety valve requirements of section 90.010(f)—the section the pretrial court relied upon when it orally denied Union Carbide's motion to dismiss. At the November 2007 hearing on Union Carbide's motion to reconsider, the Emmites asserted they were still proceeding under section 90.003, reiterated their contention that the pulmonary function testing requirements of Chapter 90 were inapplicable in a death case, and notified the court that they were attempting to have Joseph's death certificate amended so asbestosis would be listed as a cause of death. The court granted them six weeks to do so, and indicated that it would make its ruling on Union Carbide's motion to reconsider and the underlying motion to dismiss based on the outcome of the Emmites' attempt to have the death certificate amended.

The Emmites argue, and the en banc court of appeals held, that the Emmites' request for leave to seek amendment of Joseph's death certificate amounted to a motion to extend Chapter 90's time limits for serving reports. 386 S.W.3d at 290; *see* TEX. CIV. PRAC. & REM. CODE § 90.007(e).

The en banc court held that the pretrial court necessarily inferred both such a motion and good cause to support the extension by allowing the Emmites six weeks to seek the amendment. 386 S.W.3d at 290-91. Union Carbide responds that no motion was made, good cause could not have been shown because the reports were incurable under section 90.003(a)(2)(D)'s pulmonary function testing requirement, and the trial court erred in allowing the Emmites additional time.

We need not address the question of whether a motion to extend time existed and whether it was supported by good cause because Union Carbide did not secure a written ruling on either its motion for reconsideration or the underlying motion to dismiss, nor did it object to the trial court's failure to sign a written order. Thus, both motions remained pending before the MDL court. In January 2008, while Union Carbide's motion to reconsider was still awaiting resolution, the Emmites again served Union Carbide with Dr. Britton's report and for the first time affirmatively invoked the safety valve provisions of section 90.010(f)(1). Then, at the January 18, 2008 hearing, the Emmites asserted that Dr. Britton's report complied with the safety valve requirements and requested the full evidentiary hearing required by section 90.010(g). As we explain below, because the Emmites elected to proceed under section 90.010(f) at a time when the court had not ruled on Union Carbide's motions to dismiss and for reconsideration, and because the timing requirements that apply to a section 90.003 report do not apply to a section 90.010(f) report, the trial court did not err by considering the Emmites' 90.010(f) reports and other evidence it later offered.

In construing a statute our primary objective is to ascertain the Legislature's intent, and we do that, if possible, through the words the Legislature selected. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). We derive the Legislature's intent from the statute as a whole, not

by reading individual provisions in isolation. *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 454 (Tex. 2012).

Section 90.007(a) outlines the procedure for moving for dismissal for failure to timely serve a report that complies with section 90.003. TEX. CIV. PRAC. & REM. CODE § 90.007(a). That provision invokes the timing requirements of section 90.006, but makes no reference to reports filed pursuant to the safety valve provisions in section 90.010(f)(1). *See id.* The timing requirements outlined in section 90.006 refer to reports served pursuant to section 90.003, but similarly to the dismissal provisions in section 90.007, do not make reference to reports served under the safety valve provisions in section 90.010(f)(1). *See id.* § 90.006. If the trial court finds a section 90.007(a) motion to dismiss to be meritorious, it must dismiss the claim "except as provided by" section 90.010(e). *Id.* § 90.007(c). Section 90.010(e) mandates dismissal unless the claimant serves a report that complies with section 90.010(f)(1) and the court, on motion and after a hearing, makes the findings required by section 90.010(f)(2). *Id.* § 90.010(e). Thus, section 90.010(e) necessarily contemplates that a section 90.003 compliant report has not been served on the defendant, and at the same time provides a method for a claimant to avoid dismissal of the claim by serving a report that complies with the alternative safety valve requirements, which in turn requires an evidentiary hearing and factual findings by the court. *See id.* § 90.010(e). Section 90.010(e) does not mention a timing requirement for the hearing or findings. *See id.*

Among the findings a court must make under section 90.010(f)(2) is that the exposed person has impairment comparable to the impairment criteria set forth in section 90.003. *See id.* § 90.010(f)(2)(c). Section 90.010(g) further requires the section 90.010(f)(2) findings to be made

after an evidentiary hearing at which both parties may offer evidence and also requires a reasonable opportunity to conduct discovery before that hearing. *Id.* § 90.010(g). Section 90.010 thus necessarily expands the MDL court's inquiry beyond the issue of whether a report that complies with section 90.003 has been timely served on the defendant. And although Union Carbide argues that a two-year discovery period is not reasonable and defeats the purposes of Chapter 90, the factual situation here explains the delay.

It follows that because the Emmites invoked the safety valve provisions of section 90.010(f) at a time when the court was still considering Union Carbide's motion for reconsideration and motion to dismiss, they could introduce additional evidence and reports for the trial court to consider. Accordingly, the MDL court did not abuse its discretion by considering all of the Emmites' physician reports and evidence.

We now turn to the issue of whether Dr. Prince's report complied with the safety valve requirements of section 90.010(f)(1).

IV. Compliance with Section 90.010(f)(1)

In lieu of pulmonary function testing demonstrating a specified threshold of functional impairment, the safety valve provisions in section 90.010(f) require pulmonary function testing to have been performed on the exposed person and the physician making the report to have interpreted that testing. TEX. CIV. PRAC. & REM. CODE § 90.010(f)(1)(B)(ii). The only pulmonary testing performed on Joseph occurred before he retired from Union Carbide in 1979 and that testing did not show functional pulmonary impairment. As the court of appeals noted, neither the Emmites nor Dr. Prince rely upon the testing to show that Joseph suffered from asbestos-related functional pulmonary

impairment while he was alive, or that he died as a result of his exposure to asbestos. 386 S.W.3d at 296.

The Emmites contend section 90.010(f) requires only that testing was performed and that the reporting physician interpreted the tests, not that the tests were relevant to the physician's diagnosis of functional pulmonary impairment by showing some level of functional impairment or otherwise playing some part in the physician's diagnosis. They argue that the forty-year-old tests satisfy section 90.010(f)(1)(B)(ii) even though Dr. Prince testified the tests were normal and he did not rely on them in diagnosing Joseph as having had functional pulmonary impairment. We disagree.

As previously noted, our primary objective in construing a statute is to give effect to the Legislature's intent. *City of Rockwall*, 246 S.W.3d at 625. We derive the Legislature's intent from the statute as a whole, not from individual provisions in isolation. *Ruttiger*, 381 S.W.3d at 454. We construe a statute's words according to their plain and common meaning unless they are statutorily defined otherwise, a different meaning is apparent from the context, or unless such a construction leads to absurd results. *See Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). We take statutes as we find them, presuming the Legislature included words that it intended to include and omitted words it intended to omit. *See, e.g.*, *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010). We do not read words into a statute to make it what we consider to be more reasonable, rather we may do so only to prevent an absurd result. *Id.* at 930.

The language of section 90.010(f)(1)(B)(ii) does not expressly require that the pulmonary function test show functional impairment or otherwise be relevant to the physician's diagnosis of asbestos-related functional pulmonary impairment. *See* TEX. CIV. PRAC. & REM. CODE

§ 90.010(f)(1)(B)(ii). But in comparing that section to section 90.003, we note the Legislature retained pulmonary function testing as a requirement in section 90.010(f)(1) while omitting other objective criteria. That indicates that the Legislature expected pulmonary function testing to play a key role in the physician's diagnosis. Comparison of the two sets of requirements provides context for the role each provision plays. And, it is clear that both in context and in order to avoid nonsensical, absurd results, section 90.010(f)(1) must be read to require pulmonary function testing and its results to be relevant to the reporting physician's medical conclusions.

First, as to context, section 90.010(f)(1), unlike section 90.003, does not require specific x-ray readings, but instead simply requires the physician to conclude that the radiographic and other evidence establishes that the exposed person had asbestos-related disease. *Compare id.* § 90.003(a)(2)(c), *with* § 90.010(f)(1)(iii). However, while section 90.010(f)(1) omits a minimum threshold showing, by way of pulmonary function testing, that either the exposed person's (1) forced vital capacity, or (2) total lung capacity, falls below a statutorily set level of pulmonary impairment, section 90.010(f)(1) still requires that pulmonary function testing has been performed and that the reporting physician has interpreted that testing. *Compare id.* § 90.010(f)(1), *with* § 90.003(a)(2)(D). By specifically retaining pulmonary function testing in the safety valve provisions while omitting other requirements, the Legislature singled out pulmonary function testing as a paramount consideration in a physician's medical conclusions, and not merely an inconsequential procedural hurdle.

A section 90.010(f)(1) report must include a detailed medical, occupational, and exposure history. *Id.* § 90.010(f)(1)(A) (incorporating the requirements from section 90.003(a)(2)(A)-(B)).

The reporting physician must rule out causes of functional impairment other than asbestos exposure. *Id.* (incorporating the requirements from section 90.003(a)(2)(E)). And a section 90.010(f)(1) report must include copies and documentation of all testing, including pulmonary function testing, that the physician reviewed in reaching the physician's conclusions. *Id.* (incorporating the requirements from section 90.003(a)(2)(F)). By requiring copies of all pulmonary function tests reviewed by the physician in reaching his conclusions, as well as requiring pulmonary function testing to have been performed, the Legislature indicated that the pulmonary function testing must play a role in the physician's medical conclusions under the safety valve. *Id.* § 90.010(f)(1).

Moreover, absent the pulmonary function test required by section 90.010(f) being relevant to the diagnosis of functional pulmonary impairment, the safety valve requirement would yield results completely at odds with the rest of Chapter 90's testing requirements by permitting claims to go forward based on the fortuity of pulmonary testing having occurred sometime in the exposed person's past—as with Joseph's pulmonary tests—but not requiring the testing to be relevant to any diagnosis of impairment, while the other testing requirements in Chapter 90 are required to be relevant to the diagnosis of pulmonary functional impairment. The associated result would be that persons with asbestosis but no pulmonary function test in their past will be precluded from pursuing claims because they never underwent testing—even though such a test might have been completely irrelevant to a diagnosis of asbestos-related pulmonary function impairment. If the required testing is sufficient absent any relationship to the diagnosis, the requirement might just as well be some other non-relevant accomplishment or event such as requiring the exposed person to have been born on a particular day of the week. We do not attribute to the Legislature an intent that Chapter 90, with

its detailed processes and procedures, should yield such a nonsensical, arbitrary result. The Legislature's stated purpose was to preserve and allocate limited resources for compensating persons impaired by asbestosis, not to arbitrarily deny compensation to persons with asbestosis.

Thus, in order to interpret the pulmonary function testing requirement in the safety valve provision in a manner that contextually meshes with the remainder of Chapter 90, and yields non-arbitrary, non-absurd results, we are compelled to conclude that the Legislature intended that the testing have some relevance to the physician's diagnosis of asbestos-related pulmonary impairment, such as by showing some level of pulmonary impairment, even though the testing results do not meet the section 90.003 threshold. Reading the statute otherwise would ignore the Legislature's purpose in enacting Chapter 90, which was to respond to the asbestosis litigation crisis that was in large part the result of lawsuits filed by persons who had been exposed to asbestos and may even have had asbestos-related physical changes, but who had not developed asbestos-related physical *impairment*. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1(f), (n), 2005 Tex. Gen. Laws 169, 169-70.

In his dissent, Justice Boyd argues that the pulmonary function testing requirement in section 90.010(f) requires only that testing has been performed—regardless of its timing, results, or relevance to the physician's medical conclusions—because the existence of past testing establishes the claimant was concerned enough about asbestos exposure to have testing performed at some point. But nothing in this record or the legislative findings supports that position: the Emmites do not contend that pulmonary function tests are administered only to determine if persons have asbestos-related pulmonary impairment. Even if they did, their position would not account for pulmonary function tests administered for purposes completely unrelated to possible asbestos-caused pulmonary

injury, such as pre-employment physical examinations, athletic physical examinations, and certain military physical examinations.

Justice Boyd also argues that it is unnecessary for the safety valve's pulmonary function test to be relevant to the physician's diagnosis of pulmonary function impairment because of the other safety valve requirements. But if the required pulmonary function test is inconsequential as to the determination of functional pulmonary impairment, then there is no need for it to be part of the safety valve requirements at all. Chapter 90 is too detailed and carefully constructed to achieve the Legislature's specified purpose—preserving scarce assets for those who have functional pulmonary impairment—to attribute to the Legislature an intent for the statute to contain a random, inconsequential, arbitrary hurdle for claimants to overcome.

Finally, Justice Boyd speculates that legislators might have made a mistake and simply missed adding the requirement to the safety valve section that the pulmonary function test must demonstrate some impairment or other relevance to a physician's diagnosis of functional pulmonary impairment. And they may have. But we presume legislators intended to enact legislation fulfilling their clearly stated purpose rather than presuming they made a mistake that both diminishes the result they were seeking to obtain as well as arbitrarily distinguishing among persons claiming asbestos-related impairment.

In sum, applying the construction urged by the Emmites would result in the statute at least partially failing its intended purpose, and would attribute to the Legislature an intent to require pulmonary function testing and interpretation of that testing as a meaningless, arbitrary procedural hurdle instead of an objective method for differentiating between persons exposed to asbestos and

who have functional pulmonary impairment from that exposure and those exposed to asbestos but who have no functional impairment from it. *See* TEX. CIV. PRAC. & REM. CODE §§ 90.003(c)(3), 90.001(23), 90.010(f)(1); *see also* Act of May 16, 2005, 79th Leg., R.S., ch. 97, § (n), 2005 Tex. Gen. Laws 169, 170. And we presume the Legislature does not impose meaningless requirements as part of its lawmaking function. *Tex. Lottery Comm'n*, 325 S.W.3d at 635.

We conclude that forty-year-old tests that do not show some level of functional pulmonary impairment, or are not otherwise relevant to the diagnosis of functional pulmonary impairment, do not fulfill the requirements of section 90.010(f)(1)(B)(ii). Dr. Prince's report does not satisfy section 90.010(f)(1), and the statute requires dismissal of the Emmites' claims.

Our conclusion that section 90.010(f)(1)(B)(ii) mandates dismissal of the Emmites' claims leads to the question of whether, as they urge in the alternative, the section is unconstitutionally retroactive as applied to them. *See* TEX. CONST. art. I, § 16.

V. Constitutionality of Section 90.010(f)(1)(B)(ii)

A. Retroactivity Generally

The Texas Constitution provides that "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16. We have defined a retroactive law as "a law that acts on things which are past." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). Chapter 90 changed the procedures and standards for the Emmites to pursue their statutory cause of action for wrongful death after it had accrued, so the statute's effect was retroactive as to their claims. *See Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 348 (Tex. 1992) (a wrongful death cause of action accrues at the death of the

injured person); *see also* TEX. CIV. PRAC. & REM. CODE § 16.003(b). But retroactive effect alone will not make a statute unconstitutional. *See Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 139 n.67 (Tex. 2010) (citing *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971)). We begin, as we do with any challenge to a statute's constitutionality, by presuming that the statute is constitutional. *See Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003). And the burden of demonstrating a statute is unconstitutional is on the party challenging it. *Id.*

Union Carbide notes that because a wrongful death cause of action is purely statutory, its legislative restriction does not violate the open courts provision of the Texas Constitution. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355-56 (Tex. 1990). It then reasons that if the Legislature may restrict statutory causes of action without violating the open courts provision of the Texas Constitution, it may also restrict them without implicating the constitutional prohibition against retroactive laws. But our test for violation of the open courts provision applies only to common law causes of action and addresses different concerns than the prohibition on retroactive laws. *See id.*; *see also* TEX. CONST. art. I, § 13. We have noted that retroactive effects of a statute on common law and statutory causes of action present "different considerations" in the retroactivity context. *See Robinson*, 335 S.W.3d at 135-36. But we have never held that statutory causes of action are categorically beyond the constitutional protections from retroactive laws. Nor do we do so today. Rather, we apply the framework for retroactivity analysis we adopted in *Robinson*. And because the analysis we set out in *Robinson* guides our way, we briefly review that case.

In *Robinson*, Barbara and John Robinson sued Crown Cork & Seal, the successor to John's former employer, alleging that John contracted mesothelioma due to asbestos exposure. *Id.* at 129.

After the lawsuit had proceeded to the discovery stage, the Legislature enacted Chapter 149 of the Texas Civil Practice and Remedies Code which altered the choice of law rules in successor-liability asbestos cases. *Id.* at 130. The statute functioned to absolve Crown Cork & Seal of liability for John's mesothelioma and barred the Robinsons' claims. *Id.* at 132-33. The trial court granted summary judgment to Crown Cork & Seal based on Chapter 149's limitation of liability. *Id.* at 133. The Robinsons appealed, arguing that Chapter 149 was a retroactive law in violation of the Texas Constitution. *Id.*

We determined that classifying a right or interest as "vested" in order to determine whether it has been retroactively diminished or impaired in violation of the constitution has not yielded an efficient and predictable framework. *See id.* at 145 ("Robinson's argument that [three different rights] are somehow vested differently for purposes of determining unconstitutional retroactivity establishes the fundamental failure of the 'impairs vested rights' test."). After extensively reviewing our jurisprudence concerning the 'vested rights' analysis as to retroactivity and noting its shortcomings, we explained that

> [O]ur cases establish that the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power; *it protects settled expectations that rules are to govern the play and not simply the score, and prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment.* No bright-line test for unconstitutional retroactivity is possible. Rather, in determining whether a statute violates the prohibition against retroactive laws in article I, section 16 of the Texas Constitution, *courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment*. The perceived public advantage of a retroactive law is not simply to be balanced against its relatively small impact on private interests, or the

> prohibition would be deprived of most of its force. There must be a compelling public interest to overcome the heavy presumption against [the validity of] retroactive laws.

Id. at 145-46 (emphasis added) (citations omitted). After clarifying the framework for determining whether a statute is unconstitutionally retroactive, we applied the three factors we enumerated to the facts of the case.

Addressing the nature of the right impaired and the extent of that impairment, we first recognized that although it did so indirectly, Chapter 149 extinguished the Robinsons' common law claims. *Id.* at 148. We also recognized that the Robinsons' claims had matured, discovery in the case showed the claim was substantially based in fact, and recovery was predictable. *Id.* We further noted the Robinsons' reasonable, settled expectation that the rule of law permitting their recovery would not be altered after they had already filed and proceeded with their lawsuit. *Id.* Thus we concluded that Chapter 149 had the effect of abrogating the Robinsons' claims and benefitting Crown Cork & Seal. *Id.* at 149.

Turning to the public interest served, we noted that Chapter 149 contained no legislative findings and was apparently enacted to benefit Crown Cork & Seal and no one else. *Id.* We held that the public interest served—reduction of one corporation's liability—was slight. *Id.* at 149-50. Given the minimal public interest served and the grave impact on the Robinsons' right to recover, we held Chapter 149 to be unconstitutionally retroactive. *Id.* at 150.

B. Chapter 90 as Applied to the Emmites

1. Nature and Strength of the Public Interest Served

The Emmites assert that requiring them to show Joseph had a pulmonary function test showing impairment as a prerequisite for maintaining their claim does not serve a compelling public interest. They say that, as applied to them, only Union Carbide would benefit from imposition of the requirement—an improper legislative abuse of power prohibited by the Constitution. We disagree.

To overcome the presumption that laws with retroactive effects are unconstitutional, the public interest a statute serves must be compelling. *Id.* at 146. The statute in *Robinson* was ostensibly enacted for the sole benefit of Crown Cork & Seal. *Id.* The only public benefit achieved by the statute was the reduction of Crown Cork & Seal's liability due to asbestos litigation—a benefit we declined to find sufficiently compelling to overcome the presumption that retroactive laws are unconstitutional. *See id.* at 149. But the statutory provision at issue here stands in stark contrast to the one we addressed in *Robinson*. The Legislature provided extensive findings to support Chapter 90's enactment and its effects. Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Gen. Laws 169. Those findings identified a litigation crisis in which more asbestos-related suits were filed in Texas than in any other state, negatively affecting the financial resources available for compensating persons with asbestos-related injuries and the judicial resources available for allocating those financial resources. *Id.* § 1(d), (e). The findings in part attributed the crisis to lawsuits filed by persons who had been exposed to asbestos, but who were not suffering from asbestos-related impairment. *Id.* § 1(f). The Legislature noted the onslaught of asbestos litigation had negative effects on employers, employees, and the court system. *Id.* § 1(g). Because of those effects, the Legislature acted

> to protect the right of people with *impairing* asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preserving scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to asbestos or silica but have *no functional or physical impairment* from asbestos-related or silica-related disease.

Id. § 1(n) (emphasis added). To achieve its purpose the Legislature adopted standards to differentiate between persons exposed to asbestos who were functionally impaired and those who had been exposed but were not functionally impaired, even though they may have been diagnosed with asbestosis. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE §§ 90.001(23), 90.003, 90.010(f)(1).[10]

In contrast to the situation in *Robinson*, this record contains no evidence that the legislative purpose underlying Chapter 90 was to benefit any particular entity. Chapter 90 contains a comprehensive set of requirements, definitions, and procedural steps for addressing the widespread problem the Legislature identified. The application of, and public purpose served by, the statute accords with cases we cited favorably in *Robinson*. *See Robinson*, 335 S.W.3d at 143-44; *see also In re A.V.*, 113 S.W.3d 355 (Tex. 2003) (declining to declare a statute unconstitutionally retroactive when the Legislature sought to protect children); *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996) (finding retroactive legislation to safeguard the water supply compelling and not unconstitutionally retroactive). In this regard, the Emmites' claim that only Union Carbide has been benefitted by application of Chapter 90 is undermined by the

[10] We previously considered Chapter 90's purpose in the silica context. *See In re GlobalSantaFe Corp.*, 275 S.W.3d 477, 482 (Tex. 2008). There we noted that establishing a minimal level of impairment through a physician report before a lawsuit could proceed served the purpose of conserving judicial and litigant resources. *Id.* at 483.

legislative findings and the fact that the Emmites sued thirty-seven other companies along with Union Carbide.

We conclude that Chapter 90 serves a compelling public interest.

2. Nature of the Right Impaired by the Statute and Extent of the Impairment

We next consider the other two *Robinson* factors: the nature of the right impaired by Chapter 90 and the extent of that impairment. In *Robinson*, we held that at the time the Legislature enacted the statute being considered there, the Robinsons' right to pursue their common law personal injury claim had matured, recovery was predictable, and discovery had demonstrated their claims to have a substantial basis in fact. *Robinson*, 335 S.W.3d at 148. As to the extent of the impairment of that right, the choice of law statute effectively extinguished the Robinsons' common law action for personal injury. *Id.* It followed that the statute significantly disrupted the Robinsons' settled expectation that their right to proceed with their claim would not be legislatively abrogated after they filed suit. *Id.* at 148-49.

The present situation is markedly different. Until September 1, 2005, a claim for an asbestos-related injury by or on behalf of Joseph, or by his beneficiaries, would not have been subject to the pulmonary function testing requirement in Chapter 90. When the Emmites filed suit in June 2007, they could not satisfy the requirement of pulmonary function testing showing that Joseph had impairment, so undoubtedly their right to pursue a statutory wrongful death claim was detrimentally affected by Chapter 90. However, in light of the compelling public interest we have identified, and as we explain below, Chapter 90 did not impair the Emmites' right to recovery in such a manner as to be unconstitutionally retroactive.

As noted above, the situation before us is different from the one we addressed in *Robinson*. First, the timing of events is different. In *Robinson* the statute was enacted after the Robinsons filed their lawsuit. *Id.* at 155. In this case, Chapter 90 had been signed into law before Joseph died, it allowed a grace period for suits to be filed under the law as it previously existed, and it had been the law for more than a year before the Emmites filed suit. Also unlike *Robinson*, the Emmites' recovery was not yet predictable when Chapter 90 became effective. *See id.* at 148. In *Robinson*, John Robinson had been diagnosed with mesothelioma and the facts developed in discovery as of the time the Legislature enacted the statute demonstrated that the Robinsons' claims had a substantial basis in fact. *Id.* However, there is nothing in this record showing the Emmites were contemplating a suit based on claims of asbestos-related injury before Chapter 90 had taken effect. Unlike the situation in *Robinson*, no suit was pending based on Joseph's asbestos exposure when Chapter 90 became effective; his original death certificate did not mention asbestos-related disease; and the Emmites do not assert that Joseph's medical or other evidence demonstrated asbestos-related pulmonary impairment before May 2005, during his final hospitalization. It was over two years after his death and during the pendency of the Emmites' suit when they advised the trial court that they were seeking to have his death certificate amended to reference asbestosis as a cause of death. We fail to see how the Emmites reasonably could have had settled expectations that the Legislature would not change the requirements for a wrongful death lawsuit based on asbestos-related injury when they have not demonstrated that they were contemplating such a suit before Chapter 90 became effective, despite Joseph's history of asbestos exposure and the report to hospital personnel in May 2005, that he had previously been diagnosed with asbestosis. *See id.* at 148 ("The Robinsons could

well have expected . . . that a rule of law that permitted their recovery . . . would not be changed after they had filed suit to abrogate their claim."); *see also City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) (finding that a statute was not unconstitutionally retroactive when the plaintiff had two months to sue before it became effective).

The Emmites recognize that it has long been the law in Texas that the Legislature may repeal a statute and immediately eliminate any right or remedy that the statute previously granted. *See Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1998); *Dickson v. Navarro Cnty. Levee Improvement Dist. No. 3*, 139 S.W.2d 257 (Tex. 1940). They argue that their case is different. They submit that Chapter 90 did not repeal the Wrongful Death Act, but rather changed it to increase procedural requirements for only one particular type of recovery: that related to injuries from asbestos. They also argue that they had settled expectations as to the continuing viability of their statutory wrongful death claim because Texas has recognized such claims for a long time and their claim had accrued before Chapter 90 became effective. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(b) (limitations begins to run on an injury resulting in death when the death occurs). We disagree with the Emmites' position.

First, as we have discussed above, the Emmites do not assert that they were contemplating a wrongful death suit before Chapter 90 became effective, nor have they demonstrated that before they filed suit they otherwise had expectations that the law as it existed prior to the enactment of Chapter 90 would govern their claim. Further, Chapter 90 did not purport to eliminate all wrongful death causes of action based on asbestos-related injuries. Rather, it was narrowly designed to address the documented crisis. *See* Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex.

Gen. Laws 169. Its adoption of functional pulmonary *impairment* as a threshold requirement for maintaining a cause of action was not an arbitrary legislative invention or standard, but a medically accepted standard for measuring asbestos-related effects. TEX. CIV. PRAC. & REM. CODE §§ 90.003(a)(2)(D), 90.010(f)(1)(B)(ii), 90.001(23); *see also* Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1 (n), 2005 Tex. Gen. Laws 169, 170.

The addition of procedural steps for bringing a statutory cause of action is not the kind of focused, special interest legislative action we held unconstitutional in *Robinson*. The Emmites could not have had reasonable expectations that the rules as to asbestos-related injury claims as they existed before September 1, 2005, would continue to apply beyond September 1, 2005, when Chapter 90 forewarned them that they would not, and when there is nothing in the record to demonstrate that they were contemplating a suit before Chapter 90 became effective, much less before it was enacted. In the context of a constitutional retroactivity challenge to the changed rules, the impact of Chapter 90 on the Emmites' expectations does not outweigh the compelling public interest it serves.

In sum, Chapter 90 did not upset settled expectations of the Emmites in the constitutional sense to the extent that it outweighs the compelling public interest found and addressed by the Legislature—even though, under these facts, Chapter 90 effectively bars their claim. Accordingly, Chapter 90 and section 90.010(f)(1)(B)(ii)'s pulmonary function testing requirement, as applied to the Emmites, does not violate the Texas Constitution's prohibition against retroactive laws.

VI. Conclusion

We reverse the judgment of the court of appeals and render judgment dismissing the Emmites' suit.

Phil Johnson
Justice

OPINION DELIVERED: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0617

UNION CARBIDE CORPORATION, PETITIONER,

v.

DAISY E. SYNATZSKE AND GRACE ANNETTE WEBB, INDIVIDUALLY AND AS REPRESENTATIVES AND CO-EXECUTRIXES OF THE ESTATE OF JOSEPH EMMITE, SR., JOSEPH EMMITE, JR., DOROTHY A. DAY, VERA J. GIALMALVA AND JAMES R. EMMITE, RESPONDENTS

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

JUSTICE LEHRMANN, dissenting.

I join JUSTICE BOYD in concluding that Chapter 90's safety valve provision does not require a plaintiff to produce a pulmonary function test showing impairment. However, because the Court arrives at the opposite holding, I write separately to consider whether the application of Chapter 90 as construed and applied here violates the Texas Constitution's prohibition on retroactive laws. TEX. CONST. art. I, § 16.

"A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960). In

this case, the Court holds that Chapter 90 bars the claim of a plaintiff who failed to adhere to its requirements. Because the statute imposes a penalty for preenactment conduct, which the evidence shows the plaintiff was incapable of avoiding, I ultimately conclude that the statute fails the three-factor test we set forth in *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010). For that reason, I respectfully dissent.

I. Background

On May 19, 2005, the governor signed into law Chapter 90 of the Texas Civil Practice and Remedies Code. Act of May 17, 2005, 79th Leg., R.S., ch. 97, § 2, 2005 Tex. Gen. Laws 169, 171–82 (codified at TEX. CIV. PRAC. & REM. CODE §§ 90.001–.012). In broad terms, Chapter 90 requires a claimant asserting an asbestos-related injury to serve on the defendant a physician's report meeting certain requirements. *Id.* §§ 90.003, .006. Among many other prerequisites, the report must verify that the exposed person experienced a certain level of asbestos-related pulmonary impairment. *Id.* § 90.003(a)(2)(D). The impairment must be shown by a particular method, pulmonary function testing. *Id.* However, in "exceptional and limited circumstances," Chapter 90 allows a claimant to demonstrate asbestos-related impairment when he cannot satisfy all of section 90.003's requirements. *Id.* § 90.010(f)(1), (j). Even in this instance, though, the statute does not relieve the claimant of his obligation to demonstrate that the exposed person underwent pulmonary function testing. *Id.* § 90.010(f)(1)(B). On September 1, 2005, three-and-a-half months after Chapter 90 was signed into law, it became effective.

For decades, Joseph Emmite worked as an insulator at Union Carbide. By the time he was eighty-five, he suffered from a number of maladies, including osteoarthritis and dementia. When

Joseph was hospitalized in May 2005, Dr. Joseph Prince conducted a physical examination, during which he discovered that Joseph had "diminished breath sounds at the right lung base." A chest CT revealed "extensive pleural and diaphragmatic calcifications, right pleural effusion with compressive subsegmental atelectasis, and bilateral interstitial fibrotic pattern." After further testing, Dr. Prince diagnosed Joseph with pulmonary asbestosis. Dr. Prince later stated that, due to Joseph's failing health and inability to support his own weight, pulmonary function testing would have been "difficult or even prohibitive" at the time of the diagnosis. Joseph died on June 15, 2005, one month after Chapter 90 was signed into law, and two-and-a-half months before the statute became effective.

Joseph's family brought suit two years later, on June 7, 2007. Union Carbide filed a motion to dismiss based primarily on Joseph's lack of pulmonary function testing. After multiple hearings, the MDL pretrial court made numerous findings of fact, including that "[s]hortly before his death [Joseph] suffered from physical and mental limitations, which made it impossible for him to take a pulmonary function test," and that "[h]ad Joseph Emmite been physically and mentally capable of performing a pulmonary function test, the results would have demonstrated pulmonary impairment greater than required under [section] 90.003." As a result, the MDL judge denied Union Carbide's motion to dismiss, and Union Carbide filed an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(11). The court of appeals, sitting *en banc*, held that Chapter 90 was unconstitutionally retroactive as applied to the Emmites. 386 S.W.3d 278, 302. I agree with the court of appeals and would hold that Chapter 90 is unconstitutional as applied.

II. Retroactivity

"[T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). This "has long been a solid foundation of American law." *Kaiser Aluminum & Chem. Corp.*, 494 U.S. at 855 (Scalia, J., concurring). Indeed, the Texas Constitution states plainly that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16. However, "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf*, 511 U.S. at 268. Rather, the question is a complex one, and "the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power." *Robinson*, 335 S.W.3d at 145. To provide guidance in determining when a statute is unconstitutionally retroactive, we developed a three-factor test in *Robinson*, under which we consider "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment." *Id.* I take each of these factors in turn.

A. The Public Interest

"The perceived public advantage of a retroactive law is not simply to be balanced against its relatively small impact on private interests, or the prohibition would be deprived of most of its force." *Id.* at 145–46. Instead, "[t]here must be a compelling public interest to overcome the heavy

presumption against retroactive laws." *Id.* at 146. In contrast to the law at issue in *Robinson*, Chapter 90 was enacted for a legitimate public purpose. The Legislature has stated that it designed Chapter 90 to protect the right of people with asbestos-related diseases "to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed . . . but have no functional or physical impairment." Act of May 17, 2005, 79th Leg., R.S., ch. 97, § 1(n), 2005 Tex. Gen. Laws 169, 170. The Court correctly notes that this public interest is an important one. However, that characterization does not end our inquiry.

The Court fails to acknowledge that the Legislature's aim is entirely thwarted by the retroactive application of Chapter 90 to the Emmites' case. This is not an instance in which a plaintiff who had "no functional or physical impairment" sought to misdirect valuable judicial resources. *Id.* Instead, this case presents the opposite scenario. Dr. Prince concluded that "the clinical history and other diagnostic testing, coupled with meticulous postmortem analysis of pulmonary tissue" demonstrated that Joseph suffered from "significant, advanced pulmonary asbestosis." The pretrial MDL court agreed, finding that "[h]ad Joseph Emmite been physically and mentally capable of performing a pulmonary function test, the results would have demonstrated pulmonary impairment greater than required under Texas Civil Practice and Remedies Code § 90.003." In light of the evidence the Emmites adduced, I fail to see how applying Chapter 90 to their claims serves the public interest the Legislature sought to vindicate.

The Court maintains that, through Chapter 90, the Legislature adopted "an objective method" to distinguish between those whose asbestos exposure resulted in functional impairment and those

whose exposure did not so result. *Ante* at ___. But the Court forgets that the pulmonary function testing the statute mandates is not an end in itself. Again, the stated purpose of Chapter 90 is to ensure that individuals with "no functional or physical impairment" do not misdirect scant judicial resources. The Emmites demonstrated by credible evidence that Joseph was not one of those individuals.

We do not consider retroactivity in a vacuum. Instead, we consider the application of a particular law to the facts of a particular case, and then determine whether the law, as applied, is unconstitutional. *See Robinson*, 335 S.W.3d at 147. We ought to assess public interest with this in mind. On the facts presented here, because Joseph does not fall into the category of persons whom the Legislature intended to prevent from bringing suit, the public interest the statute was intended to further is not at all served by the application of Chapter 90 to the Emmites' claims.

B. The Nature of the Right

In *Robinson*, we also considered the nature of the plaintiff's right to recover that the challenged law impedes or extinguishes. 335 S.W.3d at 148. We reasoned that "claims like the Robinsons' [involving injury from asbestos exposure] have become a mature tort, and recovery is more predictable, especially when the injury is mesothelioma, a uniquely asbestos-related disease." *Id.* We also observed that "the Robinsons' claims had a substantial basis in fact." *Id.* The same conclusions can be drawn here. Like the Robinsons' claims, the Emmites' claims have become a mature tort. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 765 (Tex. 2007) ("Nearly ten years ago, we observed that asbestos litigation had reached maturity."). Like mesothelioma, asbestosis is a uniquely asbestos-related disease, for which recovery is generally predictable. *See id.* at 766. And,

finally, like the Robinsons' claims, the Emmites' claims have a substantial basis in fact, reflected in the favorable factual findings made by the MDL pretrial court. There can be little doubt, then, that the Emmites' right to recover is a substantial one, and should not be easily disturbed.

C. The Extent of the Impairment

But the principal question in this case is not whether the right is a substantial one, but rather whether the application of Chapter 90 impairs the Emmites' ability to exercise that right to an unconstitutional degree. In today's opinion, the Court holds that the Emmites' rights were not so impaired as to offend the Texas Constitution for two reasons. First, the Court argues that because Chapter 90 was signed into law before Joseph died, the case at bar is distinguishable from *Robinson*, in which the applicable statute was signed into law *after* the Robinsons' cause of action accrued. 335 S.W.3d at 129–30. But this argument dissolves the distinction between the date upon which a statute is signed into law and the date upon which a statute becomes effective. Contrary to the Court's assertion, at the time Joseph died and the Emmites' cause of action accrued, Texas law did not require a plaintiff to produce pulmonary function testing–this change occurred *after* the Emmites' cause of action accrued, just as it did in *Robinson*. Nor is it of any moment that the Emmites had notice that the law would change, as Joseph would have been unable to engage in pulmonary function testing in any event; the statute was signed into law one month before his death, and the MDL pretrial judge stated in his findings of fact that "[s]hortly before his death [Joseph] suffered from physical and mental limitations, which made it impossible for him to take a pulmonary function test." The case at bar cannot be distinguished from *Robinson*, then, on the basis that Chapter 90 was signed into law before Joseph died.

Second, the Court notes that, because the Emmites had an opportunity to bring their claims before Chapter 90 went into effect, their claims were not completely extinguished. While I agree that the Emmites had a brief window during which they could have filed suit without the need for a pulmonary function test, I do not agree that two-and-a-half months is a sufficient period of time to tip the constitutional balance. Ordinarily, the statute of limitations for a wrongful death action is two years. TEX. CIV. PRAC. & REM. CODE § 16.003(b). However, the enactment of Chapter 90 had the effect of shortening that statute of limitations to two-and-a-half months in the Emmites' case. One purpose of the prohibition on retroactive laws is to ensure that the settled expectations of litigants are not upset. *Landgraf*, 511 U.S. at 265–66. In my view, it is not reasonable to expect the Emmites, particularly when they were mourning the loss of a family member, to have known that they would be required to investigate and file a lawsuit in only two-and-a-half months' time. In this instance, I cannot conclude that "the heavy presumption against retroactive laws" has been overcome. *Robinson*, 335 S.W.3d at 126.

Finally, I feel compelled to call the Legislature's attention to a problem this case presents: though the stated purpose of Chapter 90 is to allow people with asbestos-related injuries "to pursue their claims for compensation in a fair and efficient manner through the Texas court system," the mechanism the Legislature has chosen to effect that goal, pulmonary function testing, seems overly broad. The testimony in today's case indicates that pulmonary function testing may be impossible for plaintiffs who are very ill. A plaintiff should not be prevented from recovering for an injury caused by exposure to asbestos because that exposure has made him too sick to complete a pulmonary function test. I respectfully urge the Legislature to reconsider the wisdom of requiring

pulmonary function testing even in Chapter 90's "safety valve" provision, at least in those cases in which a doctor has concluded that such testing would be prohibitive. TEX. CIV. PRAC. & REM. CODE § 90.010(f)(1), (j).

III. Conclusion

In the case at bar, I conclude that the Emmites' wrongful death claims were substantial and had accrued before Texas law required asbestos plaintiffs to produce a pulmonary function test. The Emmites' claims were also significantly impaired because they had only two-and-a-half months' time during which they could have brought those claims before the statute came into effect. Finally, the public interest furthered by the statute would not be served by its application to Joseph's case. Accordingly, I would hold that the application of Chapter 90 to the Emmites' claims is unconstitutionally retroactive. TEX. CONST. art. I, § 16. I would affirm the judgment of the court of appeals.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0617

UNION CARBIDE CORPORATION, PETITIONER,

v.

DAISY E. SYNATZSKE AND GRACE ANNETTE WEBB, INDIVIDUALLY AND AS REPRESENTATIVES AND CO-EXECUTRIXES OF THE ESTATE OF JOSEPH EMMITE, SR., JOSEPH EMMITE, JR., DOROTHY A. DAY, VERA J. GIALMALVA AND JAMES R. EMMITE, RESPONDENTS

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

Argued October 10, 2013

JUSTICE BOYD, joined by JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE DEVINE, dissenting.

In deciding this case, the Court rewrites an unambiguous statute to achieve the result the Court believes the Legislature must have intended. Because I would hold that the statute means what it says, I must respectfully dissent.

I. Statutory Construction

"In lieu of pulmonary function testing demonstrating a specified threshold of impairment," section 90.010(f)'s "safety valve" provisions "require pulmonary function testing to have been performed on the exposed person and the physician making the report to have interpreted that testing." *Ante* at ___ (citing TEX. CIV. PRAC. & REM. CODE § 90.010(f)(1)(B)(ii)). The Court

acknowledges that "[t]he language of section 90.010(f)(1)(B)(ii) does not expressly require that the pulmonary function test show functional impairment or otherwise be relevant to the physician's diagnosis of asbestos-related functional pulmonary impairment." *Ante* at ___. Yet it construes the statute to include those requirements because, in its view, (1) doing so is necessary to avoid "nonsensical, absurd results," *ante* at ___; (2) not doing so "would ignore the Legislature's purpose in enacting Chapter 90," *ante* at ___; and (3) not doing so would "attribute to the Legislature an intent for the statute to contain a random, inconsequential, arbitrary hurdle for claimants to overcome." *Ante* at ___. I disagree on all three points.

First, the Court concludes that the only sensible way to interpret section 90.010(f) is to rewrite it to include the requirements that the claimant's pulmonary function tests show "some impairment" (the "impairment requirement") and be a basis for the physician's diagnosis of impairment (the "basis requirement"). But construing the statute as written, to require a pulmonary function test (the "test requirement") that is interpreted by a physician (the "interpretation requirement"), does not create an absurd result because these latter two requirements are not meaningless. At a minimum, the test requirement would establish that the claimant was at least potentially exposed enough, or sick enough, or concerned enough to have had a pulmonary function test at some point prior to filing a legal claim. And the interpretation requirement would ensure that the claimant's physician is aware of the test and considers its results when reaching a diagnosis, and also ensures that the results do not meet the "specified threshold of impairment" under section 90.003. Together, the two requirements also ensure that the defendants are aware of the test's existence and results.

The Court rejects these justifications for the test requirement and the interpretation requirement because "nothing in this record or the legislative findings supports" them, but in doing so the Court confuses our role in applying the absurdity doctrine. When determining whether we should ignore a statute's language because it reaches an absurd result, we consider whether "a rational Legislature *could have* intended" that result. *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 631 (Tex. 2013) (emphasis added). We do not require the parties to *prove* the reasons why the Legislature intended a particular result, and we certainly don't require the Legislature to issue legislative findings to state all of the reasons it imposes a statutory requirement. If we can conceive of a rational purpose for the requirement, we cannot strike down the statute as "absurd." *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 701 (Tex. 2007) (rejecting absurdity argument because "[t]he Legislature *could have* rationally presumed" a reason for statute's requirements) (emphasis added).

Maybe, as the Court contends, requiring that the claimant was exposed, sick, or concerned enough to have had pulmonary function testing at some time in the past, and ensuring that the claimant's physician and opposing counsel are aware of the test, are not very good reasons to impose the test requirement and the interpretation requirement, and maybe there are better reasons to impose the impairment requirement and the basis requirement, but "not very good" and "not better" are a far cry from the kind of "unreasonable" that allows us to ignore a statute's language. We cannot ignore a statute's unambiguous language unless its meaning is so unreasonable that it "would lead to absurd results." *Combs*, 401 S.W.3d at 629; *see, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234 (2012) (explaining that courts can ignore a statute's

unambiguous meaning only if that meaning "would result in a disposition that no reasonable person could approve"). But even this "can be a slippery slope," because "[i]t can lead to judicial revision of . . . texts to make them (in the judges' view) *more* reasonable." *Id.* at 237 (emphasis added). From my perspective, that is what the Court is doing with section 90.010(f).

It is not our role to make statutes "more reasonable." That is why "the [absurdity] bar for reworking the words our Legislature passed into law is high, and should be." *Combs*, 401 S.W.3d at 630. It has been said that courts can ignore a statute's unambiguous language only when "the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Scalia & Garner, *supra* at 237 (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 427 (1833)). Or, at least, as we have said, "[t]he absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity." *Combs*, 401 S.W.3d at 630. This statute does not present such an exceptional case, and the Court's rewriting of the statute achieves, at best, only a "more reasonable" result.

Second, the Court reads the impairment and basis requirements into the statute because it concludes that, without them, the statute would "at least partially fail[] its intended purpose" to ensure that claimants have "physical, functional impairment." *Ante* at ___. In light of the numerous alternative requirements that section 90.012(f) imposes on those who rely on the statute's safety valve, I do not agree.

We must be very careful when we endeavor to construe statutes based on our perception of the Legislature's "purpose." For one thing, "[w]hat motivates one legislator to vote for a statute is

not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983). As a result, "inquiry into legislative motive is often an unsatisfactory venture." *Id.* The task is made easier when, as here, the enacted legislation expressly states its purpose. Here, as the Court notes, the act expressly states that its purposes are "to protect the right of people with impairing asbestos-related and silica-related injuries to pursue their claims . . . while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who . . . have no functional or physical impairment from asbestos-related or silica-related disease." Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 1(n), 2005 Tex. Gen. Laws 169, 170.

But even when armed with knowledge of a statute's purpose, we must still determine the manner in which the statute aims to achieve that purpose. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). We must look to the statute's text to determine the policy choices that the Legislature made when deciding how to achieve Chapter 90's purpose. What we cannot do is simply assume that the statute requires whatever promotes its stated purpose. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Id.* at 526. Thus, we "are bound, not only by the ultimate purposes [the Legislature] has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994).

So we must look to the plain language of section 90.010(f), read within the context of the statute as a whole, and determine the means that it adopts to achieve the statute's purpose. Under section 90.010(d), a claimant may proceed to trial from the multidistrict litigation pretrial court after serving a report from a qualified physician that, among other things, verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by pulmonary function testing showing specified levels of impairment. *See* TEX. CIV. PRAC. & REM. CODE §§ 90.003, 90.010(d)(1). Alternatively, the claimant can proceed to trial under the "safety valve" in section 90.010(f), by serving a physician's report that complies with subsection (f)(1) and obtaining findings from the court that comply with subsection (f)(2). Subsection (f)(1) incorporates many of the requirements of subsections 90.003, but not the requirement of a pulmonary function test showing specified levels of impairment. Subsection (f)(2) limits the availability of the safety valve to cases in which the MDL court finds that the claimant's physician's report is reliable and credible, the criteria set forth in section 90.003 (or 90.004 in a silica case) do not adequately assess the claimant's asbestos-related impairment "due to unique or extraordinary physical or medical characteristics," and the claimant has produced sufficient credible evidence for a factfinder to reasonably find that the claimant is physically impaired as a result of exposure to asbestos (or silica) to a degree comparable to the impairment the claimant would have had if the claimant met the criteria set forth in section 90.003 (or 90.004 in a silica case). *Id.* § 90.010(f)(2).

In short, section 90.010(f) provides a mechanism by which asbestos claimants may proceed to trial in the absence of pulmonary function tests that meet section 90.003's impairment standards. They may do this by producing a reliable and credible physician's report that finds impairment

"comparable" to that demonstrated by pulmonary impairment tests that satisfy section 90.003's standards. This can only be satisfied when the claimant's "unique or extraordinary physical or medical characteristics" make it such that his pulmonary impairment test results below section 90.003 standards "do not adequately assess" the claimant's asbestos-related impairment. *See id.* § 90.010(f)(2)(B). Because the pulmonary function tests in these circumstances do not meet the minimum impairment standards identified in section 90.003 for proceeding to trial, it makes little sense to require that the physician's impairment conclusion be based on those tests. Instead, the physician necessarily concludes, in light of other considerations, that "comparable" impairment is present despite the sub-standard pulmonary impairment test results.

We know that these are the means by which the Legislature intended to achieve the statute's stated purposes because the statute's text tells us so. To "assume that whatever furthers the statute's primary objective must [also] be the law," as the Court does in this case, only "frustrates rather than effectuates" the Legislature's intent. *Rodriguez*, 480 U.S. at 526. Even if reading the impairment and basis requirements into the statute would be the best policy choice for furthering the statute's stated purpose, we must "read unambiguous statutes as they are written, not as they make the most policy sense," *Combs*, 401 S.W.3d at 629, because "policy arguments cannot prevail over the words of the statute." *In re Allen*, 366 S.W.3d 696, 708 (Tex. 2012).

Finally, the Court concludes that it must read the impairment and basis requirements into the statute because, otherwise, we would "attribute to the Legislature an intent" to impose the test and interpretation requirements "as a meaningless, arbitrary[,] procedural hurdle." *Ante* at ___. As discussed above, because I can conceive of rational justifications for the latter two tests. I do not

agree that they are "meaningless" or "arbitrary," even in the absence of the former two tests. But the Court's statement requires an additional comment about "attributing an intent" to the Legislature.

The truth is, we do not and cannot know *all* that the 79th Texas Legislature intended when it enacted section 90.010(f) in 2005. "Intent is elusive for a natural person, fictive for a collective body." Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 68 (1994). The actual or imputed intent of the Legislature in enacting section 90.010(f) is unknowable because it is nonexistent. We do not know why the Legislature did not include the impairment and basis requirements. Perhaps someone meant to include them but forgot. Or perhaps no one ever thought about doing so. Or perhaps they were the topic of many extended late-night debates in Capitol offices among various legislators and their staffs, and the key players reached an agreement to omit those requirements in exchange for the necessary votes to pass all the requirements they ultimately enacted. "Legislation is compromise. Compromises have no spirit; they just are." *Id.* Including the impairment and basis requirements certainly might have promoted the act's stated purpose, but omitting the requirements may have been the key to passing any legislation at all. We cannot engage in a method of interpretation that requires us to speculate as to conversations, negotiations, and bargains that may have occurred in the Capitol in 2005. Nor can we engage in a method that permits us to fix or improve the statute or make it "more reasonable." And we certainly cannot engage in a method that allows us to make the statute say what we, or some members of the 79th (or current) Legislature, want it to say. What we can do is read and apply the unambiguous language that the Legislature passed, unless doing so would achieve an absurd result. I conclude that applying the as-written language of this statute does not.

II. Conclusion

"Only 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). "[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." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010) (citation omitted).

Section 90.010(f) unambiguously requires a claimant's physician to review and interpret a pulmonary function test, but it does not require that the test demonstrate any level of impairment or serve as the basis for the physician's opinion that the claimant is impaired. Instead, section 90.010(f) provides a safety valve for claimants whose pulmonary function tests are medically unreliable as an indicator of impairment. Because this is not an absurd result, we must enforce the statute as written and cannot write in language to cover what we may perceive as policy gaps. Because the claimants in this case satisfied the express requirements of section 90.010(f)'s safety valve provision, I would affirm the court of appeals' judgment.

_____

Jeffrey S. Boyd
Justice

OPINION DELIVERED: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0620

RAHUL K. NATH, M.D., PETITIONER,

v.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE, RESPONDENTS

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

Argued February 5, 2014

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

JUSTICE GREEN filed a dissenting opinion, in which JUSTICE LEHRMANN, JUSTICE BOYD, and JUSTICE BROWN joined.

In a civil suit, few areas of trial court discretion implicate a party's due process rights more directly than sanctions. This proceeding involves one of the highest reported monetary sanctions awards in Texas history stemming from baseless pleadings and one of the largest such awards in the United States.[1] Further, the award was levied against a party rather than an attorney. The Civil

[1] *See* Peter Vieth, *2013: The Year in Review*, VIRGINIA LAWYERS WEEKLY, Dec. 9, 2013 ($881,000 sanction award in a divorce proceeding was "the largest sanction ever imposed" in Virginia); Cheryl Millet, *Divorcee Slapped with Record-Setting $552K Sanction in Custody Case*, DAILY BUS. REV., Feb. 7, 2012 (discussing record setting sanctions award of $552,000 in a California divorce proceeding); Lisa Provence, *Unusual outcome: $722K in sanctions, juror judges judge*, THE HOOK, Nov. 4, 2011, *available at* www.readthehook.com/101759/final-order -plaintiffs

Practice and Remedies Code and our Rules of Civil Procedure allow for pleadings sanctions against parties and attorneys when, among other things, a pleading was filed with an improper purpose or was unlikely to receive evidentiary support. We have held that due process concerns impose additional layers of protection on sanctions awards by requiring, among other things, that the awards be just and not excessive.

In this suit between a physician and other medical providers, the trial court imposed sanctions against the physician well in excess of one million dollars for filing groundless pleadings in bad faith and with an improper purpose. We conclude the physician plaintiff's pleadings asserted time-barred claims and addressed matters wholly irrelevant to the lawsuit in an attempt to leverage a more favorable settlement, and therefore are sanctionable. But in assessing the amount of sanctions, the trial court failed to consider whether, by litigating for over four years before seeking sanctions, the defendants bore some responsibility for the attorney's fees they incurred. Accordingly, we reverse the court of appeals' judgment and remand to the trial court to reassess the amount of the sanctions award.

I. Background

Dr. Rahul K. Nath is a plastic surgeon who was employed by Baylor College of Medicine and affiliated with Texas Children's Hospital (the Hospital). Nath reported to Dr. Saleh Shenaq, the Chief of Baylor College of Medicine's Division of Plastic Surgery, who also was Nath's partner at

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-sanctioned-722k-juror-judges-judge ($542,000 sanction against counsel and $180,000 sanction against litigant was "one of the largest sanctions in Virginia legal history"); *Hunton & Williams and Wachovia Obtain Largest Sanctions Award by Tennessee Court*, BUS. WIRE NEWS RELEASES, Nov. 13, 2006, *available at* http://www.businesswire.com/news/home/20061113006140/en/Hunton-Williams-Wachovia-Obtain-Largest-Sanctions-Award#.U6Q_WPldX0s ($1.2 million sanction against litigant was the "largest sanctions award ever granted by a Tennessee court").

the Hospital's Obstetrical Brachial Plexus Clinic. Baylor received fifteen percent of the clinic's patient fees, and Nath and Shenaq evenly split the remainder of the fees.

Nath's relationship with his colleagues turned acrimonious in 2003, when several doctors complained that Nath billed excessively, performed unnecessary procedures, and treated fellow colleagues in an unprofessional manner. A letter from his faculty supervisors states that, "there have been several complaints pertaining to your billing practices, ethics, and professional conduct," and described his academic contributions as "minimal." For these reasons, the letter announced that Nath's faculty appointment would not be renewed, and his employment with Baylor was terminated effective June 30, 2004. Nath's former office manager also claimed Nath had a history of making racially-provocative statements and seemed to harbor delusions of grandeur.

Shortly after receiving the letter, Nath retained an attorney and notified Baylor that its employees were making statements "potentially damaging to Dr. Nath's reputation," allegedly in an effort to get Nath's patients to remain at the clinic. In 2006, Nath sued Shenaq, Baylor, and the Hospital. Nath and Shenaq settled two years later. Shenaq and another clinic doctor subsequently died and the clinic never reopened.

In his original pleading in 2006, Nath asserted claims for defamation and tortious interference with business relations against Baylor and the Hospital.[2] Nath's third amended petition added claims for negligent supervision and training predicated on the previously alleged facts. Nath's fourth amended petition added allegations that Shenaq had been operating on patients despite impaired vision. Similarly, Nath's fifth amended petition added that Shenaq had been operating on patients

[2] Nath subsequently sued Dr. Allan Belzberg and his employer, Johns Hopkins University, over an allegedly defamatory statement Belzberg made regarding Nath in Belzberg's capacity as a Johns Hopkins employee. After a battle over whether the trial court possessed personal jurisdiction over Belzberg and Johns Hopkins, Nath nonsuited them.

while afflicted with hepatitis. The fifth amended petition also included a declaratory judgment claim (that Nath could or should disclose to his patients that Shenaq was in poor health). The Hospital counterclaimed for attorney's fees pursuant to the declaratory judgment act, and in December 2009, moved for summary judgment on all of the claims in Nath's fifth amended petition. Baylor moved for summary judgment in January 2010. In response, Nath moved to compel additional depositions, extend the deadline to respond to the motions, and continue the summary judgment hearing—all of which the trial court granted. In March 2010, Nath again moved to continue the summary judgment hearing, which the trial court denied. Nath retained new counsel, Daniel Shea, who appeared at the hearing and filed a motion to recuse the judge. Nath also moved to recuse the judge assigned to hear the motion to recuse. Ultimately, the motions to recuse were denied.

Nath also filed a sixth amended petition in April 2010, in which he abandoned his defamation, tortious interference, negligence, and declaratory judgment claims and brought a claim for intentional infliction of emotional distress. The Hospital and Baylor moved for summary judgment on the new claim. Nath failed to respond to the motions and instead objected to the notice of hearing based on a technical defect. All parties appeared at a summary judgment hearing in June 2010, more than four years after the suit began, where the trial court dismissed Nath's claims.[3]

Two months later, the Hospital nonsuited its declaratory judgment counterclaim. The Hospital then moved to modify the judgment to assess attorney's fees as sanctions against Nath. Nath retained new counsel and filed special exceptions to the motion for sanctions in September. After a hearing on the special exceptions and the Hospital's sanctions motions, the trial court denied

[3] The trial court dismissed all the claims in Nath's fifth and sixth amended petitions, even though the sixth amended petition was Nath's only live pleading at the time of the hearing.

the special exceptions and granted the sanctions motion. The court issued findings of fact and conclusions of law indicating the sanctions were based on: (1) "Nath's improper purposes in filing the pleadings in this case;" (2) "the bad faith that his actions manifest;" and (3) "the lack of any factual predicate for his claims, as previously established by the Court's orders granting the motions for summary judgment." The court explained that its finding of bad faith stemmed from Nath's conduct in seeking information regarding Shenaq's health, conduct for which the court had previously admonished Nath.[4] Finally, the court concluded that Nath's leveraging of this information in an attempt to obtain a settlement constituted an improper purpose.

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[4] At a hearing on a motion to compel in July 2009 where Nath sought production of information regarding the patients Shenaq had seen, the court responded:

> I can't do that. You can't do that. The State Medical Board could do that. Hospital Board, someone else. Somebody that's not here can do that. . . .
>
> You should be before some other board that has a different authority than me. It shouldn't be used as a tool in your litigation. . . .
>
> I'm wondering why you're asking me to uncover [Shenaq's alleged health issues and patients allegedly at risk] instead of the State Medical Board. That's my big issue with your approach. . . .
>
> You're coming to me asking me to blow open this cover. When there is an agency out there that is well situated to deal with all of the [privilege] issues that you are raising. . . .

At another hearing on a motion to compel in January 2010, the court stated:

> I think—I answered that by saying Dr. Shenaq's condition is not in this suit. . . .
>
> I think I was very clear about it last time. If I wasn't, I want to be clear now. . . .
>
> I said it's not relevant to this lawsuit. . . .
>
> It's irrelevant to your lawsuit so it's not your job to do it. Your doctor has an obligation to report it to his medical board and they have a job to do. We don't.

The trial court further found that Nath took "a personal, participatory role in this litigation." The court posited that Nath "is knowledgeable about the law and legal issues, having previously studied the law," for several semesters in the early 1980s in Canada. According to the trial court, Nath insisted on delaying the summary judgment hearing so he could be present at two depositions. Nath also filed an affidavit in response to the motion for summary judgment indicating he authorized the facts and theories set forth in the petitions. The court further found that Nath met with one deponent shortly before his deposition to discuss his testimony. And the trial court observed that "Nath has used the court system to intimidate adversaries and to stifle dissent with baseless legal allegations" by suing an alleged defamer, suing his former partner in a MRI business, suing two individuals associated with the Texas Medical Board (which later dismissed its proceedings against Nath), and asserting claims in federal court related to the sale of his home (on which he prevailed).[5] Ultimately, the trial court found that the Hospital's fees of $776,607 in defending the suit were reasonable and awarded them as sanctions.

Before the hearing on the Hospital's motion for sanctions, Nath moved to sever the claims as to Baylor, and after severance, Baylor also moved to modify the judgment to assess fees as sanctions. After a hearing on Baylor's sanctions motion in November 2010, the trial court made similar findings and awarded Baylor's $644,500.16 in attorney's fees as sanctions against Nath. The court of appeals affirmed the awards, and we granted Nath's petition for review. 375 S.W.3d 403, 415.

[5] Nath was defending a suit the Fifth Circuit ultimately determined to be groundless. *See Petrello v. Prucka*, 484 Fed. Appx. 939, 942–43 (5th Cir. 2012).

II. Discussion

Nath primarily argues in this Court that the sanctions imposed against him as the client were not visited on the true offender and were excessive. The Hospital and Baylor counter that Nath had personal, active involvement in the litigation and that the fee award was appropriate given the circumstances. We agree with the Hospital and Baylor that the trial court properly sanctioned Nath because he pursued time-barred claims and irrelevant issues in order to leverage a more favorable settlement. But concerning the excessiveness of the award, the Hospital and Baylor waited almost four years into the litigation before moving for summary judgment on Nath's claims and only moved for sanctions after obtaining a final judgment. We previously advised courts to consider a variety of factors when imposing sanctions, including the degree to which the non-sanctioned parties' behavior caused their own expenses. The trial court failed to discuss this relevant factor, and we reverse and remand for it to do so.

A. Standard of Review

We review the imposition of sanctions under an abuse of discretion standard. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). Both Chapter 10 of the Texas Civil Practice and Remedies Code and Texas Rule of Civil Procedure 13 are applicable to this case, and sanctions imposed pursuant to both are reviewed under this abuse of discretion standard. *Id.* A sanctions award will not withstand appellate scrutiny if the trial court acted without reference to guiding rules and principles to such an extent that its ruling was arbitrary or unreasonable. *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). A sanctions award that fails to comply with due process constitutes an abuse of discretion because a trial court has no discretion in determining what the law is or applying the

law to the facts. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991); *Huie v. DeShazo*, 922 S.W.2d 920, 927 (Tex. 1996). But we will not hold that a trial court abused its discretion in levying sanctions if some evidence supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009). Generally, courts presume pleadings and other papers are filed in good faith. *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 730 (Tex. 1993). The party seeking sanctions bears the burden of overcoming this presumption of good faith. *Id.* at 731.

B. Substantive Law Governing Sanctions

The sanction at issue here concerns pleadings, and its propriety is thus primarily governed by Chapter 10 of the Texas Civil Practice and Remedies Code and Texas Rule of Civil Procedure 13.[6] Chapter 10 allows sanctions for pleadings filed with an improper purpose or that lack legal or factual support. It provides that upon signing a pleading or motion, a signatory attests that:

> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]

[6] Chapter 9 of the Texas Civil Practice and Remedies Code also addresses frivolous pleadings and claims, but its application is limited to proceedings in which neither Rule 13 nor Chapter 10 applies. *See* TEX. CIV. PRAC. & REM. CODE § 9.012(h); *see also Low*, 221 S.W.3d at 614 (noting "Chapter 9 of the Texas Civil Practice and Remedies Code only applies in proceedings in which neither Rule 13 nor Chapter 10 applies"). Chapter 9 has largely been subsumed by subsequent revisions to the code. *See* Cynthia Nguyen, *An Ounce of Prevention is Worth a Pound of Cure?: Frivolous Litigation Diagnosis Under Texas Government Code Chapters 9 and 10, and Texas Rule of Civil Procedure 13*, 41 S. TEX. L. REV. 1061, 1083–84 (2000) (theorizing "it would be difficult to conceive of a scenario in which Chapter 9 would be applicable," and noting that "there are only a handful of cases that even cite Chapter 9, and these date from before the 1999 amendment to Section 9.012").

> (3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

TEX. CIV. PRAC. & REM. CODE § 10.001.[7] Pleadings that violate these Chapter 10 requirements are sanctionable. *Id.* § 10.004(a). But a court may not sanction a represented party under section 10.001 for unfounded legal contentions. *Id.* § 10.004(d).

Rule 13 provides that pleadings that are groundless and in bad faith, intended to harass, or false when made are also sanctionable:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who . . . make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt . . . .
>
> Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law . . . .

TEX. R. CIV. P. 13. Importantly, Rule 13 does not permit sanctions on the issue of groundlessness alone. Rather, the filing in question must be groundless and also either brought in bad faith, brought for the purpose of harassment, or false when made. *Id.*

We have held that in order to safeguard constitutional due process rights, a sanction must be neither unjust nor excessive. We promulgated this standard most clearly in *TransAmerican*, 811

[7] Section 10.001 of the Civil Practice and Remedies Code is worded similarly to Federal Rule of Civil Procedure 11(b). *See Low*, 221 S.W.3d at 615.

S.W.2d at 913. The underlying case in *TransAmerican* was complex and multi-partied. *Id.* at 914. In brief, TransAmerican's president was sanctioned for discovery abuse pursuant to Rule of Civil Procedure 215 for failing to appear at a deposition. *Id.* at 915–16. In considering whether those sanctions complied with due process, we established a two-part test.

The first prong of the *TransAmerican* test concerns the relationship between the conduct evinced and the sanction imposed and requires a direct nexus between the offensive conduct, the offender, and the sanction award. *See id.* at 917. A just sanction must be directed against the abusive conduct with an eye toward remedying the prejudice caused to the innocent party, and the sanction must be visited upon the true offender. *Id*. A court must attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both. *Id*. Yet we warily noted in *TransAmerican* that apportioning blame between an attorney and a represented party "will not be an easy matter in many instances." *Id*. Such caution is warranted. The closeness that typically defines interaction between a litigant and his attorney not only binds their interests but may lend an overall opacity to the relationship that renders it difficult to determine where a party's input ends and where an attorney's counsel begins.

The second prong of the due process analysis under *TransAmerican* considers the proportionality of the punishment relative to the misconduct and warns "just sanctions must not be excessive." *Id.* Not only should a punishment (*i.e.*, sanctions) fit the crime (*i.e.*, the triggering offense), the sanction imposed should be no more severe than necessary to satisfy its legitimate purposes. *Id.* Legitimate purposes may include securing compliance with the relevant rules of civil

procedure, punishing violators, and deterring other litigants from similar misconduct. *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003).

We require courts to consider less stringent sanctions and weigh whether such lesser sanctions would serve to promote compliance. *TransAmerican*, 811 S.W.2d at 917.[8] Evidencing our reticence to wield the heavy hammer of sanctions, we have cautioned: "[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules." *Tanner*, 856 S.W.2d at 729.

Historically, awards for groundless pleadings in Texas have been moderate, at least in monetary terms. *See id.* at 730 (reversing a sanctions award of $150,000 in attorney's fees for groundlessness and discovery non-compliance); *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 183 (Tex. App.—Texarkana 2011, no pet.) (reversing a groundless pleadings sanction of $15,353); *Parker v. Walton*, 233 S.W.3d 535, 538 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (reversing a groundless pleading sanction of $3,500 in attorney's fees); *Emmons v. Purser*, 973 S.W.2d 696, 699 (Tex. App.—Austin 1998, no pet.) (reversing a groundless pleadings sanctions award of $3,200); *see also Robson v. Gilbreath*, 267 S.W.3d 401, 405 (Tex. App.—Austin 2008, pet. denied) (affirming a groundless pleadings sanction of $10,000 for failure to conduct a reasonable inquiry).

[8] *See also Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992) (citing *TransAmerican* to note that "[a] permissible sanction should, therefore, be no more severe than required to satisfy legitimate purposes. This means that a court must consider relatively less stringent sanctions first to determine whether lesser sanctions will fully promote compliance, deterrence, and discourage further abuse").

While this tour d'horizon is not intended to be comprehensive, it is nonetheless representative of what our reported cases suggest have been typical groundless pleadings awards in this state.[9]

Though we specifically addressed sanctions stemming from a charge of discovery abuse in *TransAmerican*, we have previously held the due process requirements we established there apply to pleadings sanctions as well. *Low*, 221 S.W.3d at 619–20.

C. Analysis

In the trial court, Nath brought claims for a declaratory judgment (regarding Shenaq's health), intentional infliction of emotional distress, defamation, tortious interference, and negligence. The trial court sanctioned Nath for (1) bad faith in his pursuit of discovery on the irrelevant issue of Shenaq's health; (2) an improper purpose of leveraging information concerning Shenaq's health to favorably settle a baseless claim; and (3) bringing claims that lacked a factual predicate. Chapter 10 requires that we analyze an improper purpose pleading-by-pleading, but we assess claim-by-claim whether a claim lacked a legal or factual basis.[10]

[9] Although imposed pursuant to the federal groundless pleadings rule, *see supra* note 7, federal pleadings sanctions may also provide a useful barometer to gauge the size of typical awards. *See generally* Maryann Jones, "*Stop, Think, & Investigate": Should California Adopt Federal Rule 11?*, 22 SW. U. L. REV. 337, 354 (1993) (noting that "[w]hile there are reported cases of awards exceeding $100,000, a recent comprehensive survey of Rule 11 sanctions in the Fifth, Seventh, and Ninth Circuits shows that the median sanction imposed pursuant to Rule 11 [at that time was] $2,500").

[10] *See* TEX. CIV. PRAC. & REM. CODE § 10.001 (providing that signing a pleading or motion certifies that "the pleading or motion is not being presented for any improper purpose, . . . each claim, defense, or other legal contention in the pleading or motion is warranted by existing law . . . [and] each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"); *see also Low*, 221 S.W.3d at 615 (recognizing that Chapter 10 requires analysis of each claim against each defendant).

1. Waiver

As an initial matter, we address the claim of the Hospital and Baylor that Nath waived his objection to the size of the sanctions award by failing to raise the issue of excessiveness at the trial court level. The court of appeals agreed, finding that the issue had not been properly preserved for review. 375 S.W.3d at 412. We disagree. The record plainly reveals Nath's objections to the award, including objections specifically predicated on the ground of excessiveness. On December 20, 2010, Nath filed a motion for new trial and a motion to modify the trial court's November judgment and sanctions order, arguing the sanctions award "violates the Excessive Fines clause of the Constitution of the United States of America—Eighth Amendment—and the Excessive Fines clause of the Texas Constitution—Article I, section 13." Additionally, Nath cited United States Supreme Court precedent to bolster his contention that the trial court should consider "whether the penalties in question were excessive."[11] We are generally loath to turn away a meritorious claim due to waiver; where the party has clearly and timely registered its objection, we find a waiver argument particularly unavailing. *See Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997). We conclude Nath did not waive his objection to the excessiveness of the sanctions award.

2. Nath's Fourth, Fifth, and Sixth Amended Petitions

Central to its ultimate imposition of sanctions, the trial court found that Nath's pursuit of information relating to Shenaq's health was in bad faith, and that Nath's ostensible intent to use that information to leverage a favorable settlement for a baseless claim constituted an improper purpose.

[11] *Austin v. United States*, 509 U.S. 602, 622 (1993).

Nath originally included allegations relating to Shenaq's health in his fourth amended petition, filed in November 2008.[12] Nath moved to compel discovery relating to Shenaq's health and in July 2009 filed a fifth amended petition that included a request for declaratory judgment relating to Shenaq's health. The trial court admonished Nath's counsel that the information was irrelevant to his lawsuit. *See supra* note 4. Nath later filed a sixth amended petition that abandoned his prior claims and added a claim for intentional infliction of emotional distress. But that petition retained allegations regarding Shenaq's health.[13] For the reasons explained below, we agree with the court of appeals that the trial court properly found Nath's pleadings sanctionable.

The hallmarks of due process for sanctions awards are that they be just and not excessive. *TransAmerican*, 811 S.W.2d at 917. Sanctioning Nath for pleadings relating to Shenaq's health was demonstrably just. First, there was a direct nexus between this portion of the trial court's sanctions and the offensive conduct. The trial court found such pleadings to be in bad faith (due to their irrelevance) and filed for an improper purpose (leveraging a settlement). The trial court's finding is supported by some evidence and is therefore not an abuse of discretion. *See Unifund*, 299 S.W.3d

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[12] For example, the fourth amended petition claimed:

> Defendants were further motivated to discredit Dr. Nath, damage his reputation, and remove him from their facilities because Dr. Nath had discovered that Dr. Shenaq had become partially or completely blind in one eye after suffering a detached retina in 2003. . . . On information and belief, Defendants sought to protect their own interests when they failed to inform Dr. Shenaq's patients about Dr. Shenaq's compromised medical condition. . . . Drs. Grossman and Brunicardi, along with Baylor and [the Hospital], knew that Dr. Nath was concerned about, and was knowledgeable of, Dr. Shenaq's condition and were fearful that Dr. Nath would make Dr. Shenaq's condition public.

[13] For example, the sixth amended petition alleged "that many patients were operated on or treated by Dr. Shenaq at Baylor and [the Hospital] after Dr. Shenaq had become partially or completely blind in one eye after suffering a detached retina in November 2003 . . . ."

at 97. Nath admittedly was seeking information relating to Shenaq's health so he could disclose it to Shenaq's patients. But such disclosures would not be relevant to triable issues related to Nath's then-contemporaneous claims for defamation, tortious interference, and negligence.

Moreover, there was some evidence supporting the trial court's determination that Nath was improperly seeking irrelevant information to leverage a favorable settlement. On the eve of a mediation in June 2009, Nath's counsel sent a letter to the Hospital indicating Nath was anxious to conduct discovery regarding Shenaq's health conditions, the results of which"would most certainly require prompt actions to notify patients so that they can undergo immediate testing and obtain legal counsel to advise them of their rights." During Nath's deposition, attorneys for Baylor and the Hospital likened Nath's use of legal process in this manner to extortion. The trial court agreed with this assessment, characterizing Nath's conduct in seeking information related to Shenaq's health as "an abuse of process" and "a form of extortion." Accordingly, the improper purpose of Nath's pleadings regarding Shenaq's health indicates the trial court appropriately levied sanctions regarding this conduct.[14]

In addition to considerations described, the just-award prong of the due process analysis also examines whether the sanction was visited on the true offender. The trial court made various findings of fact regarding Nath's direct involvement in the case, particularly noting his effort to seek information relating to Shenaq's health, and the record supports these findings. Relations between Nath and Shenaq deteriorated to the point of acrimony in the time leading up to Nath's departure

[14] While bad faith must be coupled with groundless pleadings to support sanctions under Rule 13, TEX. R. CIV. P. 13, an improper purpose alone is a sufficient predicate for sanctions under Chapter 10, TEX. CIV. PRAC. & REM. CODE § 10.001; *see Low*, 221 S.W.3d at 617 (discussing the disjunctive nature of Chapter 10's bases for sanctions).

from Baylor, and they only worsened as litigation ensued. The affidavit Nath filed in response to the motions for summary judgment claimed the relationship between Nath and Shenaq grew tense when Nath confronted Shenaq for performing surgery with allegedly impaired vision. And Nath, by his own admission, specifically sought information related to Shenaq's health so that he could inform former patients of Shenaq's health problems. Nath's affidavit also lists forty-five patient surgeries Shenaq performed with allegedly impaired vision. Further, Nath personally attended two depositions of Shenaq's colleagues where his counsel asked questions concerning Shenaq's health. Ultimately, Nath's conduct surrounding Shenaq's health appears to be less about pursuing a legal redress for an injury (the province of the attorney) and more about seeking irrelevant personal information (an extrajudicial desire of the client). While litigation is contentious by definition and often utilized to compel a desired end, we agree with the trial court that, on these facts, using a legal mechanism to force damaging, irrelevant information into the public domain and thereby compel a more favorable settlement constitutes an improper purpose. Against this backdrop and the logical inferences that flow from it, we cannot say the trial court abused its discretion by imposing the sanction against Nath personally.

Nath claims that even if some of the sanctions against him were proper, sanctions against him for the sixth amended petition were improper because the lawyer who drafted that petition swore in an affidavit that Nath had no involvement with the claim in that petition. Specifically, the attorney indicated he "exercised [his] own legal judgment" when deciding what claims to file in the sixth amended petition and asserted that Nath "had no involvement in the selection of what pleadings and motions were filed in this case." Nonetheless, the sixth amended petition contains facts regarding

Shenaq's health from the prior petitions, and we have already determined that information likely came from Nath himself. In addition, Nath almost certainly knew of the inclusion of those allegations in the sixth amended petition because his attorney "kept Dr. Nath reasonably informed"—as was his professional obligation.[15] Accordingly, we reject Nath's argument and conclude the trial court did not abuse its discretion in labeling Nath the true offender, insofar as the sixth amended petition continued to make issue of Shenaq's health.

We note, however, that while Nath may be properly deemed the true offender, his attorneys possess ethical obligations and may share in the blame for sanctionable conduct. An attorney has ethical obligations to both his client and to the judicial system as an officer of the court.[16] Though zealous advocacy is expected of an attorney—indeed, it is a professional obligation—the attorney must not permit client desires to supersede the attorney's obligation to maintain confidence in our judicial system.[17] As our rules of professional conduct unambiguously require: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."[18] Further, these rules of conduct require an attorney to "maintain the highest standards of ethical conduct" throughout representation.[19] Regardless, Baylor and the Hospital only moved to sanction

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[15] An attorney owes a client a duty to inform the client of matters material to the representation, provided such matters are within the scope of representation. *See, e.g.*, *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 160 (Tex. 2004).

[16] TEX. DISCIPLINARY R. OF PROF'L CONDUCT pmbl. ¶ 1.

[17] *Id.* at ¶ 2.

[18] *Id.* at ¶ 4.

[19] *Id.* at ¶ 1.

Nath—not his lawyers—and the trial court declined to sanction the lawyers sua sponte.[20] Thus, under the true-offender inquiry, we must uphold the trial court's decision to sanction Nath personally because some evidence supports the sanction. *See Unifund*, 299 S.W.3d at 97.

We are mindful of course that due process analysis for sanctions must encompass analyzing whether the award was excessive. But we will refrain from engaging in this analysis until we have examined all pleadings and claims for which Nath may appropriately be sanctioned.

3. Defamation

Nath's initial petitions included claims for defamation, tortious interference, and negligence. We address them in turn. The trial court made discrete findings as to Nath's defamation claim. Specifically, the trial court found the defamation claim was time-barred by a one-year statute of limitations[21] and that some of the statements Nath claimed were defamatory were not actually defamatory.[22] But Chapter 10 expressly disallows sanctions against a party for improper legal contentions when the party is represented by counsel. TEX. CIV. PRAC. & REM. CODE § 10.004(d). The trial court did not find that the statements did not occur. Rather, it sanctioned Nath because of legal impediments to recovering for the alleged statements.[23] Thus, Chapter 10 precluded the trial

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[20] *See* TEX. CIV. PRAC. & REM. CODE § 10.002 (providing that court may sanction a party or attorney under Chapter 10 "on its own initiative"); TEX. R. CIV. P. 13 (providing that court may sanction a party or attorney under Rule 13 "upon its own initiative").

[21] TEX. CIV. PRAC. & REM. CODE § 16.002(a).

[22] "[A] defamatory statement is one that tends to injure a person's reputation." *Hancock v. Variyam*, 400 S.W.3d 59, 62 (Tex. 2013).

[23] *Cf. Dolenz v. Boundy*, 197 S.W.3d 416, 421–22 (Tex. App.—Dallas 2006, pet. denied) (affirming pleadings sanctions of $250 against a party when the party was a lawyer proceeding pro se and presumably aware that the claims were time-barred).

court from sanctioning Nath for groundlessness based upon improper legal contentions when he was represented by counsel.

However, the trial court also held that the time-barred status and nondefamatory nature of some of the statements in his defamation claim indicated Nath filed the claim in bad faith and for an improper purpose. Defamation claims are subject to a one-year limitations period, and Nath filed suit in February 2006. The trial court found that most of the allegedly defamatory statements occurred in June or July of 2004, and none occurred after the end of 2004, when the Hospital closed the clinic. Nath's affidavit opposing summary judgment detailed the allegedly defamatory statements and claimed they damaged his medical practice and caused him financial harm. Further, Nath's affidavit admits he learned of eight of these allegedly defamatory statements in 2004—over one year before he filed suit.[24] As previously addressed, this matter involves legal contentions—which Chapter 10 does not allow Nath to be sanctioned for on the basis of legally groundless pleadings because he was represented by counsel. *Id.* But Chapter 10 offers no similar stricture for sanctions based on improper purpose. And in any event, Nath was represented by counsel no later than June 8, 2004, when he claimed the statements were "potentially damaging to [his] reputation." Because there is some evidence supporting the finding that Nath brought his defamation claim with an improper purpose, the trial court did not abuse its discretion in sanctioning Nath for this claim.

[24] For example, on or about June 2, 2004, Nath learned his appointment at Baylor was not renewed because of his billing practices and minimal academic contributions. Nath's affidavit also indicates he learned of seven other allegedly defamatory statements in 2004.

Nath nonetheless argues such sanctions violate the constitutional requirement that the sanction be visited on the true offender. We disagree. The fact that Chapter 10 does not shelter parties from sanctions for flawed legal contentions that demonstrate an improper purpose is simply a reflection of our warning in *TransAmerican* that the attorney-client relationship is opaque by default. Nath only diminished that opacity for his sixth amended petition, which contained a claim for intentional infliction of emotional distress. The attorney who filed that claim indicated Nath had no involvement in drafting the claim. But Nath presented no similar evidence with respect to the pleadings containing Nath's defamation claim. Accordingly, because some evidence supports the trial court's finding, and no evidence clarifies the respective roles of Nath and his attorneys in regards to his defamation claim, we conclude the trial court did not abuse its discretion in sanctioning Nath for that claim.

4. Tortious Interference

Nath's remaining claims are for tortious interference and negligence. The trial court did not find that Nath filed his tortious interference claim in bad faith or for an improper purpose. Rather, the trial court generally found Nath's claims to be sanctionable because they lacked merit, as evidenced by the court's summary judgment dismissal. The trial court also found Nath's claim to be groundless to the extent it relied on time-barred defamatory statements. As explained below, the trial court's first rationale violates the Legislature's directive in Chapter 10, but some evidence supports its second rationale.

Generally, groundless pleadings are sanctionable under either Rule 13 or Chapter 10. Under Rule 13, groundlessness in and of itself is an insufficient basis for sanctions. A pleading must also

be in bad faith, intended to harass, or knowingly false to justify sanctions. TEX. R. CIV. P. 13.[25] The trial court made no findings of bad faith, improper purpose, or falsity regarding the tortious interference claim. Accordingly, Rule 13 cannot support the sanctions as to this claim.

However, Chapter 10 provides that a claim that lacks a legal or factual basis—without more—is sanctionable. TEX. CIV. PRAC. & REM. CODE § 10.001; *see also Low*, 221 S.W.3d at 617. Legally, the claim must be warranted by existing law or a nonfrivolous argument to change existing law. TEX. CIV. PRAC. & REM. CODE § 10.001(2). But Chapter 10 expressly prohibits monetary sanctions against a represented party based on the legal contentions in a pleading. *Id.* § 10.004(d) ("The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2)."). Accordingly, the trial court could not have properly awarded sanctions against Nath for groundless legal contentions in his tortious interference claim.

Chapter 10 requires that each factual contention must have evidentiary support or be likely to receive it after a reasonable opportunity for discovery. *Id.* § 10.001(3); *Low*, 221 S.W.3d at 616–17. We held in *Low* that a pleading was sanctionable because it alleged two doctors prescribed a drug that medical records in the attorney's possession demonstrated they did not prescribe. 221 S.W.3d at 616. Thus, in holding the pleading was sanctionable, we held that the allegations did not have, and were not likely to subsequently receive, evidentiary support in light of the evidence the attorney possessed when filing the claim. *Id.*

[25] *See also Able Supply Co. v. Moye*, 898 S.W.2d 766, 772 (Tex. 1995).

Unlike in *Low*, the trial court's findings here only indicate it viewed the pleadings as groundless as of the time it granted summary judgment. But the court's findings miss the mark, as the vantage point for assessing evidentiary support is at the time the pleading is filed.[26] Establishing a vantage point at the time of a merits adjudication four years or more into a proceeding would unnecessarily chill litigation in cases where claimants in good faith believe they possess a claim, but have not yet discovered sufficient evidence on every essential element of their claim. We cannot endorse a view that runs so contrary to the Legislature's chosen words in Chapter 10 and our construction of them.

Nonetheless, a distinction between sanctions for groundless pleadings and sanctions for discovery abuse is worth noting. A claim may be likely to receive evidentiary support when filed and thus not be groundless under Chapter 10. But if a party later learns through discovery that no factual support for the contention exists and still pursues litigation, such conduct might be sanctionable. But the sanctionable conduct would likely be the abuse of the discovery process, not the filing of pleadings, as our rules of civil procedure specify that a court may sanction a party or counsel if the court "finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing." TEX. R. CIV. P. 215.3. While the ultimate penalty

[26] For example, Chapter 10 specifies that anyone signing a pleading certifies that each allegation "has evidentiary support or . . . is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." TEX. CIV. PRAC. & REM. CODE § 10.001(3). Likewise, the trial court's sanctions order in *Low* indicated that the factual contentions "did not, on January 31, 2002 [when the petition was filed], and do not now, have evidentiary support; nor were they on January 31, 2002, likely to have evidentiary support after a reasonable opportunity for further investigation." 221 S.W.3d at 617.

may be similar in its effect on the sanctioned party, its application is predicated on a different ground.[27]

But in addition to concluding that Nath's claims ultimately lacked merit, the trial court also specifically noted in a footnote in its findings of fact and conclusions of law that "Nath's claims of negligence and tortious interference are also groundless to the extent that those claims rely on time-barred, allegedly defamatory statements." Defamation is subject to a one-year statute of limitations, TEX. CIV. PRAC. & REM. CODE § 16.002(a), while tortious interference is subject to at least a two-year statute of limitations, *First Nat'l Bank of Eagle Pass v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986). However, the Fifth Circuit and several Texas courts of appeals have held that, when the sole basis for a tortious interference claim is defamatory statements, the one-year statute of limitations for defamation applies.[28] Likewise, we have applied a one-year statute of limitations to business disparagement claims when the gravamen of the complaint is defamatory injury to reputation and there is no evidence of special damages. *See Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). We now similarly conclude that if a tortious interference claim is based solely on defamatory statements, the one-year limitations period for defamation claims applies.

Nath's tortious interference claim was predicated solely on the allegedly defamatory

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[27] This analysis need not detain us here. Nath engaged in questionable discovery conduct surrounding the original setting for the summary judgment motions. But even if this conduct was sanctionable as discovery abuse, it occurred during a time when Nath's fourth, fifth, and sixth amended petitions were on file—which we have found to be sanctionable pleadings. Thus, we need not assess whether such conduct was sanctionable for a second reason. And in any event, the Hospital and Baylor did not move for discovery sanctions.

[28] *See Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 146–47 (5th Cir. 2007); *Williamson v. New Times, Inc.*, 980 S.W.2d 706, 710–11 (Tex. App.—Fort Worth 1998, no pet.); *Martinez v. Hardy*, 864 S.W.2d 767, 776 (Tex. App.—Houston [14th Dist.] 1993, no writ); *Gulf Atl. Life Ins. Co. v. Hurlbut*, 696 S.W.2d 83, 97–98 (Tex. App.—Dallas 1985), *rev'd on other grounds*, 749 S.W.2d 762 (Tex. 1987).

statement because it alleges the Hospital and Baylor tortiously interfered "by continuing to make false statements regarding" Dr. Nath to third parties. Accordingly, Nath's tortious interference claim was subject to the one-year statute of limitations. The trial court correctly found the earliest of the allegedly defamatory statements occurred in June 2004. Nath filed his tortious interference claim in February 2006, after the one-year limitations period had run. Thus, some evidence supports the trial court's finding that Nath's tortious interference claim (as with his defamation claim) was time-barred and demonstrated an improper purpose.

5. Negligence

Nath's final claim was for negligence, in which Nath claimed that Baylor and the Hospital's negligent training and supervision of its employees led them to defame him and tortiously interfere with his practice. As with Nath's tortious interference claim, the trial court (1) generally found Nath's claims to be sanctionable because they lacked merit due to their dismissal at summary judgment, and (2) specifically found the negligence claim to be groundless to the extent it relied on time-barred defamatory statements. As explained above, assessing groundlessness only at the time of a merits dismissal over four years into the litigation contravenes the requirement in Chapter 10 that groundlessness is assessed as of the time of filing. Thus, the trial court's first rationale cannot support sanctions as to the negligence claim.

But the trial court's second rationale—that the negligence claim relied on time-barred statements—is a sufficient basis for sanctions. Nath filed his negligence claim in his third amended petition in September 2008, over four years after learning of the first allegedly defamatory statements in June 2004. Regardless of whether the two-year limitations window for negligence claims was

truncated to one year because Nath's claim was predicated solely on defamatory statements (as with the tortious interference claim), limitations barred the negligence claim. For the same reason sanctions are appropriate for Nath's defamation and tortious interference claims, they are appropriate for his negligence claim.

D. Remand

In short, all of Nath's petitions are sanctionable. But we must still assess whether the amount of the award was excessive. A trial court abuses its discretion by failing to adhere to guiding rules and principles. *Cire*, 134 S.W.3d at 838–39. We set forth these guiding rules and principles for assessing the amount of pleadings sanctions in *Low*.[29] 221 S.W.3d at 620 n.5. This nonexclusive

[29] The list of nonexclusive factors we enumerated was:

a. the good faith or bad faith of the offender;

b. the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;

c. the knowledge, experience, and expertise of the offender;

d. any prior history of sanctionable conduct on the part of the offender;

e. the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;

f. the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;

g. the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;

h. the risk of chilling the specific type of litigation involved;

i. the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;

j. the impact of the sanction on the offended party, including the offended person's need for compensation;

list of factors is helpful in guiding the often intangible process of determining a penalty for sanctionable behavior, and it provides context for our review of the trial court's award. We advised in *Low* that "[a]lthough we do not require a trial court to address all of the factors . . . to explain the basis of a monetary sanction . . . it *should consider relevant factors* in assessing the amount of the sanction." *Id*. at 620–21 (emphasis added). In practice, this means that when a factor is relevant to a party being sanctioned, that factor must inform the issuance of the award. To take just one example, one factor we referenced in *Low* is "any prior history of sanctionable conduct on the part of the offender." *Id*. at 620 n.5. A court obviously need not consider prior sanctionable conduct in calibrating a sanction award for a first-time litigant for the self-evident reason that no such conduct exists. Yet, were the example reversed and a sanctioned litigant possessed a lengthy history of prior sanctions, the court "should consider" that party's checkered history in levying a sanction. *Id*. at 620–21 & 620 n.5.

Here, the trial court cited and then considered nearly all of the relevant *Low* factors. In the context of this matter, however, one factor made relevant by the protracted nature of this litigation

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> k. the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
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> l. burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;
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> . . . .
>
> n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought.

Low, 221 S.W.3d at 620 n.5 (quoting AMERICAN BAR ASSOCIATION, STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE, *reprinted in* 121 F.R.D. 101, 104 (1988) (omission in original)).

is "the degree to which the offended person's own behavior caused the expenses for which recovery is sought." *Id*. at 620 n.5 (quotation marks omitted). The trial court failed to address this factor, though it is unquestionably relevant. The statements Nath addressed in his original petition were made in 2004, and Nath filed suit well after the one-year limitations period had run. Yet, the record indicates that all three parties litigated a host of merits issues for nearly a half-decade before the Hospital and Baylor moved for summary judgment on such grounds as limitations. Thus, while Nath was the initiator of this litigation, the degree to which the Hospital and Baylor caused their attorney's fees is a relevant inquiry.

A party is entitled to thoroughly and vigorously litigate a matter. But if issues asserted in pleadings are revealed to be frivolous, and the defending party delays moving for summary judgment and sanctions, the defending party adopts some responsibility for the overall increase in litigation costs. Of course, placing the entire cost of litigation on a plaintiff may be proper and deserved if the plaintiff was the party responsible for sustaining frivolous litigation over a prolonged period. Here, the trial court found the defamation claims were friviolous ab initio because the statements were alleged to have been made at least one year before suit was filed. Moreover, the time-barred statements permeated subsequent pleadings. The defendants, however, did not file a summary judgment for years after the allegations were first made. A defending party cannot arbitrarily shift the entirety of its costs on its adversary simply because it ultimately prevails on a motion for

sanctions. Because the trial court did not discernibly examine this relevant *Low* factor, we remand for it to do so.[30]

E. Response to the Dissent

The dissent tacitly agrees with our analysis, but would affirm the sanctions award rather than remand for the trial court to assess the relevant *Low* factor. Specifically, the dissent argues that we should outright affirm the award of sanctions because, among other things: (1) the findings of fact and conclusions of law contained a typographical error, and (2) our direction that trial courts "should" consider the relevant *Low* factors is permissive.

The dissent first contends the trial court made a typographical error in stating that it considered the extent to which Nath caused the Hospital and Baylor's fees. But viewing the findings and conclusions as a whole belies the dissent's position. The trial court was careful to detail its rationale for the *Low* factors it found to be relevant—except the extent to which the Hospital and Baylor caused their own injuries. For example, the findings and conclusions spent considerable time discussing Nath's bad faith, his degree of willfulness, and his knowledge and expertise. When a trial court recites a relevant issue but fails to discuss it, we cannot automatically conclude that such cursory mention is tantamount to compliance. This was true in the case of the $50,000 sanction we reversed in *Low*, and it is equally as true of the $1.4 million sanction presented here.

Additionally, the dissent contends that our admonishment that trial courts "should" consider the relevant *Low* factors is permissive. Notably, the dissent does not contend the extent to which the

[30] We are confident in the trial court's ability to resolve this discrete issue on remand either on the existing record or, at most, after a hearing examining briefing accompanied by affidavits regarding the degree to which the Hospital and Baylor caused their attorney's fees.

Hospital and Baylor caused their attorney's fees is irrelevant. And regardless of whether consideration of the relevant *Low* factors is permissive, the trial court went to great lengths to examine all the relevant *Low* factors except for the extent to which the non-sanctioned parties caused their own injuries. We do not believe the standard of review allows a trial court that dutifully considers almost all of the relevant *Low* factors to essentially ignore a relevant factor. As noted, failure to adhere to guiding rules and principles constitutes an abuse of discretion. *Cire*, 134 S.W.3d at 838–39. *Low* offered these guiding rules and principles, the trial court failed to adhere to them, and this amounted to an abuse of discretion.

III. Conclusion

Due process requires that sanctions be just, meaning that there be a direct nexus between the sanction and the sanctionable conduct, and be visited on the true offender. Here, the trial court's sanctions award complied with these requirements because Nath's petitions were filed for the improper purpose of pursuing an unrelated issue and advancing time-barred claims. However, when assessing the amount of sanctions, the trial court failed to examine the extent to which the Hospital and Baylor caused the expenses they accrued in litigating a variety of issues over several years. Accordingly, we remand for the trial court to reassess the amount of the sanctions award while considering the omitted factor. *See Low*, 221 S.W.3d at 622.

Eva M. Guzman
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0620

RAHUL K. NATH, M.D., PETITIONER,

v.

TEXAS CHILDREN'S HOSPITAL AND BAYLOR COLLEGE OF MEDICINE, RESPONDENTS

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

JUSTICE GREEN, joined by JUSTICE LEHRMANN, JUSTICE BOYD and JUSTICE BROWN, dissenting.

The Court holds that the trial court abused its discretion when it assessed sanctions against Dr. Rahul K. Nath without examining the extent to which Texas Children's Hospital and Baylor College of Medicine caused the accrual of their own attorney's fees. ___ S.W.3d ___, ___. Because I read the trial court's orders as having addressed that specific factor, and because I believe the trial court's discretion is broader in this context than the Court does, I respectfully dissent.

The abuse of discretion standard is critical to our analysis in this case. Under this standard, we may reverse the trial court *only* if it acted "without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable." *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) (citing *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004)).

The amount of a sanction is limited only by the trial court's duty to act within its sound discretion in accordance with the Due Process clause of the Texas Constitution. *Low*, 221 S.W.3d at 619; *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). In exercising its discretion, the trial court must ensure that the sanction: (1) relates directly to the abuse found; and (2) is not excessive. *Low*, 221 S.W.3d at 620; *Powell*, 811 S.W.2d at 917. In *Low*, we provided a list of non-exhaustive factors to assist a trial court in determining whether a sanction is appropriate. *Low*, 221 S.W.3d at 620–21 n.5. We explained that a trial court need not consider every factor listed, but rather "should consider relevant factors in assessing the amount of the sanction" in each case. *Id.* at 621.

The Court's holding that the trial court abused its discretion in assessing the amount of sanctions rests on two erroneous propositions: (1) the trial court omitted from its analysis a single *Low* factor regarding the extent to which Texas Children's Hospital and Baylor caused the accrual of their own attorney's fees, *see Low*, 221 S.W.3d at 620–21 n.5; and (2) the trial court was required to consider that factor when assessing monetary sanctions. ___ S.W.3d at ___.

First, the trial court's exhaustive findings of fact and conclusions of law in support of its sanctions award indicate that it considered all of the *Low* factors. Paragraph 91 of the Texas Children's Hospital order concluded:

> *In determining the amount of sanctions, this Court has considered the factors listed in Low v. Henry, 221 S.W.3d at 620 & n.5*. In light of Nath's bad faith and improper purposes, as set forth herein; Nath's knowledge of the law as a former legal student; Nath's prior conduct as a litigant in numerous cases; the expenses incurred by Texas Children's Hospital as a result of the litigation and their reasonable proportion to the amount Nath sought in damages; the relative culpability of Nath, as set forth above; the minimal risk of chilling legitimate litigation activity posed by sanctions here;

> Nath's ability to pay for the damages he has caused Texas Children's Hospital; the need for compensation to Texas Children's Hospital as a result of the damages inflicted upon it in defending against this lawsuit; the necessity of imposing a substantial sanction to curtail Nath's abuse of the judicial process and punish his bad faith and improper conduct; the burdens on the court system attributable to Nath's misconduct, including his consumption of extensive judicial time and resources in prosecuting this case; and *the degree to which Nath's own behavior caused the expenses for which Texas Children's Hospital seeks reimbursement*, the Court concludes that Texas Children's Hospital should be awarded a substantial portion of its attorney's fees to sanction Nath for his conduct. (Emphasis added).

The trial court reached a similarly-worded conclusion in its findings of fact and conclusions of law in support of its judgment granting Baylor's request for sanctions. In both orders, the trial court expressly stated that it was familiar with the *Low* factors and had considered them in assessing sanctions. The Court claims, however, that in both orders, the trial court failed to "discernibly examine" an "unquestionably relevant" *Low* factor. ___ S.W.3d at ___, ___. However, reading the findings and conclusions as a whole, I can conclude only that the trial court *did* consider the factor that the majority claims was omitted. In its findings and conclusions, the trial court expressly stated that it considered "the degree to which Nath's own behavior caused the expenses for which Texas Children's Hospital [and Baylor] seeks reimbursement." The trial court's list of considerations mirrors the *Low* factors except in this one instance. While the trial court appears to have transposed Nath's name where Texas Children's Hospital or Baylor's name should have been, we should view this transposition as merely a typographical error which may be forgiven, rather than an omission. *Cf. Bd. of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 428 n.2 (Tex. 2002) (reading the printed word "riot" to mean "not" in a statute containing a typographical error); *City of Amarillo v Martin*, 971 S.W.2d 426, 428 n.1 (Tex. 1998) (inserting the word "not" into a statute to indicate

the obvious legislative intent); *Beall v. Chatham*, 99 S.W. 1116, 1117–18 (Tex. 1907) (affirming a judgment containing a typographical error which obscured the trial court's reasoning). After all, Nath's conduct was covered fully by other *Low* factors that the trial court considered.

The trial court's extensive findings of fact and conclusions of law regarding Baylor's request for sanctions totaled forty-one pages and contained ninety-five discrete findings and conclusions. The trial court's findings and conclusions regarding Texas Children's Hospital's request for sanctions totaled forty-two pages and contained ninety-four discrete findings and conclusions. Given the trial court's exhaustive effort to explain its decision and address the *Low* factors, it seems a waste of judicial resources to remand this case so that the trial court may correct a typographical error.

Second, contrary to the Court's holding, a trial court has as much discretion in determining which *Low* factors to consider as it does in determining the amount of the sanctions assessment. The Court cites *Low* for the proposition that when a factor is relevant, a trial court must consider it or risk reversal on appeal. ___ S.W.3d at ___ (citing *Low*, 221 S.W.3d at 620–21). This reading of *Low*, which unnecessarily constrains a trial court's discretion, begs the question—who is to determine whether a factor is relevant, and, under what standard is that decision reviewed? In my view, we must respect the trial court's discretion to determine which factors are relevant and its discretion to ensure that the amount of its sanctions assessment is appropriate and supported by evidence. After all, the trial court witnessed the parties' behavior firsthand.

Furthermore, the Court's interpretation of *Low*'s use of "should" as creating a mandatory requirement is unconvincing. Just as this Court has held that a statute or rule containing "shall" does not always mandate action, surely our own use of "should" must likewise be interpreted to be merely

directory. *Cf. Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310–11 (Tex. 1976) (interpreting administrative rule containing "shall" to be merely directory, not mandatory); *Chisholm v. Bewley Mills*, 287 S.W.2d 943, 945 (Tex. 1956) (interpreting statute containing "shall" to be merely directory, not mandatory); *Thomas v. Groebl*, 212 S.W.2d 625, 630–32 (Tex. 1948) (same).

Again, I would caution against excessive scrutiny of the trial court's application of the *Low* factors when the trial court's assessment of sanctions, as a whole, does not amount to an abuse of discretion. As we noted in *Low*, the amount of a penalty under Chapter 10 of the Civil Practice and Remedies Code should "begin with an acknowledgment of the costs and fees incurred because of the sanctionable conduct." 221 S.W.3d at 621. The trial court found that a large sanction was "required to sufficiently punish Nath's conduct and deter similar conduct in the future." The record details Texas Children's Hospital and Baylor's incurred attorneys' fees, and the trial court's sanctions assessment excludes fees related to the recusal proceedings.[1] The trial court, after finding ten of the thirteen *Low* factors to be applicable, had an ample basis for assessing sanctions at the amount of Texas Children's Hospital and Baylor's incurred attorneys' fees.

We might critique the final amount of the sanctions imposed. We might reach a different result under de novo review. But that is simply not our task. We normally afford the trial court considerable latitude under the abuse of discretion standard. We should not modify our test even when it yields unpalatable results. Provided that the trial court relies upon the guiding principles this Court established in *Low* and supports its findings with evidence in the record, we should affirm

[1] Only the judge hearing the recusal motion may assess these sanctions. TEX. R. CIV. P. 18a(h).

even debatable sanctions. Why? Because, as the trial judge wrote: "The Court has witnessed much of this behavior firsthand." The trial court dealt with the parties throughout four years of litigation. The court watched Nath cycle through claim after claim in multiple petitions. The court dealt with numerous attorneys. The court dealt with Nath's last-minute effort to recuse the trial judge—followed by Nath's attempt to recuse the judge overseeing the recusal process. The court admonished Nath's attorneys to cease certain irrelevant pursuits, and then saw Nath ignore this admonishment in an affidavit reemphasizing irrelevant matters. Finally, the trial court dismissed all of Nath's remaining claims at the summary judgment stage. The trial court witnessed all of Nath's actions firsthand, found support in the record, and relied upon the factors this Court set out in *Low* to arrive at its assessment. Therefore, I would hold that the trial court did not abuse its discretion in assessing sanctions against Nath.

The Court's remand of this case is especially troubling because the trial court judge who presided over the case for four years lost reelection in 2012. His replacement will face the same disadvantage in reviewing the sanctions assessment that the Court does today—she did not witness Nath's behavior firsthand. The current trial court's unfamiliarity with the parties and the litigation will require her to either conduct additional hearings or base her decision upon the same cold record this Court cautions against. *E.g.*, *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688 (Tex. 2012). Neither of these options are adequate substitutes for a trial court's firsthand observations, and the Court should not remand the case for an unfamiliar trial court to reconsider sanctions.

Low provides boundaries for trial courts assessing sanctions. We must ensure that trial courts act within these boundaries; however, we cannot have appellate courts unnecessarily circumventing

a trial court's discretion. Detailed findings of fact and conclusions of law and an extensive record provide support for both the decision to sanction and the amount of the sanctions. On the record here, I conclude that the trial court acted within its discretion. Because the Court holds otherwise, I respectfully dissent.

_____

Paul W. Green
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0621

EXXON MOBIL CORPORATION, PETITIONER,

v.

WILLIAM T. DRENNEN, III, RESPONDENT

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

Argued November 6, 2013

JUSTICE GREEN delivered the opinion of the Court.

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

In this declaratory judgment action, we consider whether New York choice-of-law provisions in a Texas-based corporation's executive bonus-compensation incentive programs are enforceable and, if not, whether the programs' provisions allowing forfeiture of an executive's bonus awards for engaging in "detrimental activity" are enforceable under Texas law. We hold that the New York choice-of-law provisions in the executive compensation plan are enforceable and that the detrimental-activity provisions are enforceable under New York law. Accordingly, without reaching the second question, we reverse the court of appeals' judgment and render judgment in favor of the corporation.

I. Factual and Procedural Background

William Drennen, III, worked as a geologist with Exxon Mobil Corporation (ExxonMobil) in Houston for over thirty-one years, from 1976 through May of 2007, culminating his career with the title of Exploration Vice President of the Americas. During his employment, he received several forms of incentive compensation, including participation in the 1993 Incentive Program and the 2003 Incentive Program (Incentive Programs). Compensation under the Incentive Programs included bonus awards, awards of restricted stock options, and earnings bonus units. Each time Drennen received restricted stock, he signed a restricted-stock agreement that adopted the terms of the Incentive Programs. These agreements were executed in Texas by both Drennen and ExxonMobil—Drennen in Houston and ExxonMobil through its corporate representatives at its corporate headquarters in Irving. During his thirty-one years of employment, Drennen was awarded a total of 73,900 shares of restricted ExxonMobil (XOM) stock. Under the terms of the Incentive Programs, 50% of the shares were to be delivered to Drennen (no longer restricted) three years after each grant, with the remaining 50% to be delivered seven years after each grant.

The Incentive Programs both include choice-of-law provisions providing for application of New York law, although ExxonMobil is headquartered in Texas and incorporated in New Jersey.[1] The Incentive Programs contain termination provisions that enabled ExxonMobil to terminate the outstanding awards if the employee (1) engaged in a detrimental activity, or (2) left ExxonMobil by either "not terminating normally" (terminating before the standard retirement plan without written

[1] The choice-of-law provisions state that "all actions taken under the [Incentive] Program shall be governed by the laws of the State of New York."

approval) under the 1993 Incentive Program or "resigning" (early retirement at the initiative of the employee) under the 2003 Incentive Program. "Detrimental activity" is defined under the 1993 Incentive Program as "activity that is determined in individual cases by the administrative authority to be detrimental to the interest of the Corporation of any affiliate." "Detrimental activity" is defined under the 2003 Incentive Program as "acceptance . . . of duties to a third party under circumstances that create a material conflict of interest," where a "material conflict of interest" includes when a grantee "becomes employed . . . by an entity that regulates, deals with, or competes with the Corporation or an affiliate."

Until 2006, Drennen consistently ranked in the top 20% of ExxonMobil employees in his annual review. However, after ExxonMobil implemented a new ranking system in 2006, Drennen received a very unfavorable annual performance review, allegedly a result of his age and the new C.E.O.'s desire to bring in a younger group of vice presidents. In December 2006, he was told by Tim Cejka, his supervisor, that he would be replaced at ExxonMobil and that they were trying to find him a new position but were thus far unsuccessful. Drennen asked about his unvested options should he leave and was told by Cejka that, so long as he did not go to work for one of the other four "majors" (Shell, BP, ChevronTexaco, or ConocoPhilips), he would be fine.

In March 2007 Drennen submitted his letter of resignation, stating his intent to retire in May. Upon his retirement, Drennen had already received 16,700 shares of XOM stock without restriction and had cashed out $4 million in pension funds, $1.8 million in 401(k) funds, and $3 million in stock options. However, Drennen had 57,200 shares still in the restricted period. Before his retirement, Drennen informed Cejka that he was considering taking a position at Hess Corporation (another large

energy company), and Cejka warned him that if he accepted the position, "it would be highly likely that [Drennen] would lose all [of his] incentives." Despite this warning, Drennen accepted the position and began working at Hess as Senior Vice President for Global Exploration and New Ventures in July 2007.

Shortly thereafter, Drennen's former supervisor, Cejka, sent him a letter cancelling his incentive awards, explaining that Hess is a direct competitor of ExxonMobil so there is a material conflict of interest, constituting detrimental activity under both Incentive Programs. Therefore, Drennen's 57,200 outstanding restricted shares of ExxonMobil were forfeited and "cancelled" by the plan administrator.

Drennen sued to recover the restricted stock, which ExxonMobil claimed he forfeited when he accepted the position with Hess, a competitor. Drennen sought a declaratory judgment that: (1) the detrimental-activity provisions in the Incentive Programs were being utilized as covenants not to compete; (2) the covenants not to compete are unenforceable because they are not limited as to time, geographic area, or scope of activity; and (3) therefore, ExxonMobil's cancellation of the restricted shares and bonus units was an impermissible attempt to recover monetary damages for an alleged breach of an unenforceable covenant not to compete. The parties agreed that the declaratory-judgment action would be decided by the trial court after the jury verdict. Additionally, Drennen brought a claim for breach of an oral contract (the conversation between Drennen and Cjeka that Drennen could retain his incentive awards so long as he did not go work for one of the four other "majors"), raised a waiver or estoppel argument based on Cjeka's assertions, and claimed that the Incentive Program agreements had been modified by his conversation with Cjeka.

The jury found for ExxonMobil on all claims and theories put before it—the breach of contract claim, the waiver and estoppel theory, and the oral contract modification theory. Drennen moved for judgment notwithstanding the verdict (JNOV), urging the court to find that the detrimental-activity provisions in the Incentive Programs are unenforceable covenants not to compete under Texas law. The trial court denied the motion, rejected Drennen's arguments on the declaratory-judgment action, and entered a take-nothing judgment for ExxonMobil. Drennen did not challenge the jury verdict on appeal; rather, he appealed the denial of the JNOV, arguing that Texas public policy prohibits enforcement of the detrimental-activity provisions in the Incentive Programs as void covenants not to compete.

The court of appeals reversed and ordered the trial court to render a declaratory judgment for Drennen. 367 S.W.3d 288, 298 (Tex. App.—Houston [14th Dist.] 2012), *pet. granted*, 56 Tex. Sup. Ct. J. 861, 864 (Aug. 26, 2013). The court of appeals held that the forfeiture conditions were unreasonable covenants not to compete, which are unenforceable under Texas law as a matter of public policy. *See id.* at 295. Applying conflicts-of-law analysis under the Restatement, the court of appeals refused to apply New York law because the result would be against Texas fundamental policy. *See id.* at 296–97 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)). Therefore, the court of appeals held that Texas law applies because the choice-of-law provisions are unenforceable and held that the detrminental-activity provisions, as forfeiture conditions, are unenforceable covenants not to compete under Texas law. *Id.* at 298.

ExxonMobil petitioned this Court for review, arguing primarily that the choice-of-law provisions are enforceable and the detrimental-activity provisions should, therefore, be enforced

under New York law. Alternatively, ExxonMobil argues that, even if Texas law applies, the detrminental-activity provisions should be enforced under Texas law.

II. Discussion

We begin our analysis by determining whether the choice-of-law provisions, electing to apply New York law for all disputes arising out of the Incentive Programs, are enforceable.

A. Enforceability of the Choice-of-Law Provisions

ExxonMobil argues that New York law should govern because the choice-of-law provisions are enforceable under the Restatement. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187. We first note that Texas law recognizes the "party autonomy rule" that parties can agree to be governed by the law of another state. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990); *cf.* TEX. BUS. & COM. CODE § 1.301(a) ("[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."). While we recognize that parties "cannot require that their contract be governed by the law of a jurisdiction which has *no relation whatever* to them or their agreement," *DeSantis*, 793 S.W.2d at 677 (emphasis added), both Texas and New York bear some relation to the parties and the agreements at issue in this case. ExxonMobil is now headquartered in Texas, and Drennen worked in Houston when he executed both Incentive Program agreements. But Drennen spent three years of his career working for ExxonMobil in its New York City office in the mid-1980s. Additionally, ExxonMobil's outside counsel is a New York law firm. Finally, the subject-matter of the transaction—XOM shares—are traded on the New

York Stock Exchange and are valued based on the average of the high and low price of the shares as reported on the consolidated tape at the New York Stock Exchange in New York City.

In *DeSantis v.Wackenhut Corp.*, we adopted Restatement section 187, which provides the framework for determining whether the parties' agreement as to choice of law is enforceable.[2] *See* 793 S.W.2d at 677–78; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187. Section 187(2) provides:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

We have already explained that some relationship exists between the parties and agreements in this case and their chosen jurisdiction. Nowhere does the Restatement define "substantial relationship," nor have we defined the term. The comments to the Restatement do indicate, however, that parties will be held to their choice when "the state of the chosen law [has] a sufficiently close

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[2] Section 187 has two subparts. However, the parties do not argue that section 187(1) applies. Section 187(1) provides that the law of the chosen state governs if the particular issue to be decided is one which the parties could have explicitly resolved in their agreement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1). This Court held in *DeSantis* that the issue of whether a non-compete agreement is enforceable is not a question the parties could have resolved by explicit provision, so section 187(1) does not apply. *See* 793 S.W.2d at 678.

relationship to the parties and the contract to make the parties' choice reasonable." *Id.* § 187 cmt. f. Even when a relationship is not substantial, the parties may be held to the chosen state's law when they had a reasonable basis for their choice, such as choosing law they know well or that it is well developed. *Id.* Here, ExxonMobil claims that the choice of New York law was reasonable because it assures uniformity, certainty, and predictability in the application of its Incentive Programs. ExxonMobil provided affidavit testimony that New York law was chosen to govern its incentive agreements for three reasons: (1) ExxonMobil provides incentive awards to large numbers of employees in many states and countries, many of whom move throughout their careers, so consistency is required to administer the Incentive Programs; (2) New York has a well-developed and clearly defined body of law regarding employee stock and incentive programs; and (3) ExxonMobil's stock is listed on the New York Stock Exchange, and New York—as home of the Stock Exchange—has a well-developed and predictable body of law regarding a wide variety of financial transactions, securities, and securities-related transactions, making it a routine choice of law for parties to stock-related transactions and agreements. Indeed, the Restatement recognizes that the prime objectives of contract law—protecting parties' expectations and enabling parties to predict accurately what their rights and liabilities will be—are best furthered, and certainty and predictability of result most likely to occur, when parties to multistate transactions can choose the governing law. *Id.* § 187 cmt. e. Further, "[c]ontracts are entered into for serious purposes and rarely, if ever, will the parties choose a law without good reason for doing so." *Id.* § 187 cmt. f. Under the circumstances of this case, we conclude that section 187(2)(a) of the Restatement does not preclude application of New York law.

We must next determine, in accordance with the three-step approach set forth in *DeSantis*, 793 S.W.2d at 678, whether Drennen and ExxonMobil's choice of New York law is enforceable under section 187(2)(b) of the Restatement.

1. Most Significant Relationship

The first determination of Restatement section 187(2)(b) is "whether there is a state the law of which would apply under section 188 of the Restatement absent an effective choice of law by the parties." *DeSantis*, 793 S.W.2d at 678. This inquiry evaluates "whether a state has a more significant relationship with the parties and their transaction than the state they chose." *Id.* Thus, in *DeSantis* we considered whether the relationship of the transaction and parties to Texas was clearly more significant than their relationship to the chosen state, taking into account such factors as the locations of the parties, the location of negotiations of the agreement, the location of the execution of the agreement, and the place of performance. *See id.* at 678–79. Here, the parties are both located in Texas, as ExxonMobil is headquartered in Irving and Drennen is a Houston resident; the negotiations, if any, took place in Houston, as did the execution of the Incentive Program agreements; and the performance of the contract took place in Houston, Drennen's place of employment, and in Irving, at ExxonMobil's headquarters. However, ExxonMobil is a multi-national corporation with a presence in New York.[3] Additionally, as discussed above, Drennen spent

[3] *See, e.g.*, *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 604–06 (1991) (detailing Exxon's business dealings in New York); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 78–88 (2d Cir. 2013) (detailing ExxonMobil's conduct in New York leading to liability for environmental contamination), *cert. denied sub nom. Exxon Mobil Corp. v. City of New York*, 134 S. Ct. 1877 (2014); *Exxon Corp. v. Duval Cnty. Ranch Co.*, 406 F. Supp. 1367, 1368 (S.D. Tex. 1975) (explaining that, at the time, Exxon maintained its principal place of business in the State of New York).

three years of his career with ExxonMobil working in its New York City office. While the transaction and parties bear relations to both states, weighing the respective interests between New York and Texas, we conclude that the relationship of the transaction and parties to Texas is more significant than their relationship to New York. *See id.* at 679.

2. Materially Greater Interest

Under the Restatement, if Texas does not have a materially greater interest than New York in the determination of this particular issue, it is immaterial whether the application of New York law here would be contrary to a fundamental policy of Texas. *See id.* at 679. The next step in the analysis, then, is determining whether Texas has a materially greater interest in the determination of whether the detrimental-activity provisions are enforceable. *Id.*

In *DeSantis*, we considered both the specific facts of the case and the agreement's potential impact on the employee to determine whether Texas had a materially greater interest than did Florida, the chosen state. *See id.* Wackenhut, the employer, was headquartered in Florida, and the parties chose the law of Florida to govern the non-compete. *Id.* at 675. We recognized that Florida shared an interest with Texas in protecting the justifiable expectations of entities doing business in several states and noted that Florida had a direct interest in the enforcement of the agreement in protecting a national business headquartered in Florida. *Id.* at 679. However, we noted that Texas was directly interested in: (1) DeSantis—as an employee in Texas; (2) Wackenhut—as a national employer doing business in Texas; (3) the new business DeSantis formed in Texas in violation of the non-compete; and (4) consumers of the services in Texas. *Id.* We ultimately held that Texas clearly had a materially greater interest in whether the agreement should be enforced. *Id.*

Here, ExxonMobil argues that Texas has no "materially greater interest" in the enforceability of the forfeiture conditions than New York because New York law was chosen for uniformity and predictability. The weight of the interests involved in *DeSantis* appear very similar to those involved here. So while New York shares with Texas a general interest in protecting the justifiable expectations of entities doing business in several states, that does not outweigh Texas's interests in this transaction. Having concluded in *DeSantis* that Texas had a materially greater interest in enforcement of the agreement than Florida when the employer at issue was Floridian, *see* 793 S.W.2d at 679, we must conclude that Texas has a materially greater interest than New York here, where both the employee and the employer are Texas residents. The second step of the analysis weighs in favor of Texas.

3. Contrary to Fundamental Policy

The final step in the analysis is determining whether the application of New York law would be contrary to a fundamental policy of Texas. *Id.* at 678; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b). In *DeSantis*, we recognized that neither this Court nor the Restatement has adopted a general definition of "fundamental policy," and we declined to define it then. 793 S.W.2d at 680. We determined that applying the Florida choice-of-law provision would contravene fundamental policy in Texas because the law governing enforcement of non-competes is fundamental policy in Texas, and that "to apply the law of another state to determine the enforceability of such an agreement *in the circumstances of a case like this* would be contrary to that policy." *Id.* at 681 (emphasis added). Notably, we based this reasoning, at least in part, on the desire to avoid "disruption of orderly employer-employee relations [and] competition in the marketplace."

Id. at 680. We must, then, determine whether the provisions at issue in the Incentive Programs are covenants not to compete.

In this Court's most recent decision involving a non-compete provision, *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011), we did not address this particular question because the parties agreed that the provision in question was governed by the Covenants Not to Compete Act. *See id.* at 768. We laid out a general definition for covenants not to compete: "Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and are governed by the Act." *Id.* The agreement here, arguably, does not fit within this definition as it does not "limit" Drennen's professional mobility, per se.

Looking at the facts in our prior non-compete cases, it is clear that the agreement here does not fit the mold. In *Marsh*, the employee agreed that he would not solicit or accept business of the type offered by his employer, perform or supervise any services related to that business, solicit clients, or solicit employees for a period of two years following his termination. *Id.* at 767. In another landmark non-compete case, *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642 (Tex. 1994), the employee agreed that, upon termination of employment and for one year after, she would not directly or indirectly compete with her employer in the Longview–Tyler–Kilgore–Marshall service area. *Id.* at 645 n.8. Finally, in *DeSantis v. Wackenhut Corp.*, a third historic Texas non-compete case, the employee signed an agreement that, as long as he was employed by Wackenhut and for two years thereafter, he would not compete in any way with Wackenhut in a forty-county area in south Texas. 793 S.W.3d at 675.

There is a difference, although a narrow one, between an employer's desire to protect an investment and an employer's desire to reward loyalty. Non-competes protect the investment an employer has made in an employee, ensuring that the costs incurred to develop human capital are protected against competitors who, having not made such expenditures, might appropriate the employer's investment. *Marsh*, 354 S.W.3d at 769. Forfeiture provisions conditioned on loyalty, however, do not restrict or prohibit the employees' future employment opportunities. Instead, they reward employees for continued employment and loyalty. As we recognized in *Marsh*, employee stock-ownership plans have a purpose that is unrelated to restraining competition—linking the interest of key employees with the employer's long-term success. *See id.* at 777. Under a non-compete, the former employer can bring a breach of contract suit to enforce the clause. But under a forfeiture provision, the former employer does not need to take legal action because the profit-sharing plan belongs to the employer.

In *Marsh*, we were faced with an employee stock-ownership plan with a restrictive covenant, and we held that the covenant was an enforceable non-compete. *See id.* at 766. However, the provision in *Marsh* was materially different from the provision presented here in ExxonMobil's Incentive Programs. In *Marsh*, to exercise a stock option under the plan's terms, employees were required to provide the employer with written notice that the employee was exercising his option, pay for the stock at the discounted stock price, and sign a non-solicitation agreement. *Id.* at 767. The non-solicitation agreement was held to be an enforceable non-compete. *Id.* at 766. The issue in *Marsh* was not whether the agreement was a covenant not to compete, or even whether the terms of the agreement made it unenforceable, but rather whether, under *Light* and the Texas Covenants

Not to Compete Act, the non-compete was an unenforceable contract because it did not appear to be ancillary to or part of an otherwise enforceable agreement. *Id.* at 767–68; TEX. BUS. & COM. CODE § 15.50. A divided Court held that such independent agreements are enforceable so long as the consideration for the non-compete is reasonably related to the company's interest in protecting its goodwill, vacating that part of *Light* which held that a unilateral non-compete agreement supported by consideration did not meet the requirement that the covenant be ancillary to or part of an otherwise enforceable agreement. *Marsh*, 354 S.W.3d at 775–76, 780.

Here, the detrimental activity provisions in the Incentive Programs are not like the provisions in *Marsh*, *Light*, or *DeSantis*. They are, however, similar to the provision at stake in *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381 (Tex. 1991). Haass, an accountant, begrudgingly signed a merger agreement with the accounting firm of Main Hurdmann (MH)[4] whereby he promised to compensate MH as provided for in the partnership agreement should Haass withdraw from MH and take MH clients with him.[5] *Id.* at 383. After Haass left MH, the firm sued him for breach of the partnership agreement and breach of fiduciary duty. *Id.* at 384. Haass, in response, asserted that the agreement operated in restraint of trade and as a penalty, and was thus unenforceable and counterclaimed for his capital account, which MH was holding. *Id.* The parties disagreed as to

[4] Before suit was filed, Main Hurdmann merged with another large international accounting firm to form Peat Marwick Main & Co. *Haass*, 818 S.W.2d at 382 n.1. Peat Marwick succeeded to the interest of Main Hurdman and was the party on appeal. *Id.*

[5] While Haass never signed the partnership agreement itself, the provision in the partnership agreement referenced by and incorporated in the merger agreement contained a section titled "Termination Other Than by Retirement—Payment to Firm." *See id.* at 383 n.3. That section provided that a partner is liable to the firm for the costs of acquiring the client and any fees and expenses due to the firm from such clients, should the partner (1) terminate for any reason other than retirement, and (2) within two years of leaving the firm, solicit or provide services to any current client of MH or client acquired by MH in the two years after termination. *Id.*

whether this provision was, in fact, a covenant not to compete. *Id.* at 384–85. The provision in question did not expressly prohibit Haass from providing accounting services to clients of MH and was not an express promise by Haass not to compete. *See id.* at 385–86. While we ultimately determined that the provision in *Haass* was an unreasonable restraint of trade, notably, we never concluded that the damage provision was, itself, a covenant not to compete. *See id.* at 385–87. Further, we did not provide a definition of a covenant not to compete. *See generally id.* at 385–88. The Covenants Not to Compete Act likewise does not define what it is to be a covenant not to compete. *See* TEX. BUS. & COM. CODE §§ 15.50–.52.

It is not necessary here to answer the question of what it means to be a covenant not to compete any more than it was in *Haass* or *Marsh*. Drennen did not promise to refrain from competing with ExxonMobil or refrain from soliciting clients or employees from ExxonMobil. Instead, he agreed that, in reward for his hard work and loyalty, he would receive bonus compensation in the form of stock options. One of the conditions of this bonus compensation was continued loyalty, which was not a promise on Drennen's part, but rather a power reserved to his employer should he opt into the Incentive Programs. If he chose to compete with ExxonMobil (which he did), he would forfeit the shares still in the restricted phase that were to be awarded as bonus compensation. There is a distinction between a covenant not to compete and a forfeiture provision in a non-contributory profit-sharing plan because such plans do not restrict the employee's right to future employment; rather, these plans force the employee to choose between competing with the former employer without restraint from the former employer and accepting benefits of the retirement plan to which the employee contributed nothing. *See Dollgener v. Robertson Fleet Servs.,*

Inc., 527 S.W.2d 277, 278–80 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.). Whatever it may mean to be a covenant not to compete under Texas law, forfeiture clauses in non-contributory profit-sharing plans, like the detrimental-activity provisions in ExxonMobil's Incentive Programs, clearly are not covenants not to compete.

Accordingly, we hold that, under Texas law, this provision is not a covenant not to compete. Whether such provisions in non-contributory employee incentive programs are unreasonable restraints of trade under Texas law, such that they are unenforceable, is a separate question and one which we reserve for another day. *See Haass*, 818 S.W.2d at 385–86.

Turning back to our analysis under Restatement section 187(2)(b), we can easily distinguish the current case from our holding in *DeSantis*. First and most importantly, ExxonMobil's Incentive Programs do not involve covenants not to compete. *See discussion, infra*. Second, the policy concerns regarding uniformity of law raised in *DeSantis* have changed in the past twenty-four years. *See Funk v. United States*, 290 U.S. 371, 381 (1933) ("The public policy of one generation may not, under changed conditions, be the public policy of another."). With Texas now hosting many of the world's largest corporations,[6] our public policy has shifted from a patriarchal one in which we valued uniform treatment of Texas employees from one employer to the next above all else, to one in which we also value the ability of a company to maintain uniformity in its employment contracts across all employees, whether the individual employees reside in Texas or New York. This prevents the

[6] Fifty-two of the 2014 Fortune 500 Companies maintain headquarters in Texas, placing Texas third behind California and New York's fifty-four companies. Maria Halkias, *Texas Remains Near Top for Fortune 500 Companies*, THE DALL. MORNING NEWS, June 3, 2014, *available at* 2014 WLNR 14947032.

"disruption of orderly employer-employee relations" within those multistate companies and avoids disruption to "competition in the marketplace." *DeSantis*, 793 S.W.2d at 680.

The drafters of the Restatement explained the rationale for section 187 by stating that "[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e. In multistate transactions, these prime objectives "may best be attained . . . by letting the parties choose the law to govern the validity of the contract." *Id.* Our fear in *DeSantis* that "[e]mployers would be encouraged to attempt to invoke the most favorable state law available to govern their relationship with their employees in Texas or other states," 793 S.W.2d at 680, is directly addressed by the drafters of the Restatement:

> It may . . . be objected that, if given this power of choice, the parties will be enabled to escape prohibitions prevailing in the state which would otherwise be the state of the applicable law. Nevertheless, the demands of certainty, predictability and convenience dictate that, subject to some limitations, the parties should have power to choose the applicable law.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e. As the court of appeals noted, ExxonMobil's argument, in essence, is that, "as a large, multi-national corporation, ExxonMobil has a strong interest in uniform application of its employment agreements." 367 S.W.3d at 297. Uniformity is a frequent goal of contracting, as recognized in the comments to Restatement section 187, and parties should be able to achieve that goal by choosing the applicable law. While application of Texas and New York law may reach different results on the enforceability of these particular detrimental-activity provisions—which we do not decide today—we cannot conclude that

applying New York law in such a determination is "contrary to a fundamental policy" of Texas.[7] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g ("The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law."); *see also DeSantis*, 793 S.W.2d at 680 ("[T]he result in one case cannot determine whether the issue is a matter of fundamental state policy for purposes of resolving a conflict of laws."). Because enforcement of New York law does not contravene any fundamental public policy of Texas, we are bound to enforce the parties' choice-of-law provisions and apply New York law.

B. Application of New York Law

In the Court of Appeals of New York's certified-question case of *Morris v. Schroder Capital Management International*, 859 N.E.2d 503 (N.Y. 2006), the New York high court analyzed an almost identical set of facts. As a portion of his year-end bonus, the plaintiff-employee, Paul Morris, was awarded deferred compensation bonuses for the years 1997, 1998, and 1999 that would vest in

[7] We recognize that other jurisdictions have held, as we did in *DeSantis*, that the application of another state's law which results in the enforcement of a non-competition agreement contravenes the forum state's fundamental public policy. *See Dresser Indus., Inc. v. Sandvick*, 732 F.2d 783, 787–88 (10th Cir. 1984) ("[T]he tendency of the courts [is] to apply the policy of the forum state when parties are litigating covenants not to compete."); *Nordson Corp. v. Plasschaert*, 674 F.2d 1371, 1375 (11th Cir. 1982); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham*, 658 F.2d 1098, 1100 n.5 (5th Cir. Unit A 1981); *Davis v. Jointless Fire Brick Co.*, 300 F. 1, 3–4 (9th Cir. 1924); *Muma v. Fin. Guardian, Inc.*, 551 F. Supp. 119, 121–23 (E.D. Mich. 1982); *Walling Chem. Co. v. Hart*, 508 F. Supp. 338, 340 (D. Neb. 1981); *Fort Smith Paper Co. v. Sadler Paper Co.*, 482 F. Supp. 355, 357 (E.D. Okl. 1979); *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123, 127 (S.D. Ala.1978), *aff'd per curiam*, 599 F.2d 743 (5th Cir. 1979); *Assoc. Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967, 976–78 (D.S.C. 1976); *Fine v. Prop. Damage Appraisers, Inc.*, 393 F. Supp. 1304, 1310 (E.D. La. 1975); *Boyer v. Piper, Jaffray & Hopwood, Inc.*, 391 F. Supp. 471, 473 (D.S.D. 1975); *Forney Indus., Inc. v. Andre*, 246 F. Supp. 333, 334–35 (D.N.D. 1965); *Nasco, Inc. v. Gimbert*, 238 S.E.2d 368, 369 (Ga. 1977); *Std. Register Co. v. Kerrigan*, 119 S.E.2d 533, 541–42 (S.C. 1961); *Temporarily Yours–Temp. Help Servs., Inc. v. Manpower, Inc.*, 377 So. 2d 825, 827 (Fla. Dist. Ct. App. 1979); *see also Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1031–32 (4th Cir. 1983); *Bush v. Nat'l Sch. Studios, Inc.*, 407 N.W.2d 883, 886–88 (Wisc. 1987) (suit for unfair termination). However, once again, it should be noted that this case does not involve a covenant not to compete. *See discussion infra*.

2001, 2002, and 2003. *Id.* at 505. Prior to the payments, Morris resigned and established a competing hedge fund. *Id.* The deferred compensation awards were each governed by a plan with a forfeiture provision that provided that if, before the end of the three-year vesting period, Morris resigned and took employment with a company that SIMNA, his then employer, considered to be a competitor, all deferred compensation would be forfeited. *Id.* Shortly after forming his own hedge fund, SIMNA notified Morris that he had forfeited his deferred compensation benefits by engaging in a business that competes with SIMNA. *Id.*

While recognizing that non-compete clauses in employment contracts are not favored and will be enforced only to the extent reasonable and necessary to protect valid business interests, the Court of Appeals of New York held that this forfeiture provision fell within the "employee choice" doctrine recognized in New York. *See id.* at 506. In cases where an employer conditions receipt of a benefit post-employment upon compliance with a restrictive covenant, the employee is given the choice to either preserve his rights under the contract by refraining from competition or forfeit such rights by exercising the right to compete. *Id.* Because the employee who leaves his employer voluntarily or is terminated with cause makes an informed choice between retaining the benefit by avoiding competitive employment or forfeiting his benefit by taking competitive employment, such a provision is not an unreasonable restraint upon an employee's liberty to earn a living. *See id.* When the doctrine applies, "a restrictive covenant will be enforceable without regard to reasonableness" so long as the employee voluntarily left his or her employment or was terminated for cause. *Id.* at 507; *see also Post v. Merrill Lynch, Pierce, Fenner & Smith*, 397 N.E.2d 358, 360–61 (N.Y. 1999).

Here, Drennen agreed to the detrimental-activity provisions in exchange for the receipt of additional incentive compensation, i.e., stock options. *See Int'l Bus. Mach. Corp. v. Martson*, 37 F. Supp. 2d 613, 617 (S.D.N.Y. 1999). By enrolling in the Incentive Programs, Drennen agreed that he would forfeit any outstanding awards should he engage in activity determined to be detrimental to the interest of ExxonMobil or should he accept employment with a competitor of ExxonMobil. The Incentive Programs' detrimental-activity provisions did not bar Drennen from seeking or accepting other employment, but rather gave Drennen the "choice of preserving his rights under the [Incentive Programs] by refraining from competition with [ExxonMobil] or risking forfeiture of such rights by exercising his right to compete with [ExxonMobil]." *See Lenel Sys. Int'l, Inc. v. Smith*, 966 N.Y.S.2d 618, 621 (N.Y. App. Div. 2013) (quoting *Kristt v. Whelan*, 164 N.Y.S.2d 239, 243 (N.Y. App. Div. 1957), *aff'd*, 155 N.E.2d 116 (N.Y. 1958)).

One essential element to the employee choice doctrine is the employer's "continued willingness to employ" the employee. *Morris*, 859 N.E.2d at 506 (quoting *Post*, 397 N.E.2d at 360–61). Should the employer terminate the employment relationship without cause, enforcement of the restrictive covenant is no longer reasonable. *See id.* at 506–07. If the employee left his employer voluntarily or engaged in conduct for which he was terminated for cause, a restrictive covenant will be enforceable without regard to reasonableness under the employee choice doctrine. *Id.* at 507. Here, Drennen was told by his supervisor during his annual review that his performance had suffered to the point where he would no longer continue overseeing ExxonMobil's exploration activities in the Western Hemisphere. Drennen was told that another position would be found for him within the company, but he retired four months later. Drennen made an informed choice

between forfeiting his outstanding awards or retaining the awards by avoiding competitive employment and voluntarily left his position with ExxonMobil. Therefore, under New York law, ExxonMobil lawfully terminated the outstanding awards upon Drennen's breach of the Incentive Programs and voluntary resignation from ExxonMobil. *See id.* at 507–08.

III. Conclusion

Uniformity is a worthy goal and a logical rationale for choosing New York law and is a goal recognized in the Restatement (Second) of Conflict of Laws. While Texas law may or may not permit the enforcement of these detrimental-activity provisions, New York law does. Application of New York law, resulting in the enforcement of these provisions, does not contravene any fundamental policy in Texas. Accordingly, without determining the enforceability of the detrimental-activity provisions under Texas law, we reverse the court of appeals' judgment and, applying New York law, render a take-nothing judgment for ExxonMobil in accordance with the trial court's judgment.

Paul W. Green
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0626

GARY SAWYER, DOUG KEMPF, PETER BARNABA, SR., GEOFF RORREV, TIM GREGORY, ET AL., APPELLANTS,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, APPELLEE

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

Argued February 26, 2013

CHIEF JUSTICE HECHT delivered the opinion of the Court.

Two questions certified to us by the United States Court of Appeals for the Fifth Circuit ask whether, under Texas law, at-will employees and employees subject to a collective bargaining agreement can sue their corporate employer for fraudulently inducing them to move to a wholly owned subsidiary.[1] We conclude that while an employee can sue an employer for fraud in some situations, in the context in which the certified questions arise, the answer to both is no.

[1] 689 F.3d 463 (5th Cir. 2012) (per curiam); *see* TEX. CONST. art. V, § 3-c(a) ("The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court.").

I

The factual background, which we take from the Fifth Circuit's opinion, may be summarized as follows.[2]

In February 2002, E. I. du Pont de Nemours and Company announced plans to spin off part of its operations, including its Terathane Products Unit in La Porte, into a wholly owned subsidiary, DuPont Textiles and Interiors ("DTI"). Most of the Unit employees were covered by a collective bargaining agreement ("CBA"), which gave them the right to transfer to other DuPont jobs rather than move to the new DTI subsidiary. DTI's employees were to be covered by an identical CBA and would continue to receive the same pay and benefits they had at DuPont. But the Unit employees, who had worked for DuPont many years, were afraid DuPont would sell DTI, and that such a sale would adversely affect their compensation and retirement packages. DuPont wanted the Unit employees to go to DTI to avoid significant training expenses — both for transferring employees in their new DuPont jobs and for their DTI replacements — and layoffs of people displaced by more senior transferring employees.

DuPont and the union[3] agreed that the Unit employees would be given a deadline to decide whether to move to DTI, and the fate of those who decided to stay would be subject to further bargaining. DuPont allegedly assured the Unit employees, to persuade them to move to DTI, that DuPont would keep DTI, even though, unbeknownst to the employees, DuPont had already discussed selling DTI with a potential buyer, Koch Industries. Effective February 1, 2003, almost all of the Unit employees moved to DTI. A few weeks later, on April 14, DuPont announced it was

[2] The Fifth Circuit's opinion sets out the facts in more detail. 689 F.3d at 464-467.

[3] The employees' union at the time was Local 900C, International Chemical Workers Union Council, AFL-CIO.

negotiating a sale of DTI to Koch. The sale was finalized on May 1, 2004. Koch subsequently reduced the former DuPont employees' compensation and retirement benefits.

In November 2006, 63 of the former DuPont employees ("the Employees") sued DuPont for fraudulently inducing them to terminate their employment and accept employment with DTI by misrepresenting that DTI would not be sold.[4] The Employees claim over $23 million in damages. DuPont contends that the Employees were all at will and therefore cannot sue for fraud. The 59 Employees covered by DuPont's CBA argue that they were not at will because the CBA prohibited discharge except for "just cause". DuPont responds, in part, that because the CBA could be terminated on 60 days' notice, the CBA's requirement of "just cause" for discharge did not modify the at-will status of covered employees.

The Fifth Circuit asks:

> 1. Under Texas law, may at-will employees bring fraud claims against their employers for loss of their employment?
>
> 2. If the above question is answered in the negative, may employees covered under a 60-day cancellation-upon-notice collective bargaining agreement that limits the employer's ability to discharge its employees only for just cause, bring Texas fraud claims against their employer based on allegations that the employer fraudulently induced them to terminate their employment?[5]

As usual, the Circuit has "disclaim[ed] any intention or desire that the Supreme Court of Texas

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[4] The Employees did not allege any violation of either DuPont's or DTI's CBA. In an earlier appeal, the Fifth Circuit held that the Employees' fraud claims are not preempted by either the National Labor Relations Act or the Employee Retirement Income Security Act. *E.I. du Pont de Nemours & Co. v. Sawyer*, 517 F.3d 785, 797, 800 (5th Cir. 2008).

[5] 689 F.3d at 470.

confine its reply to the precise form or scope of the questions certified."[6]

II

We begin with the first question.

"For well over a century, the general rule in this State, as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all."[7] The Legislature has created a few narrow exceptions, prohibiting, for example, discharge based on certain forms of discrimination[8] or in retaliation for engaging in certain protected conduct.[9] But Texas courts have created only one: prohibiting an employee from being discharged for refusing to perform an illegal act.[10] Otherwise, "[t]he courts of Texas have steadfastly refused to vary from [the general rule]."[11]

Thus, we have repeatedly refused to recognize common-law whistleblower liability.[12] We

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[6] *Id.*

[7] *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (citing, *e.g.*, *East Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888) (noting the general rule)). *See also* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 cmt. a (Tentative Draft No. 1, 2008) ("The courts in 49 states recognize the principle that the employment is presumptively an at-will relationship.").

[8] TEX. LAB. CODE § 21.051.

[9] *E.g.* TEX. GOV'T CODE § 437.204 (serving in the state military forces); TEX. LAB. CODE §§ 21.055 (opposing a discriminatory practice; filing a charge or complaint; or participating in an investigation, proceeding, or hearing), 101.052-.053 (being a member or nonmember of a union), 451.001 (filing a workers' compensation claim); TEX. CIV. PRAC. & REM. CODE § 122.001 (performing jury service); TEX. FAM. CODE § 158.209 (being subject to an order or writ of withholding from wages for child support).

[10] *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985).

[11] *Id.* at 734.

[12] *Winters v. Houston Chronicle Pub'g. Co.*, 795 S.W.2d 723, 724-725 (Tex. 1990); *Austin v. HealthTrust, Inc.–The Hosp. Co.*, 967 S.W.2d 400, 403 (Tex. 1998); *Ed Rachal Found. v. D'Unger*, 207 S.W.3d 330, 332-333 (Tex. 2006) (per curiam).

have refused to impose on employers a duty to exercise ordinary care in investigating employee misconduct because such a duty "would significantly damage the at-will employment relationship that Texas has so carefully guarded."[13] And we have refused to impose a duty of good faith and fair dealing on employers, noting that it would "completely alter the nature of the at-will employment relationship".[14]

We have not determined whether an at-will employee can sue his employer for fraud,[15] but the courts of appeals have dealt with the issue and have almost all held that a fraud claim cannot be based on illusory promises of continued at-will employment.[16] So uniform is Texas caselaw that the Employees in their brief "concede that it is unlikely that Texas law permits at-will employees to assert fraud claims against their employers if the claims relate to continued future employment."[17]

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[13] *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 609 (Tex. 2002).

[14] *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000).

[15] The International Chemical Workers Union Council of the United Food & Commercial Workers (ICWUC/UFCW), a union with which the Employees' union is affiliated, argues as amicus in support of the Employees that the Court allowed an at-will employee to sue for fraud in *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986). Brief of ICWUC/UFCW in Support of Appellants at 3. But the parties in that case did not argue whether a fraud action was allowed; the issue was whether there was "evidence to support the jury's finding that the employer did not intend to implement a bonus plan at the time he promised to do so." *Spoljaric*, 708 S.W.2d at 433. The Court did not consider the broader question whether an action for fraud was allowed.

[16] *See PAS, Inc. v. Engel*, 350 S.W.3d 602, 612-613 (Tex. App.–Houston [14th Dist.] 2011, no pet.); *Cahak v. Rehab Care Grp., Inc.*, No. 10-06-00399-CV, 2008 Tex. App. LEXIS 6011, at *7, 2008 WL 3112083, at *3 (Tex. App.–Waco, Aug. 6, 2008, no pet.) (mem. op.); *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 381 (Tex. App.–Houston [1st Dist.] 2007, no pet.); *Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 379-380 (Tex. App.–Houston [1st Dist.] 2005, no pet.); *Leach v. Conoco, Inc.*, 892 S.W.2d 954, 961 (Tex. App.–Houston [1st Dist.] 1995, writ dism'd w.o.j.); *Collins v. Allied Pharmacy Mgmt., Inc.*, 871 S.W.2d 929, 937 (Tex. App.–Houston [14th Dist.] 1994, no writ); *Jones v. Legal Copy, Inc.*, 846 S.W.2d 922, 925 (Tex. App.–Houston [1st Dist.] 1993, no writ); *Molder v. Sw. Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex. App.–Houston [1st Dist.] 1983, writ ref'd n.r.e.); *contrast Roberts v. Geosource Drilling Servs., Inc.*, 757 S.W.2d 48, 50 (Tex. App.–Houston [1st Dist.] 1988, no writ) ("[i]t is no answer that the parties' written contract was for an employment-at-will, where the employer foreseeably and intentionally induces the prospective employee to materially change his position to his expense and detriment").

[17] Appellants' Brief at 18.

This does not mean that at-will employees can never sue for fraud. Recovery of expenses incurred in reliance on a fraudulent promise of prospective employment has been allowed because neither the injury nor the recovery depends on continued employment.[18] The distinction is similar to one we have drawn in determining whether an at-will employee's contract with his employer is valid. "At-will employment does not preclude employers and employees from forming subsequent contracts, 'so long as neither party relies on continued employment as consideration for the contract.'"[19] An employer and employee may agree, for example, to arbitrate their disputes,[20] or for reasonable restrictions on post-discharge competition,[21] as long as other consideration is given. But if the employer or employee can avoid performance of a promise by exercising a right to terminate the at-will relationship, which each is perfectly free to do with or without reason at any time, the promise is illusory and cannot support an enforceable agreement.[22]

Such an illusory promise can no more support an action for fraud than one for breach of

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[18] *See Halper v. Univ. of the Incarnate Word*, 90 S.W.3d 842, 847 (Tex. App.–San Antonio 2002, no pet.) (even assuming employment was at will, an "at-will" defense was unavailable because the employee's fraud claim was based on a representation made before his employment began); *Offshore Petroleum Divers, Inc. v. Cromp*, 952 S.W.2d 954 (Tex. App.–Beaumont 1997, pet. denied). The *Offshore Petroleum* court stated that "the cause of action for fraud, which encompasses misrepresentations made before employment, *as well as those made during employment*, is not barred by the employment at will doctrine." *Id.* at 956 (emphasis added). The Fifth Circuit read the emphasized language as authority for an at-will employee's fraud action based on continued employment, 689 F.3d at 468, but *Offshore Petroleum* does not indicate that any recovery sought in that case was dependent on continued at-will employment.

[19] *In re 24R, Inc.*, 324 S.W.3d 564, 566-567 (Tex. 2010) (per curiam) (quoting *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003)).

[20] *Id.*

[21] *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009).

[22] *Id.*

contract. To recover for fraud, one must prove justifiable reliance on a material misrepresentation.[23] A representation dependent on continued at-will employment cannot be material because employment can terminate at any time. Nor can one justifiably rely on the continuation of employment that can be terminated at will.[24] "I will if I want to" is not fraud. And no one can claim

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[23] *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977).

[24] Section 6.05 of Tentative Draft No. 4 of the *Restatement (Third) of Employment Law* (2011) appears to support our position. The black-letter rule states:

> An employer may be subject to liability for intentionally inducing an employee or prospective employee, through knowingly false representation of fact, current intention, opinion, or law (1) to enter into, to maintain, or to leave an employment relationship with the employer, or (2) to refrain from entering into or maintaining an employment relationship with another employer.

But comment *e* adds:

> Where employees induced to resign are in at-will employment relationship and would have no cause of action had they been discharged, however, it can be presumed, in the absence of special proof, that the employees would have been discharged had they not been induced to resign. In such cases, no remedy is appropriate, beyond the possible allowance of a claim for unemployment compensation for constructive discharge.

Comment *f* notes that damages unrelated to continued employment may nevertheless be recoverable:

> An employer who is liable to an employee for an inducement through fraudulent misrepresentation is liable for pecuniary losses incurred by the employee in reliance on the misrepresentation, but not for fulfilling any promise contained in the misrepresentation. Thus, an employer is liable for the loss of opportunities or benefits that it fraudulently induces an employee to sacrifice, but not for fulfilling the fraudulent promises used to induce that sacrifice.

The accompanying illustration explains that a person fraudulently induced to leave her job in New York and move to California for a "long and lucrative career" that never materializes may recover "the costs of moving her family across the country and for other loss occasioned by her relinquishing her former position" but not "the value of the promised 'long and lucrative career'". *Id.* illus. 10.

Section 6.05 was approved by the membership of the American Law Institute at the 2011 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative. Proceedings at 88th Annual Meeting: American Law Institute, 88 A.L.I. Proc. 193-196 (2011). According to the Institute: "Once it is approved by the membership at an Annual Meeting, a Tentative Draft or a Proposed Final Draft represents the most current statement of the American Law Institute's position on the subject and may be cited in opinions or briefs . . . until the official text is published." American Law Institute, "Overview, Project Development", *available at* http://www.ali.org/index.cfm?fuseaction=projects.main (last visited April 16, 2014). We do not adopt section 6.05 as a correct statement of Texas law but cite it as consistent with our analysis.

recovery of damages for the loss of an employment relationship he had no right to continue.

To allow a promise that is contingent on continued at-will employment to be enforced in a suit for fraud would mock the refusal of enforcement in a suit for breach of contract, making the non-existence of a contract action largely irrelevant, and would significantly impair the at-will rule. An employee who could not show consideration for an enforceable contract could simply sue for fraud and recover not only the same actual damages but punitive damages as well.

As previously stated, "[a]t-will employment is an important and long-standing doctrine in Texas, and we have been reluctant to impose new common-law duties that would alter or conflict with the at-will relationship."[25] Although common-law fraud is certainly not new, allowing it to be asserted to alter or conflict with at-will employment would be. For all these reasons, we answer the Fifth Circuit's first question:[26] an at-will employee cannot bring an action for fraud that is dependent on continued employment.[27]

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[25] *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 608, 609 (Tex. 2002) (internal citations omitted) (refusing to impose on employers a duty to exercise ordinary care in investigating employee misconduct because doing so "would significantly damage the at-will employment relationship that Texas has so carefully guarded"); *see also City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) (refusing to impose on employers a duty of good faith and fair dealing because doing so would "completely alter the nature of the at-will employment relationship").

[26] The question asks whether fraud can be claimed "for loss of . . . employment." 689 F.3d at 470. We have not answered the question directly because that phrase may cause a simple "no" to be misconstrued. Our answer must be understood in light of the rationales we offer for it.

[27] Amicus ICWUC/UFCW argues that whether the Employees were at will is irrelevant because they suffered a "greater risk [of] loss of secure employment benefits than they otherwise would have risked but for [DuPont's] deceitful activity". Brief of ICWUC/UFCW in Support of Appellants at 3. In other words, there was a better chance that, had the Employees stayed at DuPont, they would not have been discharged and would have ultimately received more benefits than by moving to DTI and not being discharged there, so that the moment they chose to move in reliance on DuPont's false assurances that DTI would not be sold, they were damaged. We think such a claim would be too speculative, but regardless, it is not the claim the Employees make. They allege that as it has turned out, they have actually suffered $23 million in damages, damages dependent on continued employment. Amicus also argues that DuPont did not want to discharge the employees, but in determining whether an at-will employee can sue for fraud, the important consideration is the employer's rights, not what might or might not be its motives.

III

We turn now to the second question.

A

As noted above, 59 of the Employees contend that they were not at-will employees at DuPont because their CBA provided "that no employee will be discharged . . . except for just cause." DuPont argues that they remained at will because the CBA could be terminated for any reason on 60 days' notice. DuPont cites cases indicating that an agreement restricting discharge that is itself terminable at will does not alter at-will employment.[28] But DuPont's termination of its CBA would not have been without significant consequences. DuPont would have been required immediately to engage in new bargaining with the union, and it worried that its labor relations would be adversely affected beyond the matter of employees transferring to DTI, even to the point of a strike. Moreover, DuPont does not suggest that a new CBA would have excluded the same just-cause-for-discharge provision. Terminating the CBA might not have avoided that requirement.

But even if DuPont could have avoided the "just cause" requirement by terminating the CBA, it did not. As the Fifth Circuit concluded, "[w]hile DuPont could have begun the termination process at anytime by providing 60 days' written notice, it never did so, and therefore was unable to discharge the covered appellants except for just cause when they transferred to DTI."[29] Thus, we

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[28] *See Hussong v. Schwan's Sales Enters., Inc.*, 896 S.W.2d 320, 322 (Tex. App.–Houston [1st Dist.] 1995, no writ); *Curtis v. Ziff Energy Grp., Ltd.*, 12 S.W.3d 114, 117-118 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *see also McGee v. Abrams Tech. Servs., Inc.*, No. 01–06–00590–CV, 2008 Tex. App. LEXIS 1616, at *9, 2008 WL 597192, at *4, (Tex. App.–Houston [1st Dist.] Mar. 6, 2008, no pet.); *C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584, 591 (Tex. App.–Dallas 2003, no pet.).

[29] 689 F.3d at 470.

need not consider whether a terminable-at-will-with-advance-notice agreement modifies terminable-at-will employment. Rather, we must determine whether the CBA's "just cause" provision, which was never in fact terminated, modified the Employees' at-will status.

B

An employer and employee may modify their at-will relationship by agreement, but lest the general at-will rule be eroded, we have insisted that the parties be definite in expressing their intent.

> For such a contract to exist, the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances. General comments that an employee will not be discharged as long as his work is satisfactory do not in themselves manifest such an intent. Neither do statements that an employee will be discharged only for "good reason" or "good cause" when there is no agreement on what those terms encompass. Without such agreement the employee cannot reasonably expect to limit the employer's right to terminate him. An employee who has no formal agreement with his employer cannot construct one out of indefinite comments, encouragements, or assurances.[30]

DuPont argues that "just cause" is not defined in the CBA or elsewhere and therefore that the "just cause" provision did not alter the employment relationship.

But "just cause" in the CBA is not the kind of amorphous assurance to which we referred. The CBA treats the concept as assertable, determinable, and consequential.

> An employee, who believes he has been unjustly discharged, shall be allowed ten (10) calendar days, from the date of notification of discharge, in which to register a complaint with [DuPont]. A complaint alleging an unjust discharge may be processed under Article VI, Adjustment of Grievances, beginning with the third step; or under Article VII, Arbitration; or both. If it is agreed or determined that an employee has been unjustly discharged, [DuPont] will reinstate without loss of seniority and compensate such employee for lost earnings at his regular rate of pay based on his regular work schedule in effect prior to the discharge, provided, however, such period of payment shall not exceed six (6) months.

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[30] *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998).

The CBA provides that at the "third step" of the grievance procedure, a grievance shall be considered by a DuPont committee and a union committee, decided within 40 days of the "third step" meeting, and — for all written grievances — answered in writing. If a grievance is arbitrated instead, the CBA requires the parties to agree on "the issue to be arbitrated" or, failing that, to submit written statements setting out the question for arbitration and other matters involved. The arbitration decision is final and binding on DuPont, the union, and the employee.

The last point is most important: the parties agreed in the CBA that the requirement that discharge be only for "just cause" can be given the force of law among all those affected. Under either procedure, or both, if "it is agreed or determined that an employee has been unjustly discharged," the CBA provides that DuPont "will reinstate" the employee. The CBA thus modified the Employees' at-will employment relationship.

C

The question remains whether the Employees, subject to a CBA that allowed discharge only for just cause, can sue for having been fraudulently induced to transfer to DTI by DuPont's statements that it would not sell DTI, resulting in a change in their benefits. The Employees argue that we answered this question in *Johnson & Johnson Medical, Inc. v. Sanchez*.[31] There, Sanchez, an employee covered by a CBA, alleged that her employer promised to call her back to work after an on-the-job injury but never did.[32] We held that Sanchez could not recover for fraud because she "did not present any evidence that she relied to her detriment on any representation made by Johnson

[31] 924 S.W.2d 925 (Tex. 1996).

[32] *Id.* at 927.

& Johnson, such as turning down other offers of employment. Indeed, Sanchez obtained other employment during the period in question."[33] The Employees argue that we recognized that an employee like Sanchez can sue for fraud with supporting evidence.

The Employees over-read *Johnson & Johnson*. The parties there did not argue, and we did not consider, the general availability of a fraud action to an employee covered by a CBA. Our analysis was limited to an assessment of the evidence in that case. Importantly, we did not consider the terms of the CBA, whether it modified Sanchez's at-will employment, and whether her complaints invoked any contractual remedy. Those considerations in the present case are crucial.

DuPont argues that the Employees' complaint that they were fraudulently induced to terminate their employment with DuPont is one for constructive discharge; that such constructive discharge would have been without just cause; that the Employees agreed in the CBA to the remedies for discharge without just cause, namely, reinstatement and up to six months' lost wages; and that their agreement forecloses an action for fraud. We agree. The Employees object that they were not discharged, indeed, that DuPont wanted them to stay at their jobs. But DuPont wanted them to leave its employ and move to DTI, a separate entity, which as the Employees feared, could be, and was, sold. Their employment at DuPont terminated. And if that termination was fraudulently induced, it was tantamount to discharge, which DuPont concedes would have been without just cause.

[33] *Id.* at 930.

In *City of Midland v. O'Bryant*, we refused to impose on employers a common-law duty of good faith and fair dealing.[34] For employees not at will but under contract, we reasoned that "such a duty would be unnecessary when there are express contractual limits on an employer's right to terminate."[35] To allow a fraud action when the Employees had a contractual remedy would not only be unnecessary, it would defeat the parties' bargain. An employee discharged for refusing to go to DTI would clearly have been limited to his remedies under the CBA. To allow an employee fooled into going to DTI to recover for fraud would defeat the CBA. The Employees argue that it would contravene public policy to allow an employer to benefit from its duplicity, but public policy is not better served by allowing contracting parties to circumvent their agreement. In this case, both DuPont and the Employees must be held to the CBA.[36]

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[34] 18 S.W.3d 209, 216 (Tex. 2000).

[35] *Id.*

[36] We are unable to discern the position of Tentative Draft No. 4 of the *Restatement (Third) of Employment Law* (2011) on this matter. Comment *e* to Section 6.05 states:

> An employer's fraudulent inducement of an employee to leave an employment relationship with the employer may be tortious, even though the employer would have been subject to no more than a contract action had it discharged the employee directly. An employer may want to induce an employee to resign, rather than to discharge her, because the employee may be protected from discharge by her employment contract or by external law. By inducing a resignation the employer may attempt to minimize the chances that the employee will assert any legal right against the employer. A fraudulently induced resignation may be treated as a constructive discharge subject to challenge under any right of the employee against wrongful discharge, but a fraudulently induced resignation may prevent the former employee from learning that she may have a right of action to challenge a discharge. A fraudulent inducement of a resignation thus may be tantamount to the fraudulent inducement of a waiver of a right of action. The remedy for the fraudulent inducement of a resignation therefore may include not only the revival of any independent cause of action for constructive discharge, but also appropriate tort remedies for any pecuniary loss from the delay in commencing the action.

The comment seems to say that a fraudulently induced termination may be treated either as a tort or as constructive discharge in violation of contractual rights. To the extent the comment indicates that an employee who has agreed to remedies for discharge without just cause can avoid that agreement by suing for fraud, we disagree.

The Employees argue that we should look to federal labor policies in deciding whether they can sue for fraud, but that is not our place. The Fifth Circuit has asked only for our interpretation of Texas law. DuPont's CBA required that "[a]n employee, who believes he has been unjustly discharged, shall be allowed ten (10) calendar days, from the date of notification of discharge, in which to register a complaint". The requirement would be excused by any fraud by DuPont, but only for a reasonable time after it became apparent that DTI would be sold. Whether the Employees' rights under the CBA have been lost is a matter we leave for the Fifth Circuit.

We agree with the Employees that we should not answer the Fifth Circuit's second question broadly. Our answer is: in the situation presented, no.

Nathan L. Hecht
Chief Justice

Opinion issued: April 25, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0636

IN RE MELISSA BLEVINS, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

This original proceeding arises from an order in a Suit Affecting the Parent-Child Relationship (SAPCR). The order transferred possession of two children who had been living with foster parents to the children's father. The foster parents assert that the trial court abused its discretion by transferring possession and seek a writ of mandamus directing the trial judge to set aside the order. However, because the trial judge who signed the order has recused from the case, we abate the proceedings in this Court. We direct the trial judge now presiding over the case to consider the matters underlying the challenged order and determine whether the challenged order should remain in effect, be modified, or be set aside, and to render its own order accordingly. The trial judge is not limited to considering only evidence on which the order was based.

In February 2010, the Department of Family and Protective Services placed siblings R.M.R. and A.L.R. in foster care with Melissa Blevins and her husband. After placing the children with the Blevinses, the Department worked extensively with the children's biological parents to help them

regain custody, but the efforts failed. Mother relinquished her parental rights and Father was arrested in December 2010 and deported to Mexico.

On August 8, 2011, the trial judge signed a Final Order in the SAPCR. In that order were findings that appointment of Father as managing conservator would not be in the best interests of the children. The order appointed the Department as Permanent Managing Conservator and Father as Possessory Conservator. Father's possession of and access to the children was limited to supervised visitation.

On October 12, 2011, the trial court held a placement review hearing. Following that hearing, the court signed an order approving placement of the children with their paternal grandparents, subject to favorable criminal history checks and good health certificates. The order did not change the conservatorship provisions of the August 8, 2011 Final Order. Another placement review hearing was set for April 4, 2012.

On December 20, 2011, Blevins intervened. She requested that she be appointed sole managing conservator and that the children not be removed from Tarrant and Somervell counties.

On March 7, 2012, the Department filed a petition seeking modification of the August 8, 2011 Final Order. The petition alleged that the appointment of Father and his mother as joint managing conservators was in the best interests of the children. Both Father and his mother resided in Mexico.

On March 29, 2012, the trial court signed a temporary restraining order (TRO) directing the Department not to remove the children from Tarrant or Somervell counties. The order set a hearing

for April 4, 2012 to determine whether the TRO should be made into a temporary injunction pending final hearing.

The April 4 hearing purported to be a placement review hearing, as well as a hearing on Blevins's motion for additional temporary orders, her motion to vacate an ex parte order, her request for a TRO, and the Department's petition to modify conservatorship. However, the April 16, 2012 order signed by the trial judge is entitled, "Order Denying Temporary Restraining Order." This order only (1) denied Blevins's request for a temporary injunction and (2) ordered the children to be placed with Father "in accordance with the prior order of this Court." However, no prior order placed them with Father. The trial judge subsequently recused from the case and a replacement judge was assigned.

Blevins asks this Court to issue a writ of mandamus directing the current trial judge to vacate the April 16, 2012 order placing the children with Father.

Although a particular respondent is not critical in a mandamus proceeding, the writ must be directed to someone. *In re Schmitz*, 285 S.W.3d 451, 454 (Tex. 2009). And generally a writ will not issue against one judge for what another did. *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008). Thus, in an original proceeding where the judge who signed the order at issue has "cease[d] to hold office," an appellate court "must abate the proceeding to allow the successor to reconsider the original party's decision." TEX. R. APP. P. 7.2. However, because the trial judge who signed the order being attacked in this case has not ceased to hold office, but has only recused from further participation in the case, it is not clear that Rule 7.2 applies. The courts of appeals are split on the matter.

The Corpus Christi Court of Appeals has held that Rule 7.2 does not apply in cases where a judge has recused, and thus abatement is not mandatory. *In re Guerra*, 235 S.W.3d 392 (Tex. App.—Corpus Christi 2007, orig. proceeding). There, the court treated the successor judge as the new respondent and proceeded to address the mandamus petition on its merits. *Id*. at 402-05.

In similar situations, the Waco Court of Appeals has denied the mandamus petitions. *In re Toups Law Firm*, No. 10-10-00226-CV, 2010 WL 3911420 (Tex. App.—Waco Oct. 6, 2010, orig. proceeding) (mem. op.); *In re Shellhorse*, No. 10-10-00111-CV, 2010 WL 2706115 (Tex. App.—Waco July 7, 2010, orig. proceeding) (mem. op.). In *Toups Law Firm* and *Shellhorse*, the court of appeals substituted the successor judge as the respondent, but denied the mandamus petition because it "would be premature" to compel the successor judge to take any action before having an opportunity to review the relator's complaint. 2010 WL 3911420, *2; 2010 WL 2706115, *1.

The Austin Court of Appeals has proceeded in yet another way. It has determined that abatement is more appropriate than the approaches taken by the courts in *Guerra*, *Toups Law Firm*, and *Shellhorse*. *See In re Gonzales*, 391 S.W.3d 251 (Tex. App.—Austin 2012, orig. proceeding). In *Gonzales* the court of appeals based its action on Rule 7.2's underlying policy that a successor judge should be afforded an opportunity to rule on the matter being challenged before a mandamus petition will be entertained. *Id.* at 252. The court abated the mandamus proceeding and instructed the successor judge to prepare and send back his ruling on the underlying case. *Id.*

We conclude that under circumstances such as those before us, appellate courts should either deny the petition for mandamus, as was done in *Toups Law Firm* and *Shellhorse*, or abate the proceedings pending consideration of the challenged order by the new trial judge, as was done in

Gonzales. Because mandamus is a discretionary writ, the appellate court involved should exercise discretion to determine which of the two approaches affords the better and more efficient manner of resolving the dispute.

In the matter before us, neither party has raised the issue of whether the new judge should have the opportunity to reconsider the order placing the children with Father. But, given the current posture of the case, we conclude that the better and more efficient approach is to abate the proceedings in this Court instead of denying the petition. Accordingly, we do so. We direct the trial judge assigned to the case to take whatever actions and hold whatever hearings it determines are necessary for it to reconsider the April 16, 2012 order and those matters underlying it. We do not intend to limit the trial court to considering only the evidence on which the April 16, 2012 order was based.

The trial court is directed to proceed in accordance with this opinion and, subject to any requests for extension of time by that court, cause its order on reconsideration of the April 16, 2012 order to be filed with the clerk of this Court no later than December 20, 2013.

OPINION DELIVERED: November 1, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0661

EWING CONSTRUCTION COMPANY, INCORPORATED, PETITIONER,

v.

AMERISURE INSURANCE COMPANY, RESPONDENT

ON CERTIFIED QUESTION FROM THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued February 27, 2013

JUSTICE JOHNSON delivered the opinion of the Court.

This case comes to us from the United States Court of Appeals for the Fifth Circuit on certified questions. The controversy centers on the contractual liability exclusion in a Commercial General Liability (CGL) insurance policy. The certified questions are:

> 1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.
>
> 2. If the answer to question one is "Yes" and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of contract."

Ewing Constr. Co. v. Amerisure Ins. Co., 690 F.3d 628, 633 (5th Cir. 2012). We answer the first question "no" and do not answer the second.

I. Background

In 2008, Ewing Construction Company, Inc. (Ewing) entered into a standard American Institute of Architects contract with Tuluso-Midway Independent School District (TMISD) to serve as general contractor to renovate and build additions to a school in Corpus Christi, including constructing tennis courts. Shortly after construction of the tennis courts was completed, TMISD complained that the courts started flaking, crumbling, and cracking, rendering them unusable for their intended purpose of hosting competitive tennis events. TMISD filed suit in Texas state court against Ewing and others[1] (the underlying suit). Its damage claims against Ewing were based on faulty construction of the courts and its theories of liability were breach of contract and negligence.[2]

[1] TMISD sued LaMarr Womack Associates, as design architects; Jaster-Quintanilla San Antonio, L.L.P., as structural engineer; Ewing as construction contractor; and Liberty Mutual Insurance Company and Liberty Mutual Insurance Group (collectively, Liberty Mutual) as issuer of a performance bond conditioned on Ewing's "faithful performance of the work in accordance with the plans, specifications, and contract documents." Specifically, its pending claims against Liberty Mutual in the underlying suit are as follows:

> Defendant Ewing has not performed the work using ordinary care and has not performed the work in accordance with the plans, specifications, and contract documents and has breached its contract, resulting in damage to Plaintiff. Therefore Plaintiff is entitled to call upon Liberty Mutual Insurance Company, and, alternatively, Liberty Mutual Group, [I]nc., for payment of all sums for which Defendant Ewing has liability to Plaintiff, (including all damages, costs and fees), growing out of the non-performance of the work under the contract in question. Plaintiff seeks recovery from the Liberty Mutual Defendants all sums claimed against Ewing Construction Company in this Petition.

[2] TMISD first sued Ewing for violation of the Texas Deceptive Trade Practices Act, *see* TEX. BUS. & COM. CODE §§ 17.01–.926, and common law misrepresentation in addition to its breach of contract and negligence claims. It omitted those claims in amended pleadings.

Ewing tendered defense of the underlying suit to Amerisure Insurance Company, its insurer under a commercial package policy that included CGL coverage. Amerisure denied coverage,[3] prompting Ewing to file suit in the U.S. District Court for the Southern District of Texas. There, Ewing sought a declaration that Amerisure had, and breached, duties to defend Ewing and indemnify it for any damages awarded to TMISD in the underlying suit. Based on its claims that Amerisure had those duties and breached them, Ewing also sought relief under Chapter 542 of the Texas Insurance Code (the Prompt Payment of Claims Act) and attorney's fees. Amerisure answered and counterclaimed, seeking a declaration that it owed Ewing neither a duty to defend nor a duty to indemnify. Amerisure did not deny that Ewing established coverage under the policy's insuring agreements; rather, it urged that policy exclusions, including the contractual liability exclusion, precluded coverage and negated its duties to defend and indemnify. On cross motions for summary judgment, the district court denied Ewing's motion, granted Amerisure's motion based on the contractual liability exclusion, and entered a final judgment dismissing the entire case.

The district court's analysis relied in large part on *Gilbert Texas Construction, L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118 (Tex. 2010), in which this Court interpreted the contractual liability exclusion in a CGL policy. *Ewing Constr. Co. v. Amerisure Ins. Co.*, 814 F. Supp.2d 739, 746-48 (S.D. Tex. 2011). The district court determined that *Gilbert* "stands for the proposition that the contractual liability exclusion applies when an insured has entered into a contract and, by doing so, has assumed liability for its own performance under that contract." *Id.*

[3] Although the certified questions reference only the contractual liability exclusion, Amerisure asserts that it reserved its rights as to and refused to defend on the basis of several exclusions.

at 747. The court concluded that TMISD's pleadings showed Ewing assumed liability for its own construction work pursuant to the contract such that it would be liable for failing to perform under the contract if the work was deficient. *Id*. The court concluded that the CGL policy's contractual liability exclusion applied to exclude coverage. *Id.* at 747-48. The court further held that the exception to the exclusion was not applicable because TMISD's claims against Ewing sounded only in contract, not tort, and did not entail liability for damages "the insured would have in the absence of the contract." *Id.* at 752. The court concluded that Amerisure had no duty to either defend or indemnify TMISD in the underlying suit. *Id.* at 752-53.

On appeal, the Fifth Circuit, in a 2-1 opinion, initially affirmed the district court's judgment on the duty to defend but vacated and remanded with respect to the duty to indemnify and the related Prompt Payment of Claims Act issue to await the results of the underlying suit. *Ewing Constr. Co. v. Amerisure Ins. Co.*, 684 F.3d 512 (5th Cir. 2012), *withdrawn by*, 690 F.3d 628 (5th Cir. 2012). Ewing petitioned for rehearing, and the Fifth Circuit withdrew its opinion and certified the above questions to this Court. *Ewing Constr. Co.*, 690 F.3d at 633.[4]

Under its CGL policy, Amerisure assumed two duties, subject to the policy terms, limitations, and exclusions: (1) the duty to defend suits seeking damages from Ewing for an event potentially covered by the policy, and (2) the duty to indemnify Ewing by paying covered claims and judgments against it. *See D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009). We have characterized these two duties as "distinct and separate" in that one may exist

[4] We have jurisdiction under Article 5 of the Texas Constitution and TEX. R. APP. P. 58.1.

without the other. *Id.* (quoting *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004)). We first consider the duty to defend.

II. Duty to Defend

A. Standard of Review and Burden of Proof

Texas courts follow the eight corners rule in determining an insurer's duty to defend. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 380 (Tex. 2012). Under that rule, courts look to the facts alleged within the four corners of the pleadings, measure them against the language within the four corners of the insurance policy, and determine if the facts alleged present a matter that could potentially be covered by the insurance policy. *Id.* The factual allegations are considered without regard to their truth or falsity and all doubts regarding the duty to defend are resolved in the insured's favor. *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). In reviewing the pleadings and making the foregoing determinations, courts look to the factual allegations showing the origin of the damages claimed, not to the legal theories or conclusions alleged. *See Evanston*, 370 S.W.3d at 380; *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) (per curiam).

The insured has the initial burden to establish coverage under the policy. *Gilbert*, 327 S.W.3d at 124. If it does so, then to avoid liability the insurer must prove one of the policy's exclusions applies. *Id.* If the insurer proves that an exclusion applies, the burden shifts back to the insured to establish that an exception to the exclusion restores coverage. *Id.*

B. The Underlying Suit and the Exclusion

The relevant allegations in TMISD's live pleading in the underlying suit are as follows. Ewing contracted with TMISD to build tennis courts and Ewing subcontracted all or part of the construction work. Shortly after construction was completed, "[s]erious tennis court cracking and flaking problems began . . . and have continued since. Chunks of the court surfaces are coming loose. Flaking, crumbling, and cracking make the courts unusable for their intended purpose, competitive tennis events." With respect to Ewing, TMISD claims damages on both contractual and negligence theories of liability:

> 20. Defendant Ewing Construction has breached its contractual commitments, proximately causing damages to Plaintiff. On information and belief, Plaintiff says that Defendant Ewing and/or its subcontractors breached its contract in the following respects:
>
> a) Failing to complete construction in accordance with the contract plans and specifications;
> b) Failing to exercise ordinary care in the preparation, management and execution of construction;
> c) Failing to perform in a good and workmanlike manner; and
> d) Failing to properly retain and supervise subcontractors.
>
> 21. Furthermore, Defendant Ewing Construction and/or its subcontractors was/were guilty of negligence proximately causing damages to Plaintiff in the following respects:
>
> a) Failing to properly prepare for and manage the construction;
> b) Failing to properly retain and oversee subcontractors;
> c) Failing to perform in a good and workmanlike manner; and
> d) Failing to properly carry out the construction so that it was completed in accordance with the plans and specifications.

TMISD further generally alleges that Ewing was negligent by breaching its duty to use ordinary care in the performance of its contract.

Amerisure's policy provides that the insurance applies to

> "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [and] (2) The "bodily injury" or "property damage" occurs during the policy period . . . .
>
> Exclusion 2(b)—the contractual liability exclusion—and its exceptions are as follows:
>
> **2. Exclusions**
> This insurance does not apply to:
>
> . . .
>
> **b. Contractual Liability**
>
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> **(1)** That the insured would have in the absence of the contract or agreement; or
>
> **(2)** Assumed in a contract or agreement that is an "insured contract" . . . .

Amerisure does not dispute that the alleged defects in the tennis courts occurred during the policy period and constitute "property damage" caused by an "occurrence" within the scope of the policy's insuring agreement.

In *Gilbert* this Court interpreted a CGL policy's contractual liability exclusion and exception that were substantively the same as those in Amerisure's policy. There, the dispute concerned whether the insurer was obligated to indemnify its insured. We held that under the facts in that case there was no coverage because the exclusion applied and the exception did not. *Gilbert*, 327 S.W.3d at 121. Although this case involves both duties to defend and to indemnify, *Gilbert*'s interpretation of the contractual liability exclusion guides our determination.

C. *Gilbert*

In *Gilbert* we addressed: (1) whether a CGL policy's contractual liability exclusion applied to exclude indemnity coverage for a third party's property damage claim where the only basis underlying the claim was the insured's contractual agreement to be responsible for the damage, and (2) if the exclusion applied, whether an exception to the exclusion operated to restore coverage. *Id.* The underlying suit in *Gilbert* involved an agreement for Gilbert Texas Construction, L.P., as general contractor, to build a light rail system for the Dallas Area Rapid Transit Authority (DART). *Id.* at 121-22. The contract between DART and Gilbert required Gilbert to protect adjacent property and to repair or pay for damage to any such property resulting from either (1) a failure to comply with the requirements of the contract, or (2) a failure to exercise reasonable care in performing the work.[5] During construction, heavy rain caused flooding to a building adjacent to the work site. The building's owner, RTR, sued Gilbert and others alleging various theories of liability including statutory violations, tort, and breach of contract as a third-party beneficiary of Gilbert's contract with DART. *Id.* Gilbert tendered defense of the underlying suit to its CGL insurers, but Underwriters, its excess carrier, refused to defend. *Id.* at 122-23. Gilbert asserted sovereign immunity as a defense in the underlying suit and the trial court granted summary judgment dismissing all RTR's claims except for the breach of contract claim. *Id.* at 123. Gilbert later settled the breach of contract claim

[5] Provision 10(b) of the contract was as follows:

> b. The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site and (2) on adjacent property of a third party . . . [and] repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, [DART] may have the necessary work performed and charge the cost to the Contractor.

and sought indemnity from Underwriters. *Id.* Underwriters claimed that the policy's contractual liability exclusion applied and the breach of contract claim was excluded from coverage. *Id.*

On appeal, Gilbert argued that the contractual liability exclusion applied only in the limited situation in which the insured "assumes *another's* liability," such as that assumed in indemnity or hold-harmless agreements. *Id.* at 128 (emphasis added). We disagreed, noting that "had it been intended to be so narrow as to apply *only* to an agreement in which the insured assumes liability of another party by an indemnity or hold-harmless agreement, it would have been simple to have said so." *Id.* at 127.

We analyzed the exclusion by first addressing the terms in the policy: the commonly understood meaning of the term "assume" is to "undertake" and that of "liability" is "[t]he quality or state of being legally obligated or accountable." *Id.* With those terms in mind, we examined the specific facts, circumstances, and obligations in the underlying suit to determine whether the exclusion applied. *Id.*

Gilbert owed RTR a duty under general law to conduct its construction operations with ordinary care so as not to damage RTR's property. *Id.* In Gilbert's contract with DART, though, it undertook a specific contractual obligation to repair or pay for damage to third-party property resulting from either (1) a failure to comply with the requirements of the contract, *or* (2) a failure to exercise reasonable care in performing the work. *Id.*; *see* n.5, *supra*. The second obligation—to exercise reasonable care—mirrored Gilbert's duty under general law principles that would have made it liable for damages it negligently caused RTR. *Gilbert*, 327 S.W.3d at 127. Thus, because Gilbert's contractual liability for damages to RTR for failing to exercise ordinary care in performing

its work would not have differed from its liability for damages to RTR under general principles of law–such as negligence–Gilbert did not assume liability for damages in its contract under the second obligation sufficient to trigger the policy's contractual liability exclusion. *See id.*

But the first obligation Gilbert assumed—to repair or pay for damage to property of third parties such as RTR "resulting from a failure to comply with the requirements of this contract"—extended "*beyond* Gilbert's obligations under general law." *Id.* (emphasis added). Thus, we held that RTR's breach of contract claim "was founded on an obligation or liability contractually assumed by Gilbert within the meaning of the policy exclusion." *Id.* In other words, Gilbert did not contractually assume liability for damages within the meaning of the policy exclusion unless the liability for damages it contractually assumed was greater than the liability it would have had under general law–in Gilbert's case, negligence. We then considered whether the exception to the exclusion brought Gilbert's liability to RTR back into coverage. *Id.* at 133-35. In doing so we recognized that the case involved "unusual circumstances" because Gilbert ordinarily could have been liable in tort for damages to RTR absent its contract, but under the facts of the case, the only basis for Gilbert's liability to RTR was RTR's claim for Gilbert's breach of the contract with DART. *Id.* We held that the exception was inapplicable because Gilbert's only liability for damages was for breach of contract. *Id.* at 135. Because the exclusion applied and the exception did not, there was no coverage. *Id.*

With these principles from *Gilbert* in mind, we turn to the coverage dispute between Ewing and Amerisure.

D. Contractual Liability Exclusion

The contractual liability exclusion in Amerisure's policy excludes claims for damages based on an insured's contractual assumption of liability except for two instances: (1) where the insured's liability for damages would exist absent the contract, and (2) where the contract is an insured contract. Amerisure references statements we made in *Gilbert* that the contractual liability exclusion "means what it says: it excludes claims when the insured assumes liability for damages in a contract or agreement, except when the contract is an insured contract or when the insured would be liable absent the contract or agreement," *id.*, and argues that the exclusion applies because Ewing contractually undertook the obligation to construct tennis courts in a good and workmanlike manner and thereby assumed liability for damages if the construction did not meet that standard. Ewing, on the other hand, argues, in part, that this case is distinguishable from *Gilbert* because Ewing's agreement to construct the courts in a good and workmanlike manner does not enlarge its obligations beyond any general common–law duty it might have. That is, Ewing posits, its agreement to construct the courts in a good and workmanlike manner did not add anything to the obligation it has under general law to comply with the contract's terms and to exercise ordinary care in doing so. That being so, Ewing argues, its express agreement to perform the construction in a good and workmanlike manner did not enlarge its obligations and was not an "assumption of liability" within the meaning of the policy's contractual liability exclusion.[6] We agree with Ewing.

[6] Three *amicus* briefs supporting Ewing's position were submitted. The first was collectively submitted by the Associated General Contractors of America; Texas Building Branch, Associated General Contractors of America; TEXO, the Construction Association; Associated General Contractors, Houston Chapter; ABC of Texas; American Subcontractors Association, Inc.; ASA of Texas, Inc. The second was submitted by the Texas Association of Builders and the National Association of Home Builders. The third was collectively submitted by the Texas Apartment Association, Inc; Texas Hospital Association; Texas Hotel & Lodging Association; Texas Automobile Dealers

As we said in *Gilbert*, the exclusion means what it says: it excludes liability for damages the insured assumes by contract unless the exceptions bring the claim back into coverage. But we also determined in *Gilbert* that "assumption of liability" means that the insured has assumed a liability for damages that exceeds the liability it would have under general law. *Id.* at 127. Otherwise, the words "assumption of liability" are meaningless and are surplusage. *See Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 N.W.2d 65, 80-81 (Wis. 2004) ("The term 'assumption' must be interpreted to add something to the phrase 'assumption of liability in a contract or agreement.' Reading the phrase to apply to all liabilities sounding in contract renders the term 'assumption' superfluous."). And interpretations of contracts as a whole are favored so that none of the language in them is rendered surplusage. *E.g.*, *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 235 (Tex. 2003); *Liberty Mut. Ins. Co. v. American Employers Ins. Co.*, 556 S.W.2d 242, 245 (Tex. 1977).

TMISD's allegations that Ewing failed to perform in a good and workmanlike manner are substantively the same as its claims that Ewing negligently performed under the contract because they contain the same factual allegations and alleged misconduct. We have 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." *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987) (discussing the implied warranty of good and workmanlike quality of services in connection with the repair of tangible goods). Negligence means

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Association, Inc; Texas Association of School Boards Legal Assistance Fund; Texas Organization of Rural & Community Hospitals; International Council of Shopping Centers; Texas Community Association Advocates; Texas Association of Counties; Texas Municipal League; and Texas Building Owners and Managers Association, Inc.

the failure to use ordinary care, that is, failing to do that which a reasonable person or provider of the defendant's type would have done under the same or similar circumstances. *See 20801, Inc. v. Parker*, 249 S.W.3d 392, 398 (Tex. 2008). Based on these definitions, TMISD's claims that Ewing failed to perform in a good and workmanlike manner and its claims that Ewing negligently performed under the contract are substantively the same. *See Coulson v. Lake L.B.J. Mun. Util. Dist.*, 734 S.W.2d 649, 651 (Tex. 1987) ("We are unable to discern any real difference between the District's claim that Coulson's efforts were not good and workmanlike and did not meet the standards of reasonable engineering practice and its claim that Coulson was negligent in his performance of professional services."). And as Ewing points out, it had a common law duty to perform its contract with skill and care. *Id.* ("[T]he common law duty to perform with care and skill accompanies every contract . . . ." (citing *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947))); *see Melody Home Mfg. Co.*, 741 S.W.2d at 354.[7]

Accordingly, we conclude that a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not "assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion. We answer the first question "no" and, therefore, need not answer the second question.

E. Liability Policy or Performance Bond

[7] We do not intend to disavow our prior holdings that when an injury is only to the subject matter of a contract, an action will sound in contract alone. *See Sw. Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 494 (Tex. 1991) ("When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract."); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) ("When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone.").

Although not necessary to our answer, we address one additional argument Amerisure advances concerning the effect of our determination that the answer to question one is "no."

Recognizing that in *Lamar Homes, Inc. v. Mid-continent Casualty Co.* 242 S.W.3d 1, 16 (Tex. 2007) we held that a claim for an insured's faulty workmanship can be an "occurrence" triggering coverage, Amerisure asserts that CGL policies are intended to protect an insured when the insured damages another's property, not to serve as a performance bond covering an insured's own work. And, if we find that the exclusion does not apply here, it further argues, CGL policies will effectively be transformed into performance bonds. *See Wilshire Ins. Co. v. RJT Constr., L.L.C.*, 581 F.3d 222, 226 (5th Cir. 2009).

We do not agree. Amerisure's argument presumes there are not other policy exclusions and coverage limitations to be considered. But, as we referenced above, in its brief Amerisure asserts that it reserved its rights to deny coverage for more reasons than the contractual liability exclusion. However, to address Amerisure's claims directly, we note that in *Lamar Homes* we considered whether allegations of defective construction or faulty workmanship that damaged only a general contractor's own work constituted an "occurrence" or "property damage" under a CGL policy's insuring agreement. 242 S.W.3d at 7. We ultimately concluded that "allegations of unintended construction defects may constitute an 'accident' or 'occurrence' under the CGL policy and that allegations of damage to or loss of use of the home itself may also constitute 'property damage' sufficient to trigger the duty to defend under a CGL policy." *Id.* at 4. Or, as we later said in *Gilbert*: "In *Lamar Homes*, we said a breach of contract can constitute an occurrence that causes property

damage, thus bringing some breach of contract claims within the general grant of coverage for purposes of determining a duty to defend." 327 S.W.3d at 132.

In *Lamar Homes* we focused on whether the underlying allegations for defective construction or faulty workmanship fell within the broad coverage granted by the CGL policy's insuring agreement—not whether any of the policy's exclusions applied to exclude coverage. 242 S.W.3d at 10 (explaining that the insuring agreement grants the insured broad coverage, which is then narrowed by the policy's exclusions that operate to restrict and shape the coverage otherwise afforded by the insuring agreement). We explained that "[m]ore often, however, faulty workmanship will be excluded from coverage by specific exclusions because that is the CGL's structure." *Id.* We mentioned some of the business risk exclusions in the policy having specific application to the construction industry, but did not determine their applicability. *Id.* at 10-11. Because the policy contains exclusions that may apply to exclude coverage in a case for breach of contract due to faulty workmanship, our answer to the first certified question is not inconsistent with the view that CGL policies are not performance bonds.

III. Conclusion

We answer the first certified question "no" and do not answer the second.

Phil Johnson
Justice

OPINION DELIVERED: January 17, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0685

DALLAS METROCARE SERVICES, PETITIONER,

v.

ADOLFO JUAREZ, RESPONDENT

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

PER CURIAM

After being sued by a patient who was struck by a falling whiteboard, a governmental entity pled immunity, arguing that the alleged injury did not arise from the "use" of personal property. The trial court denied the plea, and the defendant argued for the first time on appeal that the property's "condition" did not cause the accident. Because the defendant had not originally asserted that argument in the trial court, the court of appeals declined to consider it. In light of our recent decision in *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012), we reverse the court of appeals' judgment and remand to that court for further consideration of the defendant's jurisdictional arguments. We also conclude that the patient's alleged injuries were not caused by the "use" of the whiteboard, and the court of appeals erred to the extent it held otherwise.

Dallas Metrocare Services is a public nonprofit organization that provides mental health care to Dallas County residents. Adolfo Juarez attended periodic treatment and counseling sessions at

one of Metrocare's clinics. During one such session, Juarez was seated at one end of a long rectangular table in the clinic's conference room. A 4' by 8' whiteboard that had been propped on a table behind him fell, hitting Juarez in the head. Both parties agree that no one was writing on or moving the whiteboard, or its table, when the incident occurred.

Juarez sued Metrocare for negligence. Metrocare filed a jurisdictional plea, asserting that Juarez had failed to allege facts demonstrating a waiver of Metrocare's immunity under the Texas Tort Claims Act. Metrocare argued that Juarez's claim neither involved Metrocare's "use" of tangible personal property, nor was a claim for premises liability under the Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2) ("A governmental unit in the state is liable for . . . personal injury . . . so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."); § 101.022(a) ("Duty Owed: Premise and Special Defects"). Juarez opposed Metrocare's plea and amended his petition to add four additional allegations of negligent conduct, specifically addressing the "unsafe condition" of the whiteboard and conference room. Juarez clarified that because he was alleging a general negligence claim arising from the condition or use of tangible personal property, the Act waived Metrocare's immunity. *See id.* § 101.021(2). The trial court denied Metrocare's plea.

Metrocare appealed, and the court of appeals affirmed, rejecting Metrocare's arguments that Juarez's pleadings failed to demonstrate a waiver of Metrocare's immunity under either the premises liability prong or the "use" or defective "condition" prongs.

In doing so, the court of appeals considered Juarez's amended petition and concluded that his pleadings included allegations based on the unsafe "condition" of tangible personal property.

Though Metrocare's appellate briefs included arguments addressing all potentially relevant prongs—premises liability, use, and condition—the court of appeals determined that Metrocare's plea to the jurisdiction had "wholly failed to address Juarez's claim that the negligence claim involved the *condition* of tangible personal property." __ S.W.3d, __, __. The court of appeals noted that "[a]lthough Metrocare [has] now raise[d] arguments asserting Juarez [could] not allege a claim involving the condition of tangible personal property," the court believed that its "review [wa]s limited to the grounds set forth in [Metrocare's] plea to the jurisdiction that was before the trial court." *Id.* (citing *City of Dallas v. Turley*, 316 S.W.3d 762, 774 (Tex. App.—Dallas 2010, pet. denied)). The court also concluded that Juarez had "alleged a negligence claim involving *the condition or use* of tangible personal property." *Id.* (emphases added).

Because the court of appeals first noted that its review was "limited to the grounds set forth in the plea to the jurisdiction," which did not include the condition argument, but nevertheless concluded that Juarez "alleged a negligence claim involving the condition or use of tangible personal property," it is unclear exactly which of Metrocare's arguments the court of appeals considered or relied upon in affirming the trial court's denial of the plea. In any case, the court of appeals erred when it concluded that it could not consider jurisdictional arguments that Metrocare raised for the first time on appeal.

Shortly after the court of appeals issued its opinion, we decided *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012). The question in *Rusk* was whether "an appellate court [could] consider on interlocutory appeal whether a governmental entity has immunity when the trial court did not address the issue first." *Id.* at 93. We decided that because immunity from suit implicates a court's

jurisdiction, the *Rusk* court of appeals erred when it declined to consider the state hospital's new immunity arguments on appeal. *Id.* at 91. We held that even "if immunity is *first asserted on interlocutory appeal*, section 51.014(a) [of the Texas Civil Practice & Remedies Code] does not preclude the appellate court from having to consider the issue at the outset [of its analysis] in order to determine whether it has jurisdiction to address the merits." *Id.* at 95 (emphasis added). Under *Rusk*, an appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all. *See id.* at 94.

Unlike the defendant in *Rusk*, Metrocare asserted additional grounds for immunity on appeal rather than entirely neglecting to raise its immunity defense in a plea to the jurisdiction. But because the court of appeals declined to consider Metrocare's arguments addressing Juarez's claims on the "condition of tangible personal property," yet nevertheless concluded Juarez "alleged a negligence claim involving the condition or use of tangible personal property," the court of appeals' decision does not comport with *Rusk*. __ S.W.3d at __. On remand, the court of appeals should consider all of Metrocare's immunity arguments, including those addressing the whiteboard's "condition."

To the extent that the court of appeals based its judgment on the "use" prong, this was also error, because Juarez has not demonstrated that the Act's "use" prong has waived Metrocare's immunity. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2) ("A governmental unit in the state is liable for . . . personal injury . . . so caused by a . . . use of tangible personal . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."). This provision "waives immunity for claims based upon the 'use' of tangible personal

property only when the governmental unit itself uses the property." *Rusk*, 392 S.W.3d at 97. That is, "a hospital does not 'use' tangible personal property . . . within the meaning of section 101.021(2) by merely providing, furnishing, or allowing a patient access to it." *Id.* at 98. Therefore, the hospital in *Rusk* did not "use" a plastic bag with which a patient committed suicide. *Id.*; *see also San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 246 (Tex. 2004) (hospital did not "use" the walker and suspenders a patient used to commit suicide).

Metrocare did not "use" the whiteboard merely by making it available for use. As Metrocare points out, if displaying the whiteboard constitutes "use," immunity will be waived every time a piece of government property causes injury. If the court of appeals based its decision on the "use" prong, therefore, that was error. Of course, the court of appeals may have intended to affirm on the "condition" prong. We express no opinion on whether that provision waives Metrocare's immunity. But to the extent that the court of appeals considers the "condition" prong on remand, it must also consider all of Metrocare's relevant arguments, even those raised for the first time on appeal.

Finally, we are unclear how the court of appeals disposed of the parties' arguments concerning premises liability. *See* __ S.W.3d at __ (noting only that Metrocare had taken the "precise opposite position in the trial court" on the premises liability issue). To the extent that the court did not address any premises-liability arguments that were properly before it, it should do so on remand. We express no opinion on whether Juarez has alleged a premises-liability claim that waives Metrocare's immunity, just as we express no opinion about the "condition" prong.

Accordingly, without hearing oral argument, we grant Metrocare's petition for review, reverse the court of appeals' judgment, and remand the case to that court for further proceedings consistent with this opinion. TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: November 22, 2013

IN THE SUPREME COURT OF TEXAS

NO. 12-0721

CITY OF HOUSTON, PETITIONER,

v.

CHRISTOPHER RHULE, RESPONDENT

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

PER CURIAM

In this workers' compensation case, we must decide whether the claimant was required to exhaust administrative remedies before he could sue in district court for breach of a settlement agreement. We hold that the operative statute in effect at the time of the claimant's injury—section 12b of former Texas Civil Statutes Article 8307—required the claimant to first present his dispute to the Industrial Accident Board, now the Division of Workers' Compensation. Accordingly, we reverse the court of appeals' judgment and dismiss the claimant's action.

Christopher Rhule, a firefighter for the Houston Fire Department, suffered an on-the-job spinal injury in 1988. The City of Houston, a self-insured municipality, contested Rhule's workers' compensation claim. The parties entered into a settlement agreement under which Rhule would receive $14,000 and "lifetime open reasonable and necessary medical [expenses]" in exchange for releasing the City from any further claims derived from the injury. The trial court entered an agreed judgment to this effect.

The City paid Rhule's medical expenses until 2004 when, despite Rhule's persistent pain, the City decided that many of his medications and treatments were not reasonable, necessary, and related to the underlying 1988 injury. Rhule filed suit in district court for breach of the agreement. A jury found for Rhule and awarded him $127,500 in damages for past physical pain, mental anguish, attorney's fees, and out-of-pocket expenses. The court of appeals initially reversed the award for physical pain while affirming the remainder of the trial court's judgment. In response, the City moved for rehearing and moved the court of appeals to dismiss the case for lack of jurisdiction, arguing that Rhule did not exhaust his administrative remedies as required by statute. 377 S.W.3d 734, 737. The court of appeals granted rehearing, withdrew its prior opinion, and affirmed the trial court's judgment on all matters. *Id.* at 737–38.

The City petitioned this Court for review, reasserting its argument that the trial court lacked jurisdiction to hear the case. The City contends that both the applicable statute—section 12b of former Texas Civil Statutes Article 8307—and our opinion in *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801 (Tex. 2001), require Rhule to return to the Division before filing suit. Further, it argues that governmental immunity insulates the City from suit. Rhule argues that jurisdiction was proper because he exhausted his administrative remedies by securing the original settlement agreement, that further exhaustion would be futile, and that the City waived its governmental immunity.

Subject matter jurisdiction is "essential to a court's power to decide a case." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). A court acting without such power commits fundamental error that we may review for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air*

Control Bd., 852 S.W.2d 440, 443–44 (Tex. 1993). Not only may a reviewing court assess jurisdiction for the first time on appeal, but all courts bear the affirmative obligation "to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 306 (Tex. 2010) (quoting *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004)). A judgment rendered without subject matter jurisdiction cannot be considered final. *Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b (1982)). Subject matter jurisdiction presents a question of law we review de novo. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013).

We look to the scope of agency jurisdiction to determine whether section 12b mandated exhaustion of administrative remedies as a prerequisite to trial court jurisdiction. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). Administrative agencies may exercise only powers conferred upon them by "clear and express statutory language." *Id.* at 220. When the Legislature grants an administrative agency sole authority to make an initial determination in a dispute, agency jurisdiction is exclusive. *See id.* at 221. A party then must exhaust its administrative remedies before seeking recourse through judicial review. *See Cash Am. Int'l., Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000). The exhaustion doctrine serves as a timing mechanism to ensure that the administrative process runs its course. *See id.* The intent is never to deprive a party of legal rights; rather, it aims to ensure an orderly procedure to enforce those rights. *Yselta Indep. Sch. Dist. v. Griego*, 170 S.W.3d 792, 795 (Tex. App.—El Paso 2005, pet. denied). Absent

exhaustion of administrative remedies, a trial court must dismiss the case. *See Tex. Educ. Agency v. Cypress-Fairbanks I.S.D.*, 830 S.W.2d 88, 90 (Tex. 1992).

Our analysis turns on whether the Division has exclusive jurisdiction over Rhule's claim. *See Subaru of Am.*, 84 S.W.3d at 221. Exclusive jurisdiction is a question of statutory interpretation, *id.*, and thus we must consider the operative statute and whether it grants the Division the sole authority for initial resolution of disputes arising out of a settlement agreement. The statute in effect at the time of injury controls. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Reyna*, 897 S.W.2d 777, 778 (Tex. 1995) (per curiam) (applying the version of the Workers' Compensation Act in effect at the time of the injury, not the version in effect at the time of suit); *Harris v. Varo, Inc.*, 814 S.W.2d 520, 523–24 (Tex. App.—Dallas 1991, no writ). Rhule's injury occurred on February 25, 1988. The Legislature made significant changes to the workers' compensation system in 1989, but the impact on claims was prospective as of January 1, 1991. Act of Dec. 11, 1989, 71st Leg., 2nd C.S., ch. 1, § 17.18, 1989 Tex. Gen. Laws 122, 122. The implementing legislation provided that the Division "shall process claims for injuries occurring before January 1, 1991, in accordance with the law in effect on the date that the injury occurred, and the former law is continued in effect for this purpose." *Id.* At the time of Rhule's injury, former section 12b of Article 8307 governed disputes based on settlement agreements in workers' compensation cases. Act of May 20, 1983, 68th Leg. R.S., ch. 501, § 1, 1983 Tex. Gen. Laws 2934, 2934–35, *repealed by* Act of Dec. 11, 1989, 71st Leg. 2nd C.S., ch. 1, § 16.01(10), 1989 Tex. Gen. Laws 1, 114. Section 12b, entitled "Compromise settlement agreements and agreed judgments; disputes concerning payment of healthcare benefits," read as follows:

> Whenever in any compromise settlement agreement approved by the board or in any agreed judgment approved by the court, any dispute arises concerning the payment of medical, hospital, nursing, chiropractic or podiatry services or aids or treatment, or for medicines or prosthetic appliances for the injured employee as provided in Section 7, Article 8306, Revised Statutes, as amended, or as provided in such compromise settlement agreements or agreed judgments, all such disputes concerning the payment thereof shall be first presented by any party to the [Division] within six months from the time such dispute has arisen (except where "good cause" is shown for any delay) for the [Division]'s determination.[1]

Id. The operative statute, therefore, compels a party to a settlement agreement to first bring disputes to the Division.

The City of Houston stopped paying for Rhule's pain pump, medications, and visits to the doctor in 2004. Rhule brought suit against the City in 2008 but did not first present the matter to the Division. Because the statute compelled Rhule to present his dispute to the Division and Rhule failed to do so, Rhule has not exhausted his administrative remedies. This divests the trial court of jurisdiction.[2] *See Cypress-Fairbanks I.S.D.*, 830 S.W.2d at 90.

Without hearing oral argument, we reverse the court of appeals' judgment and render judgment dismissing Rhule's action for lack of subject matter jurisdiction. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: November 22, 2013

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[1] The statute next indicates that "[a] dispute arises when a written refusal of payment has been filed with the [Division]." *Id.* Rhule has not argued that no "dispute" has arisen because the City of Houston failed to submit a refusal in writing to the Division.

[2] We need not entertain the City's argument under *American Motorists Insurance Co. v. Fodge*, 63 S.W.3d 801 (Tex. 2001), because the statute directly addresses settlement agreements. We do note, however, that *Fodge* did not address the issue presented in this case, but rather mandated exhaustion of administrative remedies where a claimant sued for delay of *medical* payments despite entitlement only to temporary *income* benefits. *See* 63 S.W.3d at 804.

IN THE SUPREME COURT OF TEXAS

NO. 12-0728

IN THE INTEREST OF K.M.L., A CHILD

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

Argued June 24, 2013

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE BROWN joined, and in which JUSTICE JOHNSON and JUSTICE BOYD joined except as to Parts II.B, II.D, and IV, and in which JUSTICE LEHRMANN and JUSTICE DEVINE joined except as to Parts III and IV.

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

JUSTICE JOHNSON filed an opinion dissenting in part, in which JUSTICE BOYD joined.

In this parental termination case, we consider whether the trial court properly terminated the parental rights of an intellectually disabled and mentally ill mother who executed a voluntary affidavit of relinquishment and the parental rights of an indigent father who was not appointed trial counsel nor provided notice of the trial. Following a jury trial, the trial court signed a judgment terminating both the mother's and the father's parental rights to their minor child, and appointed the Texas Department of Family and Protective Services (DFPS) as the child's sole managing conservator. The court of appeals affirmed both terminations. ___ S.W.3d ___, ___ (Tex. App.—Beaumont 2012, pet. granted) (mem. op.). Because there is legally insufficient evidence that

the mother knowingly and intelligently executed the affidavit of voluntary relinquishment, and because the father did not receive notice of trial and did not waive notice, we reverse the judgment of the court of appeals and hold that termination of both parents' rights was improper.

I. Factual and Procedural Background

Just days after her eighteenth birthday, high-school student Melissa gave birth to a daughter, K.M.L., in Tennessee. The baby's father, John, seventeen at the time, lived in Texas. During the pregnancy, Melissa, her two younger brothers, and her mother, Angali, moved from Texas to Tennessee. Melissa suffers from bipolar disorder and has intellectual disabilities, and she and her mother have had a tumultuous relationship. Angali and Melissa decided that Melissa should move back to Texas to live with her uncle to finish high school, leaving K.M.L. with Angali. Over the next two years, Melissa graduated high school, visiting her daughter occasionally, and shuffled from one friend's house to the next. Angali served as K.M.L.'s primary caretaker, a position Melissa never questioned. John knew about K.M.L., but never made any attempts to see her or support her during this period.

Sometime before K.M.L.'s second birthday, Angali and Melissa consulted an attorney in Texas about making K.M.L.'s living situation permanent. Under that attorney's guidance, the women executed a "Guardianship" letter, whereby Melissa believed she had empowered Angali to manage the finances, health, and psychiatric and psychological care of K.M.L., and to make educational decisions on K.M.L.'s behalf, though it's undisputed that this document had no legal effect or power. In March and May of 2010 Melissa would again attempt to execute legal documents

that were supposed to give Angali parental rights to K.M.L. Much like the "Guardianship" letter, these later attempts were also legally ineffective at providing Angali with parental rights to K.M.L.

Shortly after execution of the "Guardianship" letter, Angali, her two teenaged sons, and K.M.L. moved to Lake Livingston, Texas, temporarily living in a loft apartment. The inside stairs in the apartment did not have railings yet, though the apartment manager had agreed to install them. On August 6, 2009, left alone with her teenaged uncles, two-year-old K.M.L. fell off the stairs. As a result of the six-foot fall, she suffered injuries to her teeth and jaw, though none life-threatening. The very next day, DFPS removed K.M.L. from the home, placed her in foster care, and filed a petition to terminate Melissa's parental rights.

More than two months after suit was filed, DFPS served John by publication, without appointing an attorney ad litem. Over the next six months, John received no notice of the proceedings, nor did he have any involvement with K.M.L. After Angali contacted John and put him in touch with her attorney, John filed pro se pleadings on May 3, 2010, acknowledging paternity, requesting that his rights not be terminated, and providing his sister's address and phone number, where he was currently residing, along with his mother's contact information. Despite filing a response in opposition, John was not provided notice of any hearings in the case, nor is there evidence that he received notice of the trial. John continued to make little effort to see his daughter, even after opposing the termination.

On June 4, 2010, long after proceedings in the termination suit began, Melissa executed an affidavit of voluntary relinquishment naming DFPS as managing conservator of K.M.L., though she allegedly believed that the document enabled Angali to obtain legal custody of K.M.L. and adopt

K.M.L. About six weeks later, as a result of Melissa's disabilities, the County Court of San Jacinto County signed a guardianship order naming Angali as Melissa's guardian of the person and estate. Melissa, through a replacement attorney ad litem and through her mother as guardian, made multiple attempts to strike the affidavit of relinquishment from the case, including a "Motion for Revocation" and a "Special Exception," both denied and overruled, and then a "First Supplemental Original Answer" and a "Second Supplemental Answer," raising an affirmative defense that the relinquishment affidavit was illegal.

On January 18, 2011, the first day of trial, the State served John with a subpoena to attend the trial, and John arrived by police escort. For the first hours of the trial, John sat in the hall outside the courtroom and missed pre-trial motions, jury selection, and part of DFPS's opening statement. Angali's attorney alerted the trial court to the fact that John was in the hallway halfway through DFPS's opening statement, and John came into the courtroom. The trial judge told John—after John gave a short opening statement—that he possibly could have been entitled to appointed counsel, but that it was "a little late for that now."[1] During trial, the jury heard testimony from, among others,

[1] The exchange between the trial court and John proceeded as follows:

The Court:	. . . You are in the case. You are representing yourself. I would say that in all likelihood if you had ever made any type of appearance before this court, that if you didn't have a job and didn't represent yourself - - or didn't - - weren't able to hire an attorney, you would be entitled to have an attorney appointed for you. It's a little late for that now. No attorney could prepare for representing you in the midst of a trial.
John:	Yes, sir.
The Court:	So, I assume you still want to participate, but you are going to have to probably make a better showing than you have made up until now, and you are going to have to operate within the rules. Just because you are not an attorney, it does not mean that you get to go outside the rules that the attorneys have to follow. Do you understand?
John:	Yes, sir.

Melissa, Angali, and John, along with testimony from Melissa's original attorney, a DFPS special investigator, K.M.L.'s DFPS conservatorship supervisor, K.M.L.'s CASA volunteer,[2] and Melissa and Angali's psychiatrist.

Following a four-day trial, the jury found that termination of Melissa and John's parental rights was in K.M.L.'s best interest. Additionally, the jury found termination grounds for Melissa based on endangerment (Family Code section 161.001(1)(D) and (E)), voluntary relinquishment (section 161.001(1)(K)), and failure to follow a court-ordered reunification plan (section 161.001(1)(O)).[3] The jury terminated John's rights based on endangerment (section 161.001(1)(D)), failure to follow a court-ordered reunification plan (section 161.001(1)(O)), and constructive abandonment (section 161.001(1)(N)). Finally, the jury found that DFPS, not Angali, should be appointed the sole managing conservator of K.M.L. The trial court ordered the termination of both Melissa and John's parental rights and appointed DFPS as K.M.L.'s sole managing conservator.

Melissa and Angali challenged the sufficiency of the evidence to support all four statutory grounds for termination of Melissa's rights in the court of appeals. ___ S.W.3d, at ___. The court of appeals acknowledged that there is conflicting evidence on the issue of whether Melissa executed

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> The Court: Okay. . . . I didn't know you were in the hallway. [Angali's attorney] knew it because he saw you. But if you don't have the understanding and the gumption to come walking in on your own, we're not going to be going out looking for you anymore. Do you understand that?
>
> John: Yes, sir.

[2] A CASA volunteer, or Texas Court Appointed Special Advocate, can be appointed to serve as guardian ad litem or a volunteer advocate for the child under Family Code section 107.031 in termination suits. TEX. FAM. CODE § 107.031; TEXAS CASA, INC., http://www.texascasa.org (last visited Aug. 27, 2014).

[3] We note that Family Code section 161.003 provides for involuntary termination of parental rights when a parent is unable to provide for the needs of the child due to mental or emotional illness or a mental deficiency. *See* TEX. FAM. CODE § 161.003(a)(1). There is no explanation for why DFPS did not pursue termination under this statutory provision.

the affidavit voluntarily, but it treated the guardianship order as merely some evidence relevant to that issue and reasoned that the jury was entitled to give the order little weight. *See id*. at ___. Because termination could be affirmed under subsection (K)—voluntary relinquishment—the court of appeals did not address the other grounds. *See id.* at ___. The court of appeals held that the jury verdict for John's constructive abandonment is supported by legally sufficient evidence and did not address John's legal and factual sufficiency challenges to the other grounds for termination. *See id.* at ___. Additionally, the court of appeals held that John waived his complaint about notice of trial by appearing at trial and did not address the lack of notice of the permanency hearings. *See id.* at ___. Finally, the court of appeals held that John waived his right to counsel under Family Code section 107.013 because he generally appeared following service by publication and did not request an attorney or file an affidavit of indigence until after trial. *See id.* at ___. All three parties—Melissa, Angali, and John—filed petitions for review in this Court, which we granted. 56 Tex. Sup. Ct. J. 519, 522 (May 3, 2013).

II. Melissa and Angali's Issues

Melissa, individually, and Angali, individually as intervenor and on Melissa's behalf as her guardian, filed separate petitions for review.[4] Taking the two petitions collectively, Melissa and Angali raise three distinct issues: (1) whether the trial court improperly admitted Melissa's June 4

[4] While Family Code section 102.004(a) grants grandparents standing to file suit requesting managing conservatorship and section 153.432 grants grandparents standing to request possession of or access to a grandchild, for a grandparent to raise issues related to a terminated parent's rights, the intervening grandparent must satisfy the requirements of Rule 60 of the Texas Rules of Civil Procedure—that is, the grandparent must have a justiciable interest in the pending suit. TEX. R. CIV. P. 60; *see In re Union Carbide Corp.*, 273 S.W.3d 152, 154–55 (Tex. 2008) (citing *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990)); *see also In re H.M.J.H.*, 209 S.W.3d 320, 322 (Tex. App.—Dallas 2006, no pet.). Because Angali was appointed Melissa's guardian by a probate court on July 26, 2010, and because Angali's rights to serve as possessory conservator were also adjudicated in the trial court below, we agree with the court of appeals that Angali's interest rises to the level of being justiciable, and we will address the issues she has raised. *See* ___ S.W.3d at ___ n.2.

affidavit of voluntary relinquishment of parental rights; (2) whether the jury's finding that Melissa knowingly and intelligently executed the affidavit of voluntary relinquishment is supported by legally sufficient evidence, and (3) whether the jury's finding that the termination of Melissa's parental rights was in the child's best interest is supported by legally sufficient evidence.

A. Admissibility of June 4 Affidavit

While a "parental rights termination proceeding encumbers a value 'far more precious than any property right,'" *In re E.R.*, 385 S.W.3d 552, 555 (Tex. 2012) (quoting *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982)), this right may be waived through statutes such as Texas Family Code section 161.103, which provides for affidavits of voluntary relinquishment of parental rights. *See, e.g.*, *In re L.M.I.*, 119 S.W.3d 707, 721–22 (Tex. 2003) (Owen, J., concurring and dissenting). In this case, the trial court terminated Melissa's parental rights upon a jury finding that Melissa knowingly and intelligently executed an affidavit of voluntary relinquishment of her parental rights, among other grounds for termination. However, Melissa argues that the June 4 affidavit of voluntary relinquishment is inadmissible. First, she argues that this affidavit is facially deficient and inadmissible because it did not include a verification, as required by Family Code section 161.103(a)(3). Second, she argues that the probate court guardianship determination made two months after the affidavit was executed negates the prima facia showing that the affidavit was executed voluntarily and knowingly and, thus, that DFPS did not meet its evidentiary burden with regard to the affidavit. Finally, she argues that the affidavit is not valid because Melissa did not execute the affidavit through a guardian, which was necessary as she was not competent to execute the affidavit without a guardian present.

1. Statutory Formalities

Under the Family Code, a trial court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that termination is in the best interest of the child and that the parent has executed a valid, irrevocable affidavit of relinquishment of parental rights. *See* TEX. FAM. CODE § 161.001(1)(K), (2). Section 161.103 of the Family Code provides a litany of requirements that must be met for the affidavit of voluntary relinquishment of parental rights to form the basis for termination of the parent-child relationship under section 161.001(1)(K). *See generally id.* § 161.103. Notably, the affidavit must be witnessed by two credible persons and verified before a person authorized to take oaths. *Id.* § 161.103(a). Melissa argues that her affidavit of voluntary relinquishment is deficient because it does not include a verification—that is, it does not include a statement by Melissa that she swears to the truth of the document's contents. Melissa points out that the relinquishment affidavit form promulgated by the Family Law Section of the State Bar of Texas includes such language, while the DFPS of San Jacinto County, Texas, used a form that does not include such language. DFPS, on the other hand, argues that a verification is not required because the requirement that the affidavit be "verified" is different from a requirement that it include a "verification." Alternatively, DFPS argues that the affidavit was verified, as the affidavit stated, "Melissa . . . , known to me to be the person whose signature appears below, appeared in person before me and being by me duly sworn, in the presence of the undersigned credible witnesses, stated under oath . . . ."

Texas Government Code section 312.011 defines "affidavit" as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." TEX. GOV'T CODE § 312.011(1).

Additionally, section 312.011 defines "swear" or "sworn" to include "affirm," and defines "oath" to include "affirmation." *Id.* § 312.011(8), (16). However, section 312.011 does not define "verify"—the key word at the center of this dispute. *See generally id.* § 312.011. Black's Law Dictionary defines "verification" as "(1) [a] formal declaration made in the presence of an authorized officer, such as a notary public . . . ; whereby one swears to the truth of the statements in the document [or]; (2) [a]n oath or affirmation that an authorized officer administers to an affiant or deponent." BLACK'S LAW DICTIONARY 1793 (10th ed. 2009). Black's also provides a separate definition for "verify" as "(1) [t]o prove to be true; to confirm or establish the truth or truthfulness of; to authenticate; [or] (2) [t]o confirm or substantiate by oath or affidavit; to swear to the truth of." *Id.*

DFPS attempts to draw a meaningful distinction between these two terms, arguing that the Family Code requires only that the affidavit be verified (substantiated by oath or affidavit) and does not require a verification (a formal declaration by which one swears to the truth of the statements in the document). However, this is a distinction without difference. Many of our rules of procedure require court documents to be "verified," without using the noun form of the word—"verification." *See, e.g.*, TEX. R. CIV. P. 93, 165a, 680, 682. Even the Legislature interchanges the terminology elsewhere in the Family Code. For instance, section 31.002, providing for suit for removal of disabilities of minority, is captioned "Requisites of Petition; Verification," yet the text uses "verify" and "verified." TEX. FAM. CODE § 31.002(b). Any difference between "verified" and "verification" is merely a matter of semantics. Family Code section 161.103(a)(3) clearly states that the affidavit for voluntary relinquishment of parental rights must be "verified before a person authorized to take oaths." TEX. FAM. CODE § 161.103(a)(3). As we interpret statutes with the fair assumption that the

Legislature intends the words it chooses, *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 886 (Tex. 1999), applying the words as they are written, *Lee v. City of Houst.*, 807 S.W.2d 290, 293 (Tex. 1991), we must determine whether the affidavit here was verified—that is, whether it included a verification.

Melissa argues that the language in the affidavit that the statements are made "under oath" cannot constitute a verification, because an affidavit, by definition, is a statement made under oath, citing Government Code section 312.011(1). Melissa's argument fails, however, because the plain language of section 312.011(1) does not state, as she argues, that an "affidavit" is a statement made "under oath." *See* TEX. GOV'T CODE § 312.011(1). Section 312.011(1) defines affidavit as a statement "sworn to before an officer authorized to administer oaths." *Id.* "Under oath" connotes more than simply "sworn to," as Black's Law Dictionary notes that "[t]he person making the oath implicitly invites punishment if the statement is untrue or the promise [to tell the truth] is broken." BLACK'S LAW DICTIONARY 1239 (10th ed. 2009).

While we have not addressed this issue in the context of relinquishment of parental rights, and nor have any of our courts of appeals, we can turn for guidance to case law interpreting other statutes and rules of procedure requiring court documents to be verified. Noticeably absent from this Court's case law, however, is a definition of "verified." For example, we have considered documents under Rule 165a(3) of the Texas Rules of Civil Procedure, which provides that a case dismissed for want of prosecution shall be reinstated if a motion to reinstate, which sets forth the grounds for reinstatement and is *verified* by the movant or his attorney, is filed with the clerk within

thirty days of dismissal.[9] In addressing Rule 165, we have either simply stated that the party filed an unverified motion or held that the motion, supported by an affidavit from counsel, was, in fact, verified. *Compare McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990) (per curiam), *and Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986) (per curiam) (stating that the motion was unverified), *with Ginn v. Forrester*, 282 S.W.3d 430, 431 (Tex. 2009) (per curiam) (stating that the party filed a "verified motion to retain the case," without analysis), *Guest v. Dixon*, 195 S.W.3d 687, 688–89 (Tex. 2006) (per curiam) (holding that a motion to reinstate was properly verified because it was supported by the attorney's affidavit), *and Thordson v. City of Houst.*, 815 S.W.2d 550, 550 (Tex. 1991) (per curiam) (stating that the motion to reinstate was verified and properly filed under Rule 165a(3)).

Several courts of appeals have attempted to delineate the verification requirement in both the Rule 165a context and the Rule 93 context, which requires certain pleas in an answer to be verified. *See* TEX. R. CIV. P. 93. The courts that have addressed the issue have held that no particular form of verification is required so long as the affiant swears to the truth of the contents and that the affidavit is based on personal knowledge. *See, e.g.*, *Andrews v. Stanton*, 198 S.W.3d 4, 7–8 (Tex. App.—El Paso 2006, no pet.); *Cantu v. Holiday Inns, Inc.*, 910 S.W.2d 113, 116 (Tex. App.—Corpus Christi 1995, no pet.); *Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co.*, 715 S.W.2d 115, 117 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Durret v. Boger*, 234 S.W.2d 898, 900 (Tex. Civ. App.—Texarkana 1950, no writ).

[9] Other examples of the term "verified" in the rules of procedure include Rule 18a (providing that a motion to recuse or disqualify a judge be verified), Rule 107 (providing that the return of service or attempt of service of a citation by a person other than a sheriff, constable, or clerk be verified or signed under penalty of perjury), Rule 680 (providing for a temporary restraining order by an affidavit or verified complaint), Rule 682 (requiring a petition for writ of injunction to be verified by an affidavit), and Rule 690 (providing that an injunction may only be dissolved before final hearing if the respondent denies the allegations of the petition in a verified answer).

Melissa relies heavily on *Brown Foundation Repair & Consulting, Inc. v. Friendly Chevrolet Co.*, which expressly held that an affidavit was not verified, as required under Rule 93. *See* 715 S.W.2d at 117. The jurat—the signature and proclamation of the notary—in *Brown* was similar to Melissa's affidavit, but contained one significant difference. *See id.* The *Brown* affidavit, after being signed by the affiant, stated, "SUBSCRIBED AND SWORN TO before me, the undersigned authority, by [affiant], known to me to be the Vice-President of Brown Foundation Repair and Consulting, Inc., to certify which witness my hand and seal of office this 28 day of June, 1985." *Id.* The court concluded that the affidavit was insufficient under Rule 93 because the affiant did not swear or affirm under oath that the facts stated were true, but simply "swore to" to facts. *Id.* at 117–18. Merely because it is stated that the affiant has subscribed and sworn to a document does not constitute the affiant swearing or affirming under oath that the facts stated are true. *Id.* at 118. The affidavit here, however, did include a jurat indicating that Melissa made the statements "under oath," distinguishing this affidavit from the one in *Brown*.

Melissa also relies on two rules of procedure which have been construed to require specific verifications, despite not using the term "verification" in the text of the rule. For instance, Rule 185 regarding suits on sworn accounts—one of the most commonly used rules of procedure requiring verified pleadings and verified denials—does not use the term verified or verification in its text. *See* TEX. R. CIV. P. 185. Rather, it requires that the pleadings be "supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of the affiant, just and true." *Id.* Additionally, Rule 166a, the procedure for summary judgments, permits the submission of evidence by affidavit, but requires that such affidavits "shall be made on personal knowledge, shall set forth such facts as would be

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," never using the term "verify" explicitly. TEX. R. CIV. P. 166a(f). Neither of these rules are analogous to Family Code section 161.103(a)(3) because both rules expressly require language in the affidavit that the information is "within the knowledge of the affiant, just and true" (Rule 185) or that the affidavit is "made on personal knowledge" (Rule 166a).

The affidavit here is verified—Melissa swore, under oath, to the contents of the affidavit. If "verify" means to "substantiate by oath or affidavit," BLACK'S LAW DICTIONARY 1793 (10th ed. 2009), and "verification" is "an oath or affirmation that an authorized officer administers to an affiant or deponent," *id.*, surely Melissa's signature on the affidavit where the notary stated, "Melissa . . . , known to me to be the person whose signature appears below, appeared in person before me and being by me *duly sworn*, in the presence of the undersigned credible witnesses, stated *under oath*," (emphasis added), and later, in the jurat, stated, "Signed *under oath* before me in the presence of the above witnesses on this the 4th day of June, 2010," (emphasis added), constitutes a verification. We overrule Melissa's first challenge to the admissibility of the affidavit and hold that the affidavit was verified.

2. Guardianship Determination

Melissa next argues that the affidavit was inadmissible because the guardianship determination effectively nullified the affidavit. However, this argument fails, as the guardianship determination was made *after* Melissa executed the affidavit. An adjudication of incapacity in a guardianship proceeding fixes the individual's status as an incapacitated person *at that time*. *See, e.g.*, *Evans v. Allen*, 358 S.W.3d 358, 368 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Kokes v. College*, 148 S.W.3d 384, 389 (Tex. App.—Beaumont 2004, no pet.); *Quada v. Quada*, 396

S.W.2d 232, 233 (Tex. App.—Texarkana 1965, no writ). Further, this determination is merely a rebuttable presumption that the legal incapacity will be that person's condition at any given time thereafter in the absence of facts showing reason has been restored. *See Quada*, 393 S.W.2d at 233. There is no legal authority for the proposition that a guardianship determination has retroactive effect such as to conclusively establish Melissa's incapacity to knowingly and intelligently execute the affidavit of voluntary relinquishment on June 4, 2010, and we refuse to hold so here. Accordingly, while the guardianship determination made after Melissa executed the affidavit may be evidence of her mental capacity at the time she executed the affidavit, we hold that the guardianship determination did not render the affidavit inadmissable, and we overrule Melissa's second argument.

3. Lack of Guardian Present

Finally, Melissa argues that, because she lacked mental capacity at the time the affidavit was executed, the affidavit needed to have been executed through her guardian to have legal effect. However, this argument also fails because the adjudication that she lacked capacity occurred after she executed the affidavit, not before. As we held above that the guardianship determination has no binding legal impact on the earlier execution of the affidavit, we cannot hold that her guardian (which did not yet exist at the time) was required to execute the affidavit. We overrule Melissa's third argument. Therefore, the trial court did not err in admitting the June 4 affidavit of voluntary relinquishment into evidence. Whether the jury's finding that Melissa knowingly and intelligently executed the affidavit of voluntary relinquishment is supported by legally sufficient evidence is a separate question that we now address.

B. Legal Sufficiency Challenge to Termination Under Subsection (K)

Melissa challenges the legal sufficiency of the evidence to support termination under subsection (K)—voluntary relinquishment of parental rights. Because the natural right between a parent and his child is one of constitutional dimensions, *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985), termination proceedings must be strictly scrutinized. *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980). In parental termination cases, due process requires application of the clear and convincing standard of proof. *Santosky*, 455 U.S. at 769; *In re J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002). The Texas Family Code defines clear and convincing 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. Our traditional legal sufficiency—or "no evidence"—standard of review upholds a finding supported by "[a]nything more than a scintilla of evidence." *Formosa Plastics Corp. U.S.A. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). However, "[r]equiring only anything more than a mere scintilla of evidence does not equate to clear and convincing evidence." *In re J.F.C.*, 96 S.W.3d at 265 (internal quotations omitted); *see also Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 621–22 (Tex. 2004). Thus, our legal sufficiency review in a parental termination case must take into consideration whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof. *In re J.F.C.*, 96 S.W.3d at 265–66.

In a legal sufficiency challenge, we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). However,

the reviewing court should not disregard undisputed facts that do not support the verdict to determine whether there is clear and convincing evidence. *In re J.F.C.*, 96 S.W.3d at 266. In cases requiring clear and convincing evidence, even evidence that does more than raise surmise and suspicion will not suffice unless that evidence is capable of producing a firm belief or conviction that the allegation is true. *Garza*, 164 S.W.3d at 621. If the reviewing court determines that no reasonable factfinder could form a firm belief or conviction that the matter to be proven is true, then the court must conclude that the evidence is legally insufficient. *In re J.F.C.*, 96 S.W.3d at 266.

Family Code section 161.001(1)(K) permits a trial court to terminate the parent-child relationship if it finds by clear and convincing evidence that the parent has executed an unrevoked or irrevocable affidavit of relinquishment of parental rights. TEX. FAM. CODE § 161.001(1)(K). The petitioner—here, DFPS—has the burden to prove the elements necessary to support termination of the parent-child relationship. *E.g.*, *Djeto v. Tex. Dep't of Protective & Regulatory Servs.*, 928 S.W.2d 96, 97 (Tex. App.—San Antonio 1996, no writ). Section 161.103 requires that the affidavit be for *voluntary* relinquishment, TEX. FAM. CODE § 161.103(a), and implicit in section 161.001(1)(K) is the requirement that the affidavit of parental rights be voluntarily executed. *E.g.*, *Monroe v. Alts. in Motion*, 234 S.W.3d 56, 61–62 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Williams v. Williams*, 150 S.W.3d 436, 447 (Tex. App.—Austin 2004, pet. denied); *Neal v. Tex. Dep't of Human Servs.*, 814 S.W.2d 216, 218 (Tex. App.—San Antonio 1991, writ denied). An involuntarily executed affidavit is a complete defense to a termination suit based on section 161.001(1)(K). *In re A.G.C.*, 279 S.W.3d 441, 449 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Monroe*, 234 S.W.3d at 62; *Neal*, 814 S.W.2d at 219. Here, the jury was specifically asked if it found "by clear and convincing evidence that [Melissa] *knowingly and intelligently* executed after

this suit was filed an unrevoked or irrevocable affidavit of relinquishment." (Emphasis added). DFPS did not object to this language in the jury charge, so we measure the sufficiency of the evidence against that language. *See Jackson v. Axelrad*, 221 S.W.3d 650, 657 (Tex. 2007). Therefore, we must determine whether the evidence at trial would cause a reasonable juror to have formed a firm belief or conviction that Melissa voluntarily—that is, knowingly and intelligently—executed the June 4 affidavit. *See In re J.F.C.*, 96 S.W.3d at 266.

Melissa's psychiatrist testified at trial that there was "no way [Melissa] had the mental ability to understand the documents she had signed relative to" terminating her rights, that she suffered from bipolar disorder and borderline intellectual functioning, and that, at Melissa's visit a few weeks after signing the affidavit, she was not regularly taking her medication. He testified that, at her visits in June 2010, Melissa was in need of a guardian to ensure her compliance with treatment. Further, less than two months after Melissa executed the June 4 affidavit, a San Jacinto County Court judge determined that, as a matter of law, Melissa could not manage her own affairs as a result of her severe bipolar disorder. While Melissa did graduate high school, there was uncontroverted testimony that she read at a second-grade reading level. The evidence was also uncontroverted that her IQ was below 70 and she had been diagnosed as borderline intellectual functioning. Her DFPS-appointed counselor testified that someone with an IQ like Melissa's would struggle with the ability to comprehend or understand at times what she is doing. Her psychiatrist stated in his assessment letter in the guardianship proceedings that Melissa did not have full mental and intellectual capacity to be able to properly consider, weigh, and evaluate the factors involved to voluntarily agree to terminate her parental rights.

On the other hand, her DFPS-appointed counselor testified that she and Melissa discussed relinquishing parental rights and that Melissa "seemed to have a good grasp on that" and "didn't seem to be confused." She agreed, however, that Melissa never "got settled, rooted with the idea that she would never see her daughter again." The counselor testified about the careful approach she took to ensure Melissa understood the relinquishment issue by avoiding words that were "too big" and instead using words she knew Melissa could understand. The counselor and Melissa also developed a rapport over time where the counselor made sure Melissa felt comfortable stopping the discussions when she did not understand issues so that the counselor could reword and tailor the conversation to Melissa's comprehension level. In stark contrast, the counselor testified that during the hearing when Melissa executed the affidavit, Melissa "couldn't hear some of what was going on and she had a hard time following the court proceedings . . . as far as the words she didn't understand."

Other testimony underscored Melissa's confusion about the June 4 affidavit. Angali's attorney testified that on two prior occasions, Melissa attempted to execute legal documents that would transfer legal rights over K.M.L. to Angali. Due to the attorney's misunderstanding of the law, both documents had no legal effect, but the attorney testified about Melissa's earnest desire to enable her mother to help care for K.M.L. while Melissa remained part of the child's life. Despite being represented by her own counsel, Melissa attempted to execute those documents without consulting him. When her attorney was present on June 4, Melissa testified that he did not go over the relinquishment affidavit with her. She confided to her DFPS-appointed counselor that her attorney pressured her into signing the relinquishment affidavit instead. Melissa also conveyed to her counselor that the circumstances surrounding the hearing were confusing, and the counselor agreed that events were becoming convoluted to the point where she became concerned people may

be taking advantage of Melissa. Similarly, Angali's attorney testified that the events unfolding at the courthouse on June 4 even confused him to the point that he "didn't understand what was going on, and [he] was concerned about that."

The court of appeals concluded that the psychiatrist's testimony at trial regarding voluntariness was equivocal because, when asked if Melissa's decision to sign the affidavit was a voluntary one, he testified, "I do not know." ___ S.W.3d at ___. The court of appeals also noted that the psychiatrist stated that he had discussed giving up the child with Melissa. *See id.* at ___. The evidence most heavily relied upon by the court of appeals was Melissa's testimony that she signed the affidavit to allow Angali "to have the baby and that I would still be able to be involved with the baby's life," which, according to the court of appeals, could be viewed by the jury as showing that Melissa understood that she was changing her rights by signing the affidavit. *See id.* at ___. Ultimately, the court of appeals held that because there was evidence going both ways, a reasonable jury could form a firm belief that Melissa knowingly and intelligently signed the June 4 voluntary relinquishment affidavit. *See id.* at ___.

There are several problems with the court of appeals' analysis. First, Melissa's testimony that she thought her mother would get the child and that she would still be involved with the child's life flies in the face of the court of appeals' reasoning that the jury could conclude that Melissa could obviously read and understand the affidavit. *See id.* at ___. The affidavit designated DFPS as managing conservator, not Angali, and did not include any language regarding post-termination contact, as any language to that effect is prohibited by the Family Code. *See* TEX. FAM. CODE § 161.103(h). Moreover, the counselor testified, "if [the affidavit] was in lawyer jargon, I would be surprised if she would have known what she signed. . . . I don't think [Melissa] would be able to

have the comprehension to read through the relinquishment and understand it." Likewise, Angali's attorney testified that, at the two previous unsuccessful attempts to transfer custody to Angali, Melissa needed an explanation of what she was signing, would sign legal documents without reading them, and did not know what she was signing. The testimony regarding Melissa's execution of the June 4 affidavit can lead to only one conclusion—she did not understand the document she was signing.

Second, the court of appeals misplaced the burden of proof. DFPS bore the burden of proving voluntariness by clear and convincing evidence. *See, e.g.*, *Djeto*, 928 S.W.2d at 97. It is uncontroverted that Melissa has an IQ of, at most, 70 and was diagnosed as borderline intellectual functioning. The testimony that she reads at a second-grade level was also uncontroverted. The only evidence to support the jury's verdict that Melissa knowingly and intelligently executed the affidavit of relinquishment is the testimony by her psychiatrist that they had discussed giving up the child, and testimony from her counselor that Melissa "seemed to have a good grasp" on the pros and cons of relinquishing her rights as everything was explained to her in a controlled, clinical setting. Testimony about the actual events on June 4, however, reveals a much different setting where Melissa did not understand the nature of the proceeding or the ultimate effect of the affidavit she signed. There is absolutely no evidence in the record, other than the language of the affidavit itself, that on June 4, 2010, Melissa understood the consequences of signing the affidavit—that she would be permanently and irrevocably severing her relationship with her daughter and handing over custody to DFPS, not her mother, with no guarantees that she would ever see her daughter again.

The evidence in support of the jury's verdict—even though it may do more than raise surmise and suspicion—is not capable of producing a firm belief or conviction that Melissa knowingly and

intelligently irrevocably relinquished her parental rights. *See Garza*, 164 S.W.3d at 621. Having reviewed all the evidence in the record under the clear and convincing standard of proof, we conclude that the record before us does not contain evidence of that effect and quality. From the evidence in the record, we therefore hold that the jury could not have reasonably found by a "firm belief or conviction" that Melissa voluntarily executed the affidavit of relinquishment of her parental rights. *See* TEX. FAM. CODE § 161.001(1)(K).

Because the court of appeals affirmed on relinquishment grounds, it did not address Melissa's challenges to the jury's findings on other statutory grounds for termination. ___ S.W.3d at ___ (citing TEX. R. APP. P. 47.1). Melissa and Angali raised these issues in their briefing before this Court, but we lack jurisdiction to review those factual sufficiency challenges. *See* TEX. CONST. art. V, § 6(a); *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). Accordingly, we remand the case to the court of appeals to consider the factual sufficiency of the evidence to support the jury's findings on the other statutory grounds for termination. TEX. R. APP. P. 53.4, 60.2(d).

C. Legal Sufficiency Challenge to the Best Interest Finding

The Family Code requires that the jury find, by clear and convincing evidence, that termination of parental rights is in the child's best interest. TEX. FAM. CODE § 161.001(2). Here, we must consider whether the evidence is legally sufficient to support the jury verdict that termination of Melissa's parental rights was in K.M.L.'s best interest. Only if no reasonable juror could form a firm belief or conviction that termination of Melissa's parental rights was in K.M.L.'s best interest can we conclude that the evidence is legally insufficient. *In re J.F.C.*, 96 S.W.3d at 266.

In *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), we established a non-exhaustive list of factors to consider in determining the best interest of a child, including: (1) the emotional and

physical needs of the child and the emotional and physical danger to the child now and in the future; (2) the parental abilities of the individuals seeking custody; (3) the plans for the child by those individuals and the stability of the home; and (4) the plans for the child by the agency seeking custody and the stability of the proposed placement. *See id*. at 371–72. We address these relevant factors in turn.

The emotional and physical needs of the child now and in the future and the emotional and physical danger to the child now and in the future are the first factors we consider. K.M.L. is still a young child. There is evidence that she was regressing in her development. DFPS testimony indicated concern about K.M.L.'s safety in Angali's home, as DFPS had intervened numerous times in Angali's home. Additionally, the DFPS investigator testified that Angali appeared to be under the influence of drugs on the day of K.M.L.'s accident, with her speech slurred, her eyes droopy, and her movements slow. Angali, at one point, admitted to using marijuana and driving the children while under its influence. As to competing evidence, the jury heard testimony from the CASA volunteer that Melissa had bonded with her child, loved and missed her child, and continued to check on the child. Angali testified that, before the accident, she and K.M.L. engaged daily in learning activities, that K.M.L. rarely watched television, that K.M.L. did not have sleeping difficulties, and that K.M.L. was potty trained, so she must have regressed in foster care. However, given that K.M.L. was seriously injured while in Angali's care, Angali's history of DFPS intervention, and the plan for Angali to be present and help raise K.M.L., these factors weigh in favor of the conclusion that termination was in K.M.L.'s best interest.

Another relevant factor is the parental abilities of the individuals seeking custody. *Id.* at 372. Even Melissa and Angali acknowledge that Melissa, on her own, cannot adequately meet K.M.L.'s needs. This factor clearly weighs in favor of termination.

Next, we consider the plans for the child by Melissa and the stability of the home. *See id.* While Melissa acknowledges that she cannot adequately provide for K.M.L., she argues that termination of her parental rights was not in K.M.L.'s best interest because Angali would help in raising K.M.L. DFPS, however, argues that the relationship between between Angali and Melissa was and is very tumultuous and would not ensure a stable home. The jury was made aware of Melissa and Angali's strained relationship from testimony that Angali sent Melissa away after K.M.L. was born and that, since her teenage years, Melissa has never resided with her mother for an extended period of time. Additionally, DFPS testimony suggested that Angali lacks the ability to provide a safe environment for K.M.L. due to a past history of domestic violence and the possibility of drug usage. A DFPS supervisor testified that Angali's home was not an appropriate placement as DFPS had been involved with the family long before K.M.L.'s birth for abuse allegations with Melissa's little brothers, though no action was ever taken. Angali testified that both she and Melissa suffer from bipolar disorder. Additionally, Melissa planned to live with Angali, creating a risk for more instability. Thus, these factors also weigh in favor of termination.

Finally, considering the plans for the child by the agency seeking custody and the stability of the proposed placement, the evidence introduced at trial reflects favorably on the foster care placement. The foster mother testified that K.M.L. was thriving in the foster home and that she and her husband planned to adopt K.M.L. The CASA volunteer testified that placement in this foster

home was in the child's best interest. These factors weigh in favor of the foster care placement and in favor of termination.

Considering the *Holley* factors and the evidence at trial, it is clear that the jury could reasonably form a firm belief or conviction that termination of Melissa's rights was, in fact, in K.M.L.'s best interest. *See In re J.F.C.*, 96 S.W.3d at 266. The evidence favoring a decision contrary to that reached by the jury is not so significant that no reasonable juror could have formed a firm belief or conviction that termination is in K.M.L.'s best interest. *See id.* We overrule Melissa and Angali's third argument.

D. Summary as to Melissa and Angali

We hold that termination was improper under Family Code section 161.001(1)(K) based on Melissa's June 4, 2010 affidavit of relinquishment of parental rights. However, we also hold that there is legally sufficient evidence that termination of Melissa's parental rights was in K.M.L.'s best interest. The court of appeals did not address the other three grounds for termination, ___ S.W.3d at ___ (citing TEX. R. APP. P. 47.1), which Melissa and Angali properly raised as factual sufficiency challenges in the court of appeals. Accordingly, we remand the case to the court of appeals to determine whether the evidence is factually sufficient to support a finding by the jury under subsections (D), (E), or (O) of section 161.001(1). *See* TEX. R. APP. P. 53.4, 60.2(d).

III. John's Issues

John also petitioned this Court for review. His petition raises three issues: (1) whether he waived his right to notice of the termination hearings by appearing at trial after being subpoenaed; (2) whether the jury's finding that John constructively abandoned K.M.L. is supported by legally sufficient evidence; and (3) whether the trial court erred in failing to make an indigence

determination, failing to appoint an attorney ad litem for John when he had not yet submitted an affidavit of indigence, and failing to admonish John that he had the right to an attorney. Because we find the first issue determinative, we do not reach the other two issues.

John argues that he did not receive notice of the termination hearings and did not waive notice by appearing at the trial. Family Code section 263.301(a) provides, "[n]otice of a permanency hearing shall be given as provided by Rule 21a, Texas Rules of Civil Procedure, to all persons entitled to notice of the hearing."[10] Rule 21a provides that citation may be served by

> delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the court in its discretion may direct.[11]

TEX. R. CIV. P. 21a.

After John filed a general appearance and answer in opposition on May 3, 2010, acknowledging his paternity of K.M.L. and providing both his address and telephone number, he became entitled to ten days' notice of any permanency hearing under section 263.301. *See* TEX. FAM. CODE § 263.301(a), (b)(3). It is undisputed that John did not receive notice of the four permanency hearings held after his May 3, 2010, answer but before the trial on January 18, 2011. In fact, at two of the hearings—the May and October 2010 hearings—the trial court issued orders finding that John did not receive proper notice. At the two other hearings, in June and August, DFPS

[10] While the Legislature amended Texas Family Code section 263.301 in 2013, *see* Act of May 20, 2013, 83rd Leg., R.S., Ch. 885, § 1, 2013 Tex. Gen. Laws 2232, 2232, only subsection 263.301(b) was amended. We refer to the current version of the statute for the purposes of subsection 263.301(a).

[11] Effective January 1, 2014, Rule 21a was amended and reorganized such that the quoted language is now subsection (a). *See* 2013 TX ORDER 0010, No. 13-9128 (Aug. 16, 2013). However, the relevant language did not change in substance.

employees testified that John was served only by publication, a manner of citation not authorized by Rule 21a. *See* TEX. R. CIV. P. 21a.

John's lack of notice of the permanency hearings has significance in two ways. First, one of the grounds under which John's parental rights were terminated is section 161.001(1)(O)—failure to comply with the provisions of a court order specifically establishing the actions necessary for the parent to obtain the return of the child who has been in DFPS custody for at least nine months as a result of an abuse or neglect removal. *See* TEX. FAM. CODE § 161.001(1)(O). The court of appeals did not address his lack of notice of the permanency hearings because it affirmed termination on constructive abandonment grounds, an independent basis from the jury's findings relating to the permanency hearings. *See* ___ S.W.3d at ___. But second and more importantly, John's failure to receive notice of the permanency hearings has implications as it relates to his lack of counsel and his due process rights. While we note our concern about DFPS's admitted and repeated failure to notify a parent about proceedings in a termination suit, we need not resolve the case on these grounds because the record indicates that DFPS may have erred in failing to provide John notice of trial.

Rule 245 of the Texas Rules of Civil Procedure provides that a trial court "may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties." TEX. R. CIV. P. 245. If a timely answer has been filed in a contested case or the defendant has otherwise made an appearance, due process rights are violated when a judgment is subsequently entered without the party having received notice of the setting of the case, *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 86–87 (1988), even when that party previously waived notice of citation. *See Delgado v. Hernandez*, 951 S.W.2d 97, 99 (Tex. App.—Corpus Christi 1997, no writ); *Gonzalez v. State*, 832

S.W.2d 706, 706–07 (Tex. App.—Corpus Christi 1992, no writ). A trial court's failure to comply with the notice requirements in a contested case deprives a party of his constitutional right to be present at the hearing and to voice his objections in an appropriate manner, resulting in a violation of fundamental due process. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

The record does not show that John was served with actual notice of the trial setting. In his original answer, John provided his sister's address, where he resided at the time of trial. No return receipt of citation was included in the clerk's record, although the appellate rules do not require such documents to be automatically included in the clerk's record absent specific request, and DFPS did not request it, even though it knew that notice was being challenged.[12] *See* TEX. R. APP. P. 34.5(a), (b)(2). Additionally, in this regard, the question of whether John had constructive notice of trial is, at most, inconclusive. John testified that he knew about the termination suit and had previously met with Angali's attorney. However, John appeared at trial under subpoena and, according to his testimony, was driven by a district attorney or possibly a police officer. When asked if he was given notice of the trial, John responded, "I have never gotten anything," and that he "didn't get anything in the mail." Failure to give a parent notice of pending proceedings "violates the most rudimentary demands of due process of law." *Peralta*, 485 U.S. at 84 (quoting *Armstrong*, 380 U.S. at 549) (internal quotations omitted). Given the constitutional implications of parental rights termination cases, *see In re E.R.*, 385 S.W.3d at 554, and John's statements on the record that he did not receive notice of trial, and absent any evidence to the contrary, we must conclude that John did not receive notice of trial. *See Gonzalez*, 832 S.W.2d at 707.

[12] In fact, DFPS made no requests for the appellate record, as the sole designation of items to be included in the clerk's record was filed by Angali. If, in fact, John was properly served, as soon as John raised this issue in his motion for new trial, DFPS could easily have requested that the return receipt be included in the appellate record.

DFPS next argues that John waived notice by appearing at trial and not moving for a continuance. The due process right to notice prior to judgment is subject to waiver. *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972). But such waiver must be voluntary, knowing, and intelligently waived. *See id.* at 185–86. It is true that John attended and participated in all four days of trial and did not request a continuance based on his lack of notice. However, John was told by the trial judge on the first day of trial that it was too late for him to be appointed an attorney and that nobody would be looking out for him anymore. Further, John appeared at trial under subpoena and testified that, "I have a lot of stuff going through my head right now, and it's very difficult to sit up here, and be this nervous, and try not to burst into tears over y'all not letting me see my little girl." The due process requirement of notice must be provided "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong*, 380 U.S. at 552). And, while we "certainly agree that pro se litigants are not exempt from the rules of procedure," when a determination "turns on an actor's state of mind . . . , application may require a different result when the actor is not a lawyer." *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (per curiam). Based on the record before us, we cannot conclude that John voluntarily, knowingly, and intelligently waived his due process right to notice of trial by sitting, under subpoena, through trial without any help from counsel and failing to formally move for continuance. John raised this complaint in a motion for new trial, and the trial court erred by not granting that motion. "Only that would have wiped the slate clean. Only that would have restored [John] to the position he would have occupied had due process of law been accorded to him in the first place." *Armstrong*, 380 U.S. at 552.

IV. Conclusion

We hold that the evidence is legally sufficient to support the jury finding that termination of Melissa's parental rights was in K.M.L.'s best interest. However, we also hold that termination of her parental rights under section 161.001(1)(K) was improper because there is legally insufficient evidence that she executed the affidavit of voluntary relinquishment knowingly and intelligently. We reverse that portion of the court of appeals' judgment regarding termination under section 161.001(1)(K) and remand the case to the court of appeals to consider the factual sufficiency of the other three grounds for terminating Melissa's parental rights.

We hold that John was entitled to notice of the permanency hearings and the trial and that he did not waive that right to notice by appearing at trial, as the record does not show that he appeared voluntarily such as to waive his constitutional due process right to notice. This lack of notice renders any judgment unenforceable and void. Accordingly, we reverse the judgment of the court of appeals as it relates to John and remand the case to the trial court for a new trial.

_____

Paul W. Green
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0728

IN THE INTEREST OF K.M.L., A CHILD

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

JUSTICE LEHRMANN, joined by JUSTICE DEVINE, concurring.

I join the Court's opinion finding legally insufficient evidence that K.M.L.'s mother knowingly and voluntarily relinquished her parental rights. As to K.M.L.'s father, John, I agree with the Court that the court of appeals' judgment should be reversed, though I do not entirely agree with the Court's reasoning.

The Court invalidates the jury's verdict terminating John's parental rights because the record does not reflect that he received notice of the trial in accordance with Texas Rule of Civil Procedure 245. ___ S.W.3d at ___. But while the Court correctly holds that John did not receive proper notice of trial, it incorrectly concludes that John did not waive the lack of notice. I agree with the court of appeals that a party who does not receive proper notice of trial waives error by, as John did, attending trial and failing to object to the lack of notice or request a continuance. ___ S.W.3d at ___ (citing *In re J.(B.B.)M.*, 955 S.W.2d 405, 407–08 (Tex. App.—San Antonio 1997, no pet.)). Further, the fact that the State had served John with a subpoena is immaterial, as he testified that he had appeared voluntarily and would have appeared regardless of the subpoena.

John's failure to preserve error does, however, cast light on issues the Court does not reach—whether the trial court erred in failing to appoint counsel to represent John or admonish him of his right to counsel. I would reach these issues and hold that, in light of indigent parents' statutory right to appointed counsel in state-initiated termination proceedings in Texas, the trial court erred in failing to admonish John of that right, rendering him unable to meaningfully exercise it.

Termination of parental rights, the total and irrevocable dissolution of the parent-child relationship, constitutes the "death penalty" of civil cases. On multiple occasions, the U.S. Supreme Court has afforded a high degree of constitutional respect to a parent's interest in maintaining the parent-child relationship. *See, e.g.*, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843–45 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). Specifically, the Supreme Court has recognized the fundamental nature of a parent's right to raise one's child, as an extension of the freedom of personal choice in family matters. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). Recognizing the significance of the rights at stake in parental termination cases, the State of Texas affords unique protections to parents whose rights are in danger of being terminated. *E.g.*, *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (holding that, due to the constitutional import of the parent-child relationship, facts in parental termination cases must be proved by clear and convincing evidence, as opposed to a mere preponderance).

In line with these protections, the Texas Legislature has afforded indigent parents in state-initiated termination proceedings the right to counsel. TEX. FAM. CODE §§ 107.013, 262.201; *In re B.G.*, 317 S.W.3d 250, 253–54 (Tex. 2010) ("An indigent parent is entitled to appointed counsel in

parental rights termination cases, and that statutory right . . . embodies the right to effective counsel." (citation and internal quotation marks omitted)). As discussed below, this right, regardless of its source, is meaningless without the ability to assert it.

A defendant who has a *constitutional* right to appointed counsel, such as a criminal defendant, has a corresponding right to be admonished of that right and the dangers of waiving it. *See Faretta v. California*, 422 U.S. 806, 835 (1975). This ensures that defendants who choose to waive their right to counsel do so knowingly and intelligently. *Id.* at 835–36. After all, a constitutional entitlement is hollow if the protected individual is unable to assert it because she does not know it exists. *See Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

Unlike in the criminal context, a defendant in a state-initiated parental termination proceeding has no absolute constitutional right to assistance of counsel. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 33 (1981). The Supreme Court held in *Lassiter* that, as the danger of an indigent litigant's being deprived of her personal liberty diminishes, so too does the presumption that she has a right to counsel. *Id.* at 26–27. The Court went on to apply the three-factor test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to determine whether due process required appointment of counsel for the indigent parent in that case. 452 U.S. at 27. These factors include (1) the private interests at stake, (2) the government's interest, and (3) the risk of error. *Id.* Though the Supreme Court declined in *Lassiter* to find a constitutional right to counsel (and, in turn, a right to admonishment), the Court notably went on to point out that "[a] wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution." *Id.* at 33. In explaining that "[state] courts have generally held that the State must

appoint counsel for indigent parents at termination proceedings," *id.* at 30, the Court not only applauded but encouraged such additional protections. *See id.* at 34 ("Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.").

As noted above, Texas is among the states that statutorily afford indigent parents the right to appointed counsel in state-initiated termination proceedings. *See* TEX. FAM. CODE § 107.013. At the time the underlying suit was filed, the statute stated in pertinent part: "In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent of the child who responds in opposition to the termination." Act of May 27, 2003, 78th Leg., R.S., ch. 262, § 1, 2003 Tex. Gen. Laws 1173, 1180, *amended by* Act of May 20, 2013, 83d Leg., R.S., ch. 810, § 2, 2013 Tex. Gen. Laws 2026, 2026 (codified at TEX. FAM. CODE § 107.013(a)).[1] While the statute did not expressly provide for admonishment, the Legislature has since amended section 262.201 of the Family Code to add an express admonishment requirement. Act of May 20, 2013, 83d Leg., R.S., ch. 810, § 9, 2013 Tex. Gen. Laws 2026, 2029 (codified at TEX. FAM. CODE § 262.201(a-1)).

Pursuant to section 107.013, "[a] parent who claims indigence under Subsection (a) must file an affidavit of indigence . . . before the court can conduct a hearing to determine the parent's

[1] As the Court notes, the statute also requires appointment of counsel for indigent parents in a state-initiated suit requesting appointment of a conservator for a child. That requirement was contained in subsection (c) of the statute at the time this suit was filed, but is now contained in subsection (a). Act of May 29, 2005, 79th Leg., R.S., ch. 268, § 1.06, 2005 Tex. Gen. Laws 621, 623, *repealed by* Act of May 20, 2013, 83d Leg., R.S., ch. 810, § 11, 2013 Tex. Gen. Laws 2026, 2030.

indigence under this section." TEX. FAM. CODE § 107.013(d). It is undisputed that John never requested appointed counsel under this provision. It is also undisputed, however, that he was not admonished of his right to counsel under this provision. Assuming that, under *Lassiter*, John had no constitutional right to counsel in this case, admonishing an indigent parent of his right to counsel is no less crucial when it originates in a state statute rather than the U.S. Constitution. A parent who is not admonished of that right cannot intelligently exercise or waive it. *Cf. Faretta v. California*, 422 U.S. 806, 835 (1975) (holding in the criminal context that the right to counsel carries with it the implied right to admonishment).

Without the right to admonishment, many indigent parents whose parental rights are in peril face a no-win situation: they have a statutory right to counsel if they follow the proper procedures to establish their indigence, but they have no right to be admonished of their right to counsel upon a finding of indigence and thus no way of ensuring they follow the required procedures to exercise it. That is exactly what happened in this case. John was entitled to appointed counsel if he demonstrated that he was indigent, but was not admonished of that right and in turn did not follow the statutory procedures to invoke it. Indeed, the trial judge told John at trial that, had he established his indigence earlier, he would have been entitled to an appointed attorney, but that "[i]t's a little late for that now." The trial court thus affirmatively recognized John's right to counsel while simultaneously denying it. Had John been admonished before trial that indigent parents have a statutory right to counsel, he would have had a chance to exercise, or waive, that right. As the court of appeals stated in *In re J.M.*:

> In the final analysis, the Department's position is that, because [Mother] did not ask for the appointment of an attorney at or before the final hearing, then we must assume she voluntarily waived any rights to appointed counsel under § 107.013(a). . . . The record is devoid of any indication that [Mother] knew of her rights to claim indigency and request counsel. However, in drawing an analogy to criminal trials, we know that a criminal defendant who is otherwise entitled to appointed counsel can waive his rights to counsel. However, such waiver must be voluntarily and intelligently made with knowledge of the dangers and disadvantages of proceeding to trial without counsel.

361 S.W.3d 734, 738–39 (Tex. App.—Amarillo 2012, no pet.) (internal citations omitted). Similarly, in this case "[t]he record is devoid of any indication that [John] knew of [his] rights to claim indigency and request counsel." *Id.* at 738.

These concerns are magnified by the fact that John failed to receive notice of trial. As noted above, I believe that John waived error on this ground, which only highlights the importance of representation by counsel that John was denied. Unlike a pro se litigant, an attorney would have been aware of the need to object and request a continuance in order to avoid waiver problems. Instead, without the guiding hand of counsel, John participated in the trial without objection.

I would hold that, even before it was amended to do so expressly, the Texas Family Code required trial courts to admonish parents (1) of their right to appointed counsel in state-initiated parental termination cases, and (2) that such right is contingent upon a finding of indigence. The Texas Legislature has taken pains to afford these parents more expansive protections than those minimally guaranteed under the U.S. Constitution. It is well established that while the federal government sets the floor for individual rights, the states set the ceiling. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986); *see also Davenport v. Garcia*, 834 S.W.2d 4, 14–15 (Tex. 1992). And the State of Texas affords indigent parents the right to counsel in parental termination cases, even

when federal due process does not. But an indigent parent who is not informed of his right to counsel, or how to exercise it, effectively has no right to counsel in the first place. Because John was given no meaningful opportunity to invoke, much less to intelligently waive, his right to appointed representation in these critically important proceedings, I agree with the Court that the court of appeals' judgment, which affirms the trial court's judgment terminating John's parental rights, must be reversed. Accordingly, I respectfully concur in the Court's judgment, but I cannot join Part III of the Court's opinion.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0728

IN THE INTEREST OF K.M.L., A CHILD

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

JUSTICE JOHNSON, joined by JUSTICE BOYD, dissenting in part.

I respectfully dissent from Part II.B. of the Court's opinion in which it holds the evidence is legally insufficient to support the jury finding that Melissa knowingly and intelligently relinquished her parental rights. Except for Parts II.B., II.D., and IV, I join the Court's opinion. I join its judgment as to John. I dissent from the judgment as to Melissa.

In determining legal sufficiency of the evidence to support a jury finding, whether the burden to obtain the finding is by a preponderance of the evidence or by clear and convincing evidence, we must credit the evidence supporting the finding if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so. *Ante* at ___; *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 819 (Tex. 2012); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009). Reviewing the evidence as to Melissa under that standard compels the conclusion that the Court errs in failing to affirm the judgment of the lower court as to her.

In concluding that the evidence is legally insufficient to support the jury finding as to the relinquishment affidavit, the Court says that "[t]here is absolutely no evidence in the record other than the language of the affidavit itself that on June 4, 2010, Melissa understood the consequences of signing the affidavit—that she would be permanently and irrevocably severing her relationship with her daughter and handing over custody to DFPS, not her mother, with no guarantees that she would ever see her daughter again." *Ante at* ___. I disagree with that statement, but also disagree with the Court's conclusion that the evidence is legally insufficient for another, more basic, reason. First, even if the affidavit is the only evidence, it is legally sufficient evidence to support the jury finding. Next, despite the Court's conclusion, the record contains other evidence that is legally sufficient to do so, especially when considered along with the relinquishment affidavit.

First, as to the June affidavit, the trial court overruled Melissa's challenge to its validity and her objection to its admission into evidence. The Court overrules her challenge to that ruling, thus the affidavit is evidence the jury could have considered for all purposes. As the sole judges of the credibility and weight of the evidence, the jurors could have credited the affidavit and its clear relinquishment language and disregarded the testimony and evidence supporting Melissa's claim that she did not know what she was doing by executing the affidavit. And the Court must disregard the evidence supporting her claim as well, because the jury could have disbelieved Melissa's testimony as an interested witness and given less weight to her other evidence regarding the affidavit. Certainly, Melissa's evidence that she was unaware of what she was doing, including the evidence that she was intellectually disabled and bipolar, does not completely negate the evidentiary value of

the affidavit. As the jury was both entitled and required to do, it resolved the conflicts in the evidence and found that Melissa voluntarily and intelligently executed the affidavit.

Next, the Court's statement that there is "absolutely no evidence" to support the jury finding other than the language of the affidavit itself ignores significant record evidence and inferences raised by that evidence. *See ante at* ___. When Melissa executed the June affidavit, she was, and had been since August 9, 2009, represented by Joe Roth, a court-appointed attorney. Roth began practicing law in 1977 and had a general practice which for many years included representing parents and children in termination cases. Roth signed as one of two statutorily required witnesses to Melissa's execution of the June affidavit. Melissa testified that Roth did not go over the affidavit with her. Roth testified at trial, but was precluded by trial court rulings from testifying about his communications with Melissa. But Amanda Jackson, the Department's conservatorship supervisor for Melissa's case, testified regarding the events surrounding Melissa's execution of the affidavit, and her testimony included some of Roth's interactions with Melissa:

> The day that [Melissa] signed the affidavit of relinquishment with -- Joe Roth was still appointed to be her attorney. It was the first Friday of June . . . and that day Melissa had arrived, and she came into the courtroom downstairs, and I was sitting at one of the tables, and she came up to me and asked if she could talk to me, and I said yes. And she said what do I have to do to sign my -- to sign my rights over. And I told her that I did not feel comfortable discussing that with her because it is not proper for [the Department] to discuss relinquishment with parents when they are represented by an attorney. So, I explained to Melissa that I did not feel comfortable discussing that with her. I told her that Mr. Roth should be there shortly, and that I would relay what she was saying to him, and that was something they would need to discuss, because I could not discuss that with her.

When asked if Melissa asked any questions regarding relinquishing her rights, Jackson testified:

> She just -- she just asked, you know, about the paperwork. She came up to me after she had signed it with Mr. Roth. When Mr. Roth arrived, I saw the two of them, you know, talking off to the side. He came over to me. I told him what his client had said. I provided him with relinquishment paperwork that is prepared by our legal department. I gave him that paperwork. . . . He went outside. He was outside on the bench with Melissa. I don't know, particularly, what they were discussing, but he sat down with her. And then he came back and said she wants to sign.

Counselor Miller, who began counseling Melissa in November 2009 and continued doing so until several months after Melissa executed the June affidavit, testified that she and Melissa "talked about relinquishment [of Melissa's parental rights] over a number of sessions." Part of her testimony focused specifically on her counseling of Melissa in March, May, and June 2010, when Melissa signed the June relinquishment affidavit as well as two earlier ones that Miller did not know about. Miller's last counseling session with Melissa before she executed the June affidavit was on June 1, 2010, three days before Melissa executed the affidavit on June 4. Miller's testimony about Melissa's understanding of what relinquishing her parental rights meant included the following exchange:

> Q: Now, do you have an opinion as to whether or not she did this voluntarily?
> A: As far as relinquishing her rights?
> Q: Yes.
> A: We spent a number of sessions talking about it. I felt like it was my job to help her look at the pros and cons, not to lead her to any certain direction, and she appeared to be able to weigh those pros and cons. And the last session I had, she was leaning towards relinquishing her rights, and she seemed to have a good grasp on that. She didn't seem to be confused.
> . . .
> Q: Do you think that she had a -- do you think that she knew what she was doing in exercising these three affidavits of relinquishment?
> A: Well, I know when I worked with her, I was very careful to make sure that the words I used weren't too big, or I would let her know that if I said something and she didn't understand to stop me. I wanted to make sure she understood. That's why I felt like, counseling-wise, that she had a good grasp of what we talked about. I

> wasn't there during the hearing. It seems like -- I recall her saying at the hearing she couldn't hear some of what was going on and she had a hard time following the court proceedings sometimes, as far as the words she didn't understand.
> Q: But from her talking with you over and over again about relinquishing, do you think that she had a firm grasp on what the pros and cons were?
> A: Yes, from the other therapy sessions.
> . . .
> Q: And so Melissa did have plans, you know, for her future; is that correct?
> A: I wouldn't say that she had her life mapped out, but she appeared to me that she was very bonded with her child.... And I explained to her if her rights were terminated, that that would mean she would have no contact with her child until possibly the child was 18.

To give context to Miller's testimony, it is important to note first that she was not a Department employee, and second, her qualifications. Miller was licensed as a professional counselor in 1996 and began practicing as a counselor that same year. Before she was licensed as a counselor she earned Bachelors and Masters degrees. Her Masters degree was in Psychology and included training in psychological, IQ, and achievement testing. As part of her counseling practice she performed "a high volume" of that type of testing until 2009, as well as performing tests for disabilities including intellectual disabilities.

As noted above, the June affidavit of relinquishment was not Melissa's first encounter with the concept of relinquishing her parental rights. She executed two earlier affidavits in which she also stated that she relinquished her rights, the first being on March 15, 2010. That affidavit was entitled Request for Termination of Parental Rights Pursuant to Voluntary Parental Relinquishment, and was prepared and notarized by the attorney representing her mother. By its language Melissa relinquished her parental rights, requested that they be permanently and irrevocably terminated, requested that her mother, Angali, be designated as KML's conservator, *and acknowledged that*

termination of her rights would not be dependent on Angali being granted conservatorship. The document contained the statement "I swear that the statements contained in this document are based on personal knowledge, are true and correct, [and] are made under oath in front of a notary."

Then, on May 5, 2010, she executed a document entitled Affidavit of Voluntary Relinquishment of Parental Rights. That document, like the March 15 document, was prepared by Angali's attorney. Two persons signed that document as witnesses and it was notarized by a deputy district clerk for San Jacinto County. In that document Melissa stated that she had been informed of her parental rights and duties, termination of her rights was in the best interest of KML, and the relinquishment was irrevocable. Both of those documents were admitted into evidence at trial.

Angali's attorney, who prepared the March and May relinquishment documents, testified that he prepared the documents based on Melissa's verbal statements and that he believed her purpose in executing them was to allow Angali to become the "adoptive parent or managing conservator of" KML. The documents were both notarized and Angali's lawyer personally notarized one of them. The attorney testified that Melissa signed the documents in front of him, but he did not think she read them. He testified, however, as follows regarding whether he explained the effect of the relinquishment documents:

> Q: And you didn't read or explain it to her at all; is that correct?
> A: I did some explanation. I don't think I read it to her.
> . . .
> Q: Did you feel any sort of obligation to tell her that she needed to read it or ask her any questions with regard to her being sure that that's something she wanted to do?
> A: I think I did some of that.
> Q: Give us an example of what you did.
> A: Okay. What this document is going to do, it's going to terminate your rights, because that has to happen in order for your Momma here, in the next room, in order

> to adopt. You can't just have multiple people that are parents of a child. So what we're going to do here is terminate -- this is going to terminate your rights in order to allow your mother to have the child.
> Q: So you explained what termination was to her, and kind of how the process would work?
> A: *I didn't tell her anything about the process, but I think I explained to her that this was a termination, yeah, termination.*
> Q: *Do you think she understood it? At the time, did you think she understood it?*
> A: *I did think at the time she understood it. I believe that.* (emphasis added)

There is evidence that Melissa, at the time she executed the June affidavit, was intellectually disabled and bipolar and that she did not understand what she was doing when she signed it. But when presented with substantial direct evidence—including the affidavit itself—and evidence from which logical inferences could be drawn to the effect that she did knowingly and intelligently execute the affidavit, the jury could have disregarded the conflicting evidence that supported Melissa's claim that she did not understand what she was doing. The evidence supporting the jury finding includes, but is not limited to, the witnessed, notarized affidavit itself; her execution of two prior notarized affidavits relinquishing her parental rights, one of which was witnessed by two unimpeached witnesses and notarized by a court clerk; the explanation to Melissa by her mother's attorney in connection with at least one of the prior affidavits about what relinquishment meant; her receipt of professional counseling specifically directed in part to helping Melissa understand the effect of relinquishing her parental rights; and opinion testimony by both Angali's attorney and Melissa's counselor that Melissa understood what relinquishing her parental rights meant.

I would affirm the judgment of the court of appeals as to Melissa.

Phil Johnson
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0739

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS UNION LIFE INSURANCE COMPANY,
PETITIONERS,

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC.,
RESPONDENTS

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

Argued November 6, 2013

JUSTICE BROWN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN and JUSTICE DEVINE joined.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE WILLETT, JUSTICE LEHRMANN and JUSTICE BOYD joined.

This is an arbitration case. The petitioners contend the court of appeals erroneously imposed a requirement for the selection of arbitrators beyond those the parties agreed upon in their arbitration agreement. For the reasons explained below, we reverse.

I

In 1998, Robert Myer and Strider Marketing Group, Inc. (collectively Myer) sold a collection of insurance companies to the petitioners (collectively Americo). The parties agreed on an up-front payment to Myer for the businesses and executed a "trailer agreement" to provide for additional payments based on the businesses' future performance. The trailer agreement included an arbitration clause with six paragraphs of terms agreed upon by the parties, including:

> 3.3 Arbitration. In the event of any dispute arising after the date of this Agreement among the parties hereto with reference to any transaction contemplated by this Agreement the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third . . . . Each arbitrator shall be a knowledgeable, independent businessperson or professional.
> . . .
> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, except that Americo and Myer each shall be entitled to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief. The arbitrators shall be entitled to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are proscribed above for arbitrators.

The agreement combines terms expressly chosen by the parties with the incorporation by reference of American Arbitration Association rules to govern the arbitration proceeding. When the parties executed their agreement, AAA rules did not require arbitrator-impartiality, but by the time Americo invoked arbitration in 2005 after disputes arose concerning the additional payments to Myer, the AAA rules by default required that "[a]ny arbitrator shall be impartial and independent . . . and shall

be subject to disqualification for . . . partiality or lack of independence . . . .” AAA Commercial Arbitration Rules R-17(a)(I) (2003).

Myer alleged that Americo’s first-choice arbitrator, Ernest Figari, Jr., was partial toward Americo, and successfully moved the AAA to disqualify him. Americo objected to Figari’s disqualification but named another arbitrator, about whom Myer likewise complained, and whom the AAA likewise struck. Myer did not object to Americo’s third appointee, who ultimately served on the panel. The arbitration proceeding resulted in a unanimous award in Myer’s favor amounting to just over $26 million in payments due, breach-of-contract damages, and attorneys’ fees.

When Myer moved to confirm the award in the trial court, Americo renewed its objection to Figari’s disqualification. Americo argued that in disqualifying Figari for partiality, the AAA failed to follow the arbitrator-selection process specified in the parties’ agreement, which provided only that “each arbitrator shall be a knowledgeable, independent businessperson or professional.” The trial court determined the arbitration agreement was ambiguous but ultimately agreed with Americo’s reading and vacated the award. Myer appealed, and the court of appeals reversed on the ground that Americo had waived its objection to Figari’s removal. We reversed that decision. *Americo Life, Inc. v. Myer*, 356 S.W.3d 496 (Tex. 2011) (per curiam). On remand, the court of appeals again reversed, this time on the merits, holding the arbitration agreement was unambiguous and the arbitration panel was properly appointed under both the terms of the agreement and the AAA rules. Nearly ten years after arbitration proceedings commenced between the parties, their case again comes before this Court.

II

Arbitrators derive their power from the parties' agreement to submit to arbitration. *City of Pasadena v. Smith*, 292 S.W.3d 14, 20 (Tex. 2009). They have no independent source of jurisdiction apart from the parties' consent. *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986). Accordingly, arbitrators must be selected pursuant to the method specified in the parties' agreement. *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672–73 (5th Cir. 2002). An arbitration panel selected contrary to the contract-specified method lacks jurisdiction over the dispute. Accordingly, courts "do not hesitate to vacate an award when an arbitrator is not selected according to the contract-specified method." *Bulko v. Morgan Stanley DW, Inc.*, 450 F.3d 622, 625 (5th Cir. 2006). So we look to the arbitration agreement to determine what the parties specified concerning the arbitrator-selection process.

A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol-evidence rule. *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011). Facts and circumstances that may be considered include the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction. *See id.* (citing 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32.7 (4th ed. 1999)). When interpreting an integrated writing, the parol-evidence rule precludes considering evidence that would render a contract ambiguous when the document, on its face, is capable of a definite legal meaning. *Sun Oil Co. (Del.) v. Madeley*, 626 S.W.2d 726, 731–32 (Tex. 1981). The rule does not, however, prohibit considering surrounding facts

and circumstances that inform the contract text and render it capable of only one meaning. *See id.*; *Wellington*, 352 S.W.3d at 469.

III

A

To determine the parties' intent, we examine the express language of their agreement. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). In their agreement, the parties directly addressed the issue of arbitrator qualifications and agreed on a short list of requirements, namely that each arbitrator must be a "knowledgeable, independent businessperson or professional." Americo argues the court of appeals improperly added "impartial" to the parties' list of qualifications. Myer counters that because "independent" and "impartial" are essentially synonymous, Americo was always obligated to name an impartial arbitrator.

We disagree that "independent" may be read interchangeably with "impartial." Various dictionary definitions might support some overlap between the two words, but when applied in the arbitration context, they carry distinct meanings. The parties in this case agreed to "tripartite arbitration," through which each party would directly appoint an arbitrator, and the two party-appointed arbitrators would agree on a third panelist. This method was commonplace when the parties executed their agreement in 1998. *See Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 630 & n.2 (Tex. 1997) (describing the method as "often-used"). In a tripartite arbitration, each party-appointed arbitrator ordinarily advocates for the appointing party, and only the third arbitrator is considered neutral. *See, e.g.*, *Winfrey v. Simmons Food, Inc.*, 495 F.3d 549, 552 (8th Cir. 2007) (noting the "industry custom that party arbitrators are frequently not required or expected to be

neutral for ruling on disputes"); *Lozano v. Md. Cas. Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988) (per curiam) ("An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial."); *Metro. Prop. and Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 892 (D. Conn. 1991) (In tripartite arbitration, "each party's arbitrator 'is not individually expected to be neutral.'") (quoting *Soc'y for Good Will to Retarded Children v. Carey*, 466 F.Supp. 702, 708 (S.D.N.Y. 1979)); *Matter of Astoria Med. Grp. (Health Ins. Plan of Greater N.Y.),* 182 N.E.2d 85, 87 (N.Y. 1962) ("[T]here has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral,' at least in the sense that the third arbitrator or a judge is.").

In fact, the arbitration agreement in *Burlington*, like the agreement in this case, "did not specify whether the two arbitrators that the parties unilaterally selected . . . would be neutral or would represent the interests of the party appointing them." *Burlington*, 960 S.W.2d at 630. But in *Burlington*, unlike this case, there was "no dispute . . . that the parties intended and understood that the party arbitrators would be aligned with, act as advocates for, and ultimately side with the appointing party." *Id.*

The AAA rules in place when the agreement was executed likewise reflect the prevalence of this practice. At that time, the rules provided that "[u]nless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed arbitrator and not subject to disqualification pursuant to Section 19." AAA Commercial Arbitration § 12 (1996). Section 19 contained procedures to challenge arbitrators for partiality. *See id.*, § 19. Accordingly, the AAA rules

presumed party-appointed arbitrators were non-neutral, and the parties would have to "agree otherwise" to rebut this presumption.

The only indication the parties sought to "agree otherwise" is their requirement that party-appointed arbitrators be "independent." Americo argues that the parties chose the word "independent" not to require impartiality, but to proscribe arbitrators employed by or otherwise under the control of one of the parties. Americo's argument is certainly plausible; the practice of appointing arbitrators who are somehow formally associated with the party appointing them is not unheard of. *See, e.g., Astoria*, 182 N.E.2d at 86 (party appointed "one of the incorporators of [the company] and its president from 1950 to 1957" who was at the time "a member of its board of directors and one of its paid consultants"); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) ("Under the [terms of the arbitration agreement], Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management."). Indeed, to prevent this practice, some arbitration agreements expressly prohibit it. *See, e.g., Burlington*, 960 S.W.2d at 630 ("While [the arbitration agreements] prohibit the parties from selecting their own employees as arbitrators, [they] do not specify whether the two arbitrators that the parties unilaterally selected . . . would be neutral or would represent the interests of the party appointing them.").

Additional agreement terms lend support to Americo's interpretation. The agreement provides that arbitrators "shall be entitled to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are proscribed above for arbitrators." The only term that can be fairly read as a proscription of a "relationship" between a party and its chosen arbitrator is the requirement that all arbitrators be

"independent" of the party appointing them. But it does not follow that an "independent" arbitrator must also be impartial; indeed, an independent arbitrator could be partial or impartial. However, if we follow Myer's suggestion that "independent" is synonymous with "impartial," it becomes unclear what "relationship" the agreement is attempting to proscribe. Impartiality is a state of mind, but "independent" necessarily refers to a relationship—the subject is free from someone or something.

The industry norm for tripartite arbitrators when the parties executed their agreement was that party-appointed arbitrators were advocates, and the AAA rules in place at that time presumed such arbitrators would not be impartial unless the parties specifically agreed otherwise. Given the pervasiveness of the practice, and the clear AAA presumption the parties had to rebut, we believe the parties would have done more than require its arbitrators to be "independent" if they wished them to be impartial. "Independent" and "impartial" are not interchangeable in this context, and therefore we conclude the parties did not intend to require impartiality of party-appointed arbitrators.

B

Having concluded the terms of the agreement do not require impartial party-appointed arbitrators, we turn to the effect of the incorporated-by-reference AAA rules on arbitrator qualifications. There is no dispute the AAA rules would govern matters on which the agreement is silent. The question is whether AAA rules on arbitrator qualifications can, as the court of appeals concluded, supplement terms agreed on by the parties that specifically speak to the same point.

The court of appeals reasoned that the rules and the agreement "can be read together and harmonized to avoid any irreconcilable conflict." *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 543 (Tex. App.—Dallas 2012). In other words, because "impartial" could be added without negating any

expressly chosen qualifications, it was proper to do so to effectuate all the agreement's provisions. But this cannot be the end of our inquiry, or the specifically chosen terms of any agreement would be hopelessly open-ended whenever outside rules are incorporated by reference.

When an arbitration agreement incorporates by reference outside rules, "the specific provisions in the arbitration agreement take precedence and the arbitration rules are incorporated only to the extent that they do not conflict with the express provisions of the arbitration agreement." *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991). The Federal Arbitration Act, which the parties agree governs their agreement, requires that if an agreement provides "a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. Similarly, the AAA rules in effect when the parties executed their agreement, as well as when arbitration was invoked, both provide that "[i]f the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed." AAA Commercial Arbitration Rules § 14 (1996), R-12 (2003).

Any attempt to harmonize the AAA impartiality rule with the parties' expressly chosen arbitrator qualifications misses the point. We do not construe "conflict" between an agreement and incorporated rules so narrowly as to find it exists only if the rule contradicts the agreement. A conflict can exist when an agreement and incorporated rules speak to the same point. Even if both can be followed without contradiction, they conflict because the parties have already addressed the matter and are not in need of gap-filling from the AAA rules. When the agreement and incorporated rules speak to the same point, the agreement's voice is the only to be heard.

Here, the parties chose a short list of arbitrator qualifications, and in doing so we must assume they spoke comprehensively. The parties chose "knowledgeable" and "independent" but not "impartial," and we think they meant not only what they said but also what they did not say. *See CKB & Assocs. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987) (*expressio unius est exclusio alterius*—the naming of one thing excludes another). And though we can concede the parties embraced some uncertainty by adopting AAA rules that were subject to change, we cannot conceive that they agreed to be bound by rules that would alter the express terms of their agreement. Nor can we imagine they took the trouble to expressly agree on some terms if their decision to incorporate AAA rules would leave those terms open to alteration. The AAA impartiality rule conflicts with the parties' agreement because the parties spoke on the matter and did not choose impartiality. When such a conflict arises, the agreement controls. *Szuts*, 931 F.2d at 832.

* * *

Because the AAA disqualified Americo's first-choice arbitrator for partiality, the arbitration panel was formed contrary to the express terms of the arbitration agreement. The panel, therefore, exceeded its authority when it resolved the parties' dispute. *See City of Pasadena*, 292 S.W.3d at 20; *I.S. Joseph Co.*, 803 F.2d at 399. Because the arbitrators exceeded their authority, the arbitration award must be vacated. *See* 9 U.S.C. § 10(a); *Bulko*, 450 F.3d at 625. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order vacating the arbitration award.

_____

Jeffrey V. Brown
Justice

OPINION DELIVERED: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0739

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS UNION LIFE INSURANCE COMPANY, PETITIONERS,

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

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

JUSTICE JOHNSON, joined by JUSTICE WILLETT, JUSTICE LEHRMANN, and JUSTICE BOYD, dissenting.

The parties in this case agreed to arbitrate disputes regarding Robert Myer's sale of life insurance companies to Americo for tens of millions of dollars, and agreed that the arbitration proceedings would be conducted in accordance with the commercial arbitration rules of the American Arbitration Association (AAA). When this dispute arose and Myer challenged the first two arbitrators appointed by Americo, the AAA disqualified them. Americo protested the disqualification of the first arbitrator it appointed, reserved the right to challenge his disqualification, eventually named an arbitrator who was not disqualified, and arbitrated. After completion of the arbitration, Americo sought to have the trial court vacate the award. The court did so on the basis

that the AAA improperly disqualified Americo's first appointed arbitrator, the panel was improperly constituted, and the award was void. The court of appeals reversed and remanded.

The Court holds that the trial court did not err by voiding the arbitration award because in their agreement (the trailer agreement) the parties established the exclusive qualifications and selection method for arbitrators. I agree with the court of appeals that the trailer agreement and provisions of the AAA rules which the parties specifically agreed would govern any arbitration proceedings are unambiguous, can be harmonized, and both can be given effect. Accordingly, the parties should be bound by the arbitrator selection provisions of both, as they agreed.

Myer sold multiple insurance companies to Americo. In 1998 they entered into a trailer agreement containing the following provisions regarding disputes:

> 3.3 Arbitration. In the event of any dispute arising after the date of this Agreement among the parties herein with reference to any transaction contemplated by this Agreement, the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third. . . . Each arbitrator shall be a knowledgeable, independent businessperson or professional.
> . . .
> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, except that Americo and Myer each shall be entitled to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief. The arbitrators shall be entitled to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are proscribed above for arbitrators.

Disputes arose, Americo demanded arbitration in 2005, and each party appointed an arbitrator. Myer objected to Ernest Figari, the arbitrator appointed by Americo. In its letter to the

AAA about Figari, Myer protested that the parties "have not agreed to the appointment of a non-neutral arbitrator in this proceeding, and [Myer] requires that any arbitrator must qualify as an impartial and independent arbitrator." The AAA disqualified Figari as well as a second Americo appointee. Finally, Americo appointed the arbitrator who served on the panel. That panel eventually rendered a unanimous award for Myer.

The trial court granted Americo's motion to set aside the award because the panel was improperly constituted and the award was void. The court entered findings of fact and conclusions of law, some of which were: (1) the arbitrator selection method in the AAA rules did not apply because the parties agreed on specific procedures and standards for appointing arbitrators; (2) the AAA was required to follow the procedures in the first paragraph of section 3.3 of the trailer agreement and it did not; and (3) the arbitrators were not required to be neutral or meet the "impartial and independent" standard of the AAA rules.

The court of appeals reversed. *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 542-46 (Tex. App.—Dallas 2012, pet. granted). It held that the trailer agreement was not ambiguous, the AAA rules applied to "proceedings" which included the arbitrator selection process, the arbitrator selection process complied with the trailer agreement and AAA rules that it specified, the applicable AAA rules required impartial arbitrators absent the parties' specific agreement otherwise, the parties did not specifically agree otherwise, and the AAA did not disregard its own rules in disqualifying Figari. *Id.*. I agree with the court of appeals' analyses and conclusions.

I also agree with a great deal of what the Court says, and certainly with the authorities it cites for fairly standard, unremarkable principles of contract interpretation. For example, I agree that the

language in the trailer agreement that requires arbitrators to be "independent" cannot be read interchangeably with "impartial." ___ S.W.3d ___, ___. I agree that in determining the intent of parties to an agreement we first and foremost, examine the express language of their agreement. *Id.* at ___ (citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011)). I agree that written contracts must be construed to give effect to the parties' intent as they expressed it in the text of the contract, and as the text is understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol evidence rule. *Id.* at ___ (citing *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011)). I agree that "[w]hen an arbitration agreement incorporates by reference outside rules, 'the specific provisions in the arbitration agreement take precedence and the arbitration rules are incorporated only to the extent that they do not conflict with the express provisions of the arbitration agreement.'" *Id.* at ___ (quoting *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991)). But I view the Court, in the end, as giving only lip service to those principles and authorities.

The Court says that the parties agreed to an arbitrator selection process and decided what qualifications their arbitrators must possess by specifying that each arbitrator must be a "knowledgeable, independent businessperson or professional." ___ S.W.3d at ___. So far, so good. But it then determines that the parties "spoke comprehensively," by listing the requirements they desired as to arbitrators. While acknowledging the parties also agreed that the AAA rules would govern the proceedings, the Court draws two conclusions with which I disagree. The first is its

response to the court of appeals' conclusion that the AAA rules and the trailer agreement can be read together and harmonized to avoid any irreconcilable conflict. The Court's response is

> In other words, because [as the court of appeals held] impartiality could be added without negating any expressly chosen qualifications, it was proper to do so to effectuate all the agreement's provisions. *But this cannot be the end of our inquiry, or the specifically chosen terms of any agreement would be hopelessly open-ended whenever outside rules are incorporated by reference.*

Id. at ___ (emphasis added). The second conclusion with which I disagree is the Court's conclusion that the AAA provisions as to arbitrator impartiality conflict with the parties' specific agreement because of the added impartiality requirement. *Id.* at ___.

As to the Court's concern of "hopelessly open-ended" terms in the agreement, the trailer agreement executed by these sophisticated parties specifies that each appointed arbitrator "shall be a knowledgeable, independent businessperson or professional." But it also provides that the AAA rules apply to the proceedings. At the time the parties entered into the trailer agreement, the 1996 AAA rules were in effect. Those rules specified that

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its commercial Arbitration Rules. *These rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration or submission agreement is received by the AAA.* The parties, by written agreement, may vary the procedures set forth in these rules.

AAA Commercial Arbitration §1 (1996) (emphasis added). That provision is not in the least ambiguous or unclear. The parties could have, but did not, incorporate the 1996 rules into their agreement while excluding any amendments to the rules. Then their agreement would not have been "open-ended" as the Court describes it. Rather, the parties incorporated language specifying that

their disputes would be resolved according to whatever AAA rules were in effect when the demand for arbitration was made. The Court's conclusion that the parties could not have meant exactly what they said because the terms of their agreement would "leave those terms open to alteration" is a judicial re-making of the parties' agreement. If the parties to a contract want its terms to be open to alteration, they are entitled to make it so. If they do not, they can make it so. But whichever way they choose should be honored by the courts.

As to the Court's conclusion that there is a conflict between the arbitrator requirements in the trailer agreement and those in the AAA rules, there is no dispute that the 2003 AAA Rules apply. And as the court of appeals explained, the 2003 rules provide that when parties have agreed to each name an arbitrator, the standards of rule R-17 with respect to impartiality and independence will apply unless the parties have "specifically agreed" that the arbitrators are to be non-neutral and do not have to meet such standards. *Myer*, 371 S.W.3d at 543 (citing AAA Commercial Arbitration Rule R-12(b) (2003)). Rule R-17 provides that

> Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for . . . partiality or lack of independence.

AAA Commercial Arbitration Rule R-17(a) (2003). The trailer agreement provides that arbitrators will be knowledgeable, independent businesspeople or professionals. But Americo and Myer did not "specifically agree" that the arbitrators would be non-neutral and need not meet the Rule R-17 standards. Therefore, in addition to the qualifications the parties set out in the first paragraph of section 3.3 of the trailer agreement, the parties also agreed that (1) the AAA arbitration rules in effect at the time arbitration was demanded would apply, and (2) pursuant to the 2003 rules that were in

effect when arbitration was demanded, the arbitrators would be impartial and perform their duties with diligence and good faith.

The Court concludes that the provisions in the trailer agreement and those in Rule R-17 conflict. It reaches that conclusion by *assuming* that the parties listed in their separate agreement all the requirements they desired of their arbitrators. But the trailer agreement language does not support such an assumption. To the contrary, the language of section 3.3 of the trailer agreement demonstrates just the opposite–that when the parties intended to supplant, vary, or circumscribe the provisions of the AAA rules, they knew exactly how to specifically do so:

> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, *except that Americo and Myer each shall be entitled to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief....* (emphasis added)

Neither section 3.3 of the trailer agreement listing the arbitrator requirements nor any other part of the trailer agreement includes language addressing, much less specifically providing for, non-neutral arbitrators. And courts should not "rewrite agreements to insert provisions parties could have included." *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996).

Further, contracts must be considered in their entirety, with all provisions harmonized, if possible, and all provisions given effect to the extent possible. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014). "No 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). By assuming the parties included

all the arbitrator qualifications they desired in the trailer agreement, the Court confounds the intent of the parties as unambiguously expressed by the words they used in their agreement and the provisions of the AAA rules they incorporated into their agreement. That assumption leads the Court to determine that the trailer agreement and the AAA rules conflict when in reality they can be harmonized as our extensive contract interpretation precedent requires.

In the end the Court misses the mark: the parties' unambiguous agreement and AAA Rule R-17 requiring arbitrator impartiality can be harmonized, and the parties did not expressly agree that the arbitrators could be non-neutral as they were required to do if they intended to negate the applicable AAA rules requiring impartiality. The parties were entitled to make whatever agreement they chose, open to alteration or not. Because the provisions of the trailer agreement and Rule R-17 can be harmonized, the provisions of both can be given effect. The provisions require the arbitrators to be impartial.

I would affirm the judgment of the court of appeals. Because the Court does not, I respectfully dissent.

_____

Phil Johnson
Justice

OPINION DELIVERED: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0772

ZACHRY CONSTRUCTION CORPORATION, PETITIONER,

v.

PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS, RESPONDENT

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

Argued November 6, 2013

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE DEVINE, and JUSTICE BROWN joined.

JUSTICE BOYD filed a dissenting opinion, in which JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE LEHRMANN joined.

The common law permits a contractor to recover damages for construction delays caused by the owner, but the parties are free to contract differently. A contractor may agree to excuse the owner from liability for delay damages, even when the owner is at fault. The contractor thereby assumes the risk of delay from, say, an owner's change of plans, even if the owner is negligent. But can a no-damages-for-delay provision shield the owner from liability for deliberately and wrongfully interfering with the contractor's work? Before this case, a majority of American

jurisdictions—including Texas courts of appeals, courts in all but one jurisdiction to consider the issue, and five state legislatures—had answered no. We agree with this overwhelming view and also conclude that the answer is the same if the owner is a local governmental entity for which immunity from suit is waived by the Local Government Contract Claims Act.[1]

Contractors are usually paid as work progresses and, in exchange for payment, must waive liens and claims related to the work paid for. But does such a general waiver release a claim the contractor has already asserted? Not, we think, unless the claim is specifically mentioned or the intent to do so is clear.

Our conclusions require us to reverse the judgment of the court of appeals[2] and remand the case to that court for further proceedings.

I[3]

Petitioner, Zachry Construction Corporation, contracted to construct a wharf on the Bayport Ship Channel for respondent, the Port of Houston Authority of Harris County, Texas. The wharf would be a concrete deck supported by piers, extending out over the water. It would be used for loading and unloading ships carrying containerized goods and would be long enough—1,660

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[1] TEX. LOC. GOV'T CODE §§ 271.151-.160.

[2] 377 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2012).

[3] The evidence in this case was hotly disputed at almost every turn. We do not pause in this rehearsal of the proceedings to note each disagreement. In reviewing any case tried to a jury, we must view the evidence "in the light most favorable to the verdict"—in this case a verdict for the petitioner—"crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not" and so summarize the evidence in that light. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 819 (Tex. 2012) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005)).

feet—for two ships to dock stern to bow. It would be built in five sections, each 135 feet wide and 332 feet long. The channel was to be dredged to a depth of 40 feet beneath the wharf and surrounding area, and revetment placed along the shore beneath the wharf to prevent erosion. The total cost was $62,485,733.

The contract made Zachry an independent contractor in sole charge of choosing the manner in which the work would be conducted. Specifically, Section 5.10 of the contract provided:

> The Port Authority shall not have the right to control the manner in which or prescribe the method by which the Contractor [Zachry] performs the Work. As an independent Contractor, the Contractor shall be solely responsible for supervision of and performance of the Work and shall prosecute the Work at such time and seasons, in such order or precedence, and in such manner, using such methods as Contractor shall choose . . . .

The provision benefitted the Port, insulating it from the liability to which it would be exposed were it exercising control over Zachry's work.[4] Still, the Port was fully engaged in reviewing Zachry's plans and overseeing construction.

Zachry's plan was innovative. It would use soil dredged from the channel to construct an 8-foot-wide earthen berm starting from the shore at either end of the worksite, extending out toward the center of the channel, then running parallel to the shore, forming a long, flat U-shaped wall in the channel around the construction area. Zachry would install a refrigerated pipe system in the wall and down into the channel floor that would carry supercooled brine, freezing the wall to make it impenetrable to the water in the channel. Zachry would then remove the water from the area between

[4] *See, e.g.*, *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 214 (Tex. 2008) ("Generally, an owner or occupier does not owe a duty to ensure that independent contractors perform their work in a safe manner. But one who retains a right to control the contractor's work may be held liable for negligence in exercising that right.") (citations omitted).

the wall and the shore. In this way, Zachry could work "in the dry", using bulldozers and other land equipment for the excavation and revetment work. Another advantage to this freeze-wall approach was that it would lower diesel emissions and require fewer nitrous oxide credits under environmental laws, giving the Port more flexibility in other construction projects. Zachry believed this approach would make the work less expensive and allow it to be completed more quickly.

And time was of the essence to the Port. Work began in June 2004 and was to be completed in two years. But two sections of the wharf had to be completed within 20 months—by February 2006—so that a ship from China could dock, delivering cranes to be used on the wharf. Zachry agreed to pay $20,000 per day as liquidated damages for missing the deadlines.

Nine months into the project, the Port realized that it would need two 1,000-foot berths to accommodate the ships it ultimately expected to service. A sixth 332-foot section would have to be added to the wharf. As a practical matter, only Zachry could perform the additional work, and Zachry and the Port began discussions on a change order. To complete the two sections of the wharf needed by February 2006, and to continue to work "in the dry", Zachry proposed to build another freeze-wall—a cutoff wall—though the middle of the project, perpendicular to the shoreline out to the existing wall, splitting the project into two parts. Zachry would finish the west end where the ship from China would dock, remove the wall barricading water from that area, then continue working on the east end "in the dry".

The Port had reservations about this plan. Near the shore, the cutoff wall would have to be built through the area where piers had already been driven into the channel floor. The Port's engineers were concerned that freezing the ground near the piers might destabilize them, weakening

the wharf and making it unsafe. But the Port was also concerned that if it rejected Zachry's plan, Zachry might simply refuse to undertake the addition of a sixth section. So the Port did not raise its concerns with Zachry. Zachry, for its part, had already identified the issue, but its own engineers had concluded that any piers that might be affected could be insulated from the frozen ground. Change Order 4, using Zachry's approach to add a sixth section of the wharf at a cost of $12,962,800, was finalized September 27, 2005.

Two weeks later, the Port ordered Zachry to revise and resubmit its plans without the cutoff wall. The practical effect of the Port's order was to refuse to allow construction of the cutoff wall. Zachry protested that, under Section 5.10 of the contract, the Port had no right to determine the method and manner of the work, but the Port would not budge. Zachry's only option was to finish the westmost sections in time for the ship from China to dock, then remove the wall altogether and continue to work "in the wet", which would delay completion of the project and increase its cost.

In negotiating Change Order 4, the Port had promised not to impose liquidated damages for delay as long as the ship from China could dock when it arrived, though the Port had refused to put its promise in writing. Nevertheless, after the ship successfully docked, the Port began withholding liquidated damages from Zachry's payments. Eventually the Port desisted, but not until it had withheld $2.36 million. Zachry completed the project in January 2009, more than two-and-one-half years after the contract deadline.

In November 2006, several weeks after the Port refused to allow construction of the cutoff wall, Zachry sued. Zachry eventually claimed some $30 million in damages from delays caused by

the Port. The Port countered that Section 5.07 of the contract precluded delay damages. That provision states:

> [Zachry] shall receive no financial compensation for delay or hindrance to the Work. In no event shall the Port Authority be liable to [Zachry] or any Subcontractor or Supplier, any other person or any surety for or any employee or agent of any of them, for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance, including events of Force Majeure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY. [Zachry's] sole remedy in any such case shall be an extension of time.

Zachry argued, and the trial court ultimately agreed, that such a no-delay-damages provision could not be enforced if the Port's intentional misconduct caused the delay.

Zachry also sought recovery of the $2.36 million in delay damages withheld by the Port. The trial court held that the contract's liquidated damages provisions were invalid, and the Port has not challenged that ruling on appeal. But the Port responded that Zachry's claim to the liquidated damages was precluded by the releases it executed to obtain the periodic payments from which liquidated damages were withheld. The releases shared language stating:

> [Zachry] hereby acknowledges and certifies that [the Port] has made partial payment to [Zachry] on all sums owing on Payment Estimate Number [___] and that it has no further claims against [the Port] for the portion of the Work completed and listed on the Schedule of Costs in Payment Estimate Number [___].[5]

[5] There are releases in other forms, at least one of which specifically acknowledged, and excluded any effect on, contract claims at issue in pending litigation between the parties. The release for Payment Estimate Number 35 provided that the parties agreed "that Zachry Construction Corporation's execution of this Lien Release . . . does not in any way release or modify the parties' rights and obligations under the Phase 1A Wharf and Dredging Contract or constitute a release of any claim or claims that the parties may present in the Lawsuit with respect to Phase 1A Wharf and Dredging Contract."

The trial court concluded that this language did not unambiguously release Zachry's claim to the liquidated damages withheld and asked the jury to decide what effect it had.

After a three-month trial, the jury found that the Port breached the contract by rejecting Zachry's cutoff wall design, causing Zachry to incur $18,602,697 in delay damages.[6] The jury also found that the delay "was the result of the Port's . . . arbitrary and capricious conduct, active interference, bad faith and/or fraud."[7] The jury failed to find that Zachry had released its claim to the

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[6] The jury was asked to find damages for "[t]he balance due and owed by the Port, if any, under the Contract, including any amount owed as compensation for any increased cost to perform the work as a direct result of Port-caused delays, and . . . [t]he amount owed, if any, for additional work that Zachry was directed to perform by the Port in connection with the Contract." The jury found that the percentage of damages for hindrance or delay, as opposed to additional work, was 58.13%. The Port and Zachry have since stipulated that 100% of the damages found by the jury were for hindrance or delay.

[7] In assessing damages, the jury was instructed as follows:

> You are instructed that § 5.07 of the Contract precludes Zachry from recovering delay or hindrance damages, if any, unless you find that the delay or hindrance damages, if any, resulted from a delay or hindrance that was the result of the Port's actions, if any, that constituted arbitrary and capricious conduct, active interference, bad faith and/or fraud.
>
> "Arbitrary and capricious" means willful and unreasoning action without due consideration and in disregard of the facts, circumstances, and rights of other parties involved.
>
> "Active interference" means affirmative, willful action that unreasonably interferes with the other party's compliance with the contract. "Active interference" requires more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence.
>
> "Bad faith" is conscious doing of a wrong for a dishonest purpose.
>
> "Fraud" occurs when
>
> 1. a party makes a material misrepresentation,
>
> 2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,
>
> 3. the misrepresentation is made with the intention that it should be acted on by the other party, and
>
> 4. the other party suffers injury as a result of its reliance on the misrepresentation.

$2.36 million liquidated damages the Port withheld, but found that the Port was entitled to offset $970,000 for defective wharf fenders. The trial court rendered judgment for Zachry on the verdict.

Both the Port and Zachry appealed. The court of appeals held that the no-delay-damages provision of the contract barred Zachry's recovery of delay damages,[8] that Zachry unambiguously released its claims to $2.205 million of the liquidated damages withheld,[9] and that the Port was entitled to the $970,000 found by the jury for defective wharf fenders.[10] The court reversed the judgment for Zachry and rendered judgment for the Port, awarding it the $10,697,750 in attorney fees found by the jury.[11]

We granted Zachry's petition for review.[12]

II

Zachry argues that the no-damages-for-delay provision of the contract (Section 5.07) is invalid. The Port disagrees but also argues that even if the provision has no effect, the contract is otherwise silent on the recovery of delay damages, and the Local Government Contract Claims Act

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> "Misrepresentation" means a promise of future performance made with an intent, at the time the promise was made, not to perform as promised, and the promise of future performance is that the Port would comply with the terms of Change Order 4.

[8] 377 S.W.3d 841, 850-851 (Tex. App.—Houston [14th Dist.] 2012).

[9] *Id.* at 857-858. The court was divided on this issue.

[10] *Id.* at 861. Since the $155,000 in liquidated damages to which Zachry had not released its claim was completely offset by the $970,000 for the defective fenders, Zachry recovered nothing.

[11] *Id.* at 865. Section 3.10 of the contracts states: "If [Zachry] brings any claim against the Port Authority and [Zachry] does not prevail with respect to such claim, [Zachry] shall be liable for all attorneys' fees incurred by the Port Authority as a result of such claim."

[12] 56 Tex. Sup. Ct. J. 864 (Aug. 23, 2014).

("the Act")[13] does not waive governmental immunity from suit for any recovery a contract does not itself provide for. The court of appeals concluded that the no-damages-for-delay provision is enforceable and thus found it unnecessary to reach the immunity issue.[14] That approach was impermissible. Immunity "implicates a court's subject-matter jurisdiction over pending claims",[15] and "'[w]ithout 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.'"[16] We must consider first whether the Act waives a local governmental entity's immunity from suit on a contract claim for delay damages the contract does not call for.

The issue has two parts. One is whether the Act's limitations on recovery help define and restrict the scope of the waiver of immunity. If not, those limitations have no role in determining a court's jurisdiction over a claim.[17] If so, as we conclude, the second part of the immunity issue is whether the delay damages Zachry seeks are permitted by the Act, so that the Port's immunity from suit is waived. We conclude they are.

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[13] TEX. LOC. GOV'T CODE §§ 271.151-.160.

[14] 377 S.W.3d at 865 n.25. The Port asserted governmental immunity in the trial court but did not request a ruling.

[15] *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012).

[16] *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 578 (Tex. 2013) (quoting *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 a Better Env't*, 523 U.S. 83, 94 (1998))).

[17] The effect of the Act's limitations on recovery is important, though not in this case, in responding to a governmental entity's plea to the jurisdiction, the ruling on which is subject to interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). If the limitations do not determine the scope of the waiver of immunity, an assertion of a claim on a contract covered by the Act would be enough to defeat the jurisdictional plea. Otherwise, a plaintiff would also be required to show that the damages claimed are permitted by the Act.

A

The Act waives immunity from contract suits for local governmental entities, such as the Port.[18] Section 271.152 of the Act states:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into *a contract subject to this subchapter* waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, *subject to the terms and conditions of this subchapter*.[19]

A "contract subject to this subchapter" includes "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity".[20] The contract between the Port and Zachry qualifies.

The "terms and condition of this subchapter" referred to in Section 271.152 are found in the Act's other nine sections. Section 271.153 states:

> (a) Except as provided by Subsection (c), the total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:
>
> (1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed

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[18] The Act defines a "local governmental entity" as "a political subdivision of this state, other than a county or a unit of state government [as that term is defined elsewhere]," "including a . . . special-purpose district or authority, including any . . . navigation district . . . ." TEX. LOC. GOV'T CODE § 271.151(3). The Port—known until 1971 as the Harris County Houston Ship Channel Navigation District—is a navigation district created in 1927 under the authority of article XVI, section 59 of the Texas Constitution, with the authority to sue and be sued. *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 812-813 (Tex. 1993); *see also Jones v. Texas Gulf Sulphur Co.*, 397 S.W.2d 304, 306- 307 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (concluding in part that the Houston Ship Channel's immunity from *tort liability* was not waived by a "sue and be sued" clause). In 1970, the Court held that the same "sue and be sued" clause waived a navigation district's governmental immunity from *suit*. *Mo. Pac. R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812 (Tex.1970). The Port would then have been subject to suit, and possible contract liability, until the *Missouri Pacific* decision was overruled in *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-331 (Tex. 2006).

[19] TEX. LOC. GOV'T CODE § 271.152 (emphasis added).

[20] *Id.* § 271.151(2)(A).

as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

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

(3) reasonable and necessary attorney's fees that are equitable and just; and

(4) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.

(b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:

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

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

(c) Actual damages, specific performance, or injunctive relief may be granted in an adjudication brought against a local governmental entity for breach of a contract described by Section 271.151(2)(B).[21]

Section 271.154 provides for enforcement of contractual adjudication procedures.[22] Section 271.155 preserves defenses other than immunity.[23] Section 271.156 limits the Act's waiver of immunity to

[21] *Id.* § 271.153.

[22] *Id.* § 271.154 ("Adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to this subchapter or that are established by the local governmental entity and expressly incorporated into the contract or incorporated by reference are enforceable except to the extent those procedures conflict with the terms of this subchapter.").

[23] *Id.* § 271.155 ("This subchapter does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.").

suits filed in state court.[24] Section 271.157 makes clear that the waiver of immunity does not extend to tort claims.[25] Section 271.158 provides that the Act only waives immunity and does not grant it.[26] And Section 271.160 precludes a finding of joint enterprise.[27]

Whether the various provisions of the Act define the scope of the waiver of immunity depends on the statutory text. As a rule, a modifier like the last "subject to" phrase in Section 271.152 applies to the nearest reasonable referent.[28] The candidates are "contract", "claim", "adjudicating", and "waives". We do not think the phrase modifies "contract". Earlier in the sentence, the Act is made applicable to any "contract subject to this subchapter", and it would be needlessly redundant to reiterate a few words later that the contract is subject to the Act's terms and conditions.[29] Nor do we think the phrase modifies "claim". Section 271.158,[30] for example, provides only that the Act does not grant immunity and says nothing about the nature of the claim for which immunity is waived. And we do not think the "subject to" phrase modifies "adjudicating". If it did,

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[24] *Id.* § 271.156 ("This subchapter does not waive sovereign immunity to suit in federal court.").

[25] *Id.* § 271.157 ("This subchapter does not waive sovereign immunity to suit for a cause of action for a negligent or intentional tort.").

[26] *Id.* § 271.158 ("Nothing in this subchapter shall constitute a grant of immunity to suit to a local governmental entity.").

[27] *Id.* § 271.160 ("A contract entered into by a local government entity is not a joint enterprise for liability purposes.").

[28] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152 (2012).

[29] *Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005) ("We must avoid, when possible, treating statutory language as surplusage.").

[30] TEX. LOC. GOV'T CODE § 271.158.

only the adjudicatory process would be governed by the Act's terms and conditions. This reading might make sense for the recovery limits and preservation of procedures and defenses provided in Sections 271.153,[31] 271.154,[32] and Section 271.155,[33]respectively. Those three sections relate to the litigation and adjudication of a claim. But the other four sections, limiting the Act's coverage to suits in state court on contract claims, providing that immunity is not granted, and precluding a finding of joint enterprise, have little, if anything, to do with the adjudication on claims. These sections—271.156,[34] 271.157,[35] 271.158,[36] and 271.160,[37] respectively, relate to the scope of immunity rather than the conduct of litigation.

The "subject to the terms and conditions" phrase in Section 271.152 incorporates the other provisions of the Act to define the scope of its waiver of immunity. The waiver does not extend to tort suits, suits in federal court, or allow recovery beyond that permitted by Section 271.153. But Section 271.152, as qualified by this "subject to" phrase also does not preclude other defenses or other contractual procedures, or confer immunity or suggest joint enterprise. The "subject to" phrase most reasonably refers to "waives", thus making the provisions of the Act limitations on the waiver

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[31] TEX. LOC. GOV'T CODE § 271.153.

[32] *Id.* § 271.154.

[33] *Id.* § 271.155.

[34] *Id.* § 271.156.

[35] *Id.* § 271.157.

[36] *Id.* § 271.158.

[37] *Id.* § 271.160.

of immunity. Section 271.152 must be read as follows: "A local governmental entity . . . waives sovereign immunity to suit . . . subject to the terms and conditions" of the Act.

We reached this result in *Tooke v. City of Mexia*[38] without the analysis just laid out because it seemed obvious. The Tookes sued the City of Mexia for breach of contract, "asserting that they had relied on a three-year term in purchasing equipment. They claimed unspecified damages, but requested jury findings only on lost profits and attorney fees".[39] They did not claim that the City failed to pay for work actually performed; rather, they sought recovery only for lost profits they would have made had the contract continued—"consequential damages excluded from recovery under [Section 271.153]."[40] Even though the Tookes' contract claim fell within Section 271.152,[41] we concluded—because they did not "claim damages within [Section 271.153's] limitations"—that "the City's immunity from suit on the Tookes' claim has not been waived."[42] This was true even though the Tookes might have proved that the City breached the contract.

The text of Section 271.152 and our decision in *Tooke* ought to have settled the matter, but courts of appeals have read our decision in *Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*[43] to retreat from *Tooke*. There, developers sued an area water authority for reimbursement

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[38] 197 S.W.3d 325 (Tex. 2006).

[39] *Id*. at 330.

[40] *Id.* at 346.

[41] *Id.* at 329-330.

[42] *Id.* at 346.

[43] 320 S.W.3d 829 (Tex. 2010).

of part of their costs of building water and sewer facilities, which the authority had agreed to pay out of voter-approved bond funds.[44] No bonds had been approved, but the developers claimed that the water authority had breached the contract by campaigning against approval, thereby forestalling its reimbursement obligation.[45] The water authority argued in part that because no bonds had been approved, its obligation to reimburse the developers had not been triggered, nothing was "due and owed" under Section 271.153(a)(1), and *for that reason*, immunity was not waived.[46] In other words, *because* there was no liability, there were no recoverable damages and, therefore, no waiver of immunity. But the premise—no liability—was disputed, and if the water authority had breached the contract by opposing bond approval, then the developers claimed only the reimbursement under the contract as damages. And such damages, we held, were "due and owed" under Section 271.153(a)(1).[47] "The purpose of section 271.153," we explained, "is to limit the amount due by a governmental agency on a contract once liability has been established, not to foreclose the determination of whether liability exists."[48] We did not suggest that Section 271.153 permits a waiver of immunity from suit for a claim for damages this Section prohibits altogether. The developers argued that they had damages recoverable under Section 273.153;[49] they did not address,

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[44] *Id.* at 833-834.

[45] *Id.* at 834 (re 2006 bond election); *see also Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 321 S.W.3d 1, 5 (Tex.App.—Houston [14th Dist.] 2008) ("*Kirby III"*) (re 1998 elections), *aff'd*, 320 S.W.3d at 843-844.

[46] 320 S.W.3d at 839-840; Brief of Respondent Clear Lake City Water Authority at 38 (No. 08-1003).

[47] 320 S.W.3d 839-840.

[48] *Id.* at 840.

[49] 320 S.W.3d 829, *passim*; Reply Brief of Petitioners Kirby Lake Development, Ltd., et al. at 11-14.

and we did not consider, whether immunity would have been waived for their claim of breach even if they sought only damages not recoverable under Section 271.153. We would not have engaged in such an analysis without acknowledging the conflict with our opinion in *Tooke*.[50]

The Austin Court of Appeals has laid out the case for confining the scope of the Act's waiver to Section 271.152 in its opinion in *City of San Antonio v. Lower Colorado River Authority*.[51] *LCRA* reasons that immunity from suit and immunity from liability are distinct concepts, that the former may be waived for a claim on which a governmental entity is not liable, and that the Act serves this very purpose.[52] We agree with all but the conclusion. As we have explained, Section 271.153's limitations on recovery are incorporated into Section 271.152 by its last "subject to" clause and are thereby conditions on the Act's waiver of immunity. We disagree with *LCRA* that this reading of the Act makes its waiver of immunity dependent on ultimate liability. The Act waives immunity for contract claims that meet certain conditions: the existence of a specific type of contract, a demand for certain kinds of damages, a state forum, etc. The waiver does not depend on the outcome, though it does require a showing of a substantial claim that meets the Act's conditions. *LCRA* argues that this view of the Act makes Section 271.153 a grant of immunity, a construction precluded by Section

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[50] In *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 412-413 (Tex. 2011), Sharyland contracted to build a water-supply system for the City of Alton. Sharyland sued the City for breach, claiming damages for injury to its system caused by contractors engaged by the City under another contract to build a sanitary sewer system. We concluded that while the claim was covered by Section 271.152 and was therefore one for which immunity was waived, the damages sought had nothing to do with the contract between Sharyland and the City and thus were "not a 'balance due and owed' under *that* contract" recoverable under Section 271.153. *Id.* at 413. As in *Kirby Lake*, however, the issue whether Section 271.153 is jurisdictional did not arise, and we did not consider it.

[51] 369 S.W.3d 231 (Tex. App.—Austin 2011, no pet.).

[52] 369 S.W.3d at 235-238.

271.158. But again, Section 271.153 does not add immunity that Section 271.152 takes away; Section 271.152 uses Section 271.153 to further define to what extent immunity has been waived.

By "substantial" claim we mean, as we held in *Texas Department of Parks and Wildlife v. Miranda*, that the claimant must plead facts with some evidentiary support that constitute a claim for which immunity is waived, not that the claimant will prevail.[53] In *Tooke*, the only damages claimed were precluded by Section 271.153, and therefore immunity was not waived. Had the Tookes claimed payment for work done, immunity would have been waived, regardless of whether the Tookes could prevail, as long as the Tookes had some supporting evidence.

We conclude that the Act does not waive immunity from suit on a claim for damages not recoverable under Section 271.153.[54]

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[53] 133 S.W.3d 217, 226-228 (Tex. 2004) ("When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. If . . . the issue is one of pleading sufficiency [] the plaintiffs should be afforded the opportunity to amend [unless] the pleadings affirmatively negate the existence of jurisdiction . . . . However, if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised . . . . If the evidence creates a fact question . . . the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder." (citations omitted)).

[54] We disapprove the following cases to the extent they are to the contrary: *Santa Rosa Indep. Sch. Dist. v. Rigney Const. & Dev., LLC*, No. 13-12-00627-CV, 2013 WL 2949566, at *5 (Tex. App.—Corpus Christi June 13, 2013, pet. denied) (mem. op.); *Roma Ind. Sch. Dist. v. Ewing Const. Co.*, No. 04-12-00035-CV, 2012 WL 3025927, at *4 (Tex. App.—San Antonio July 25, 2012, pet. denied) (mem. op.); *Corpus Christi Indep. Sch. Dist. v. TL Mech.*, No. 13-11-00624-CV, 2012 WL 1073299, at *3 (Tex. App.—Corpus Christi Mar. 29, 2012, pet. denied) (mem. op.) (note, however, that the court noted that plaintiff sought only contract damage and expressly did not claim any amount for lost profits); *City of San Antonio ex rel. San Antonio Water Sys. v. Lower Co. River Auth.*, 369 S.W.3d at 236–238; *City of N. Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 909-910 (Tex. App.—Fort Worth 2011, no pet.); *Jones v. City of Dallas,* 310 S.W.3d 523, 527–528 (Tex.App.—Dallas 2010, pet. denied) (note, however, that the court addressed an additional issue arising because the contract specifically provided for "lost profits" damages); *Clear Lake City Water Auth. v. MCR Corp.*, No. 01-08-00955-CV, 2010 WL 1053057, *10–11, (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, pet. denied) (mem. op.); *Dallas Area Rapid Transit v. Monroe Shop Partners, Ltd.*, 293 S.W.3d 839, 842 (Tex. App.—Dallas 2009, pet. denied) (note, however, that there was a dispute over whether there was a "balance due and owed"); *City of Houston v. S. Elec. Servs., Inc.*, 273 S.W.3d 739, 744 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (note, however, that there was a dispute over whether the "balance due and owed" would include increased labor

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Under Section 271.153(a)(1), the "amount of money awarded . . . for breach of contract" includes "the balance due and owed . . . under the contract" as amended, "including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays".[55] Section 271.153(b) precludes recovery of consequential damages, "except as expressly allowed under Subsection (a)(1)".[56] The Port contends that no balance can be due and owed under a contract unless the contract expressly calls for payment.

No such requirement can be found in the statute's text. The phrase, "balance due and owed/owing", is not defined in the Act, and the Legislature has not used it except in three other statutes waiving governmental immunity, where it is also undefined: the State Contract Claims Act,[57]

costs); *City of Mesquite v. PKG Contracting, Inc.*, 263 S.W.3d 444, 448 (Tex. App.—Dallas 2008, pet. denied) (note, however, that the court pointed out that the record did not establish that the claim was solely for damages excluded by the statute, and cited *Tooke*).

[55] TEX. LOC. GOV'T CODE § 271.153(a)(1).

[56] *Id.* § 271.153(b).

[57] TEX. GOV'T CODE § 2260.003(a) ("The total amount of money recoverable on a claim for breach of contract under this chapter may not . . . exceed an amount equal to the sum of: (1) the balance due and owing on the contract price; (2) the amount or fair market value of orders or requests for additional work made by a unit of state government to the extent that the orders or requests for additional work were actually performed; and (3) any delay or labor-related expense incurred by the contractor as a result of an action of or a failure to act by the unit of state government or a party acting under the supervision or control of the unit of state government.").

the County Contract Claims Act,[58] and the State Agency Contract Claims Act.[59] The word "due" simply means "owing or payable"[60] and "owing" means "unpaid".[61] A "balance due and owed . . . under the contract" is simply the amount of damages for breach of contract payable and unpaid. Direct damages for breach—"the necessary and usual result of the defendant's wrongful act"[62]—certainly qualify.

Section 271.153(a)(1) does not require the "balance due and owed . . . under the contract" to be ascertainable from the contract because, for one thing, this Section expressly includes "any amount owed as compensation . . . for owner-caused delays", an amount which cannot be determined in advance, when the contract is executed. To "include" means "[t]o contain as a part of

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[58] TEX. LOC. GOV'T CODE § 262.007(b) ("The total amount of money recoverable from a county on a claim for breach of the contract is limited to the following: (1) the balance due and owed by the county under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration; (2) the amount owed for change orders or additional work required to carry out the contract; (3) reasonable and necessary attorney's fees that are equitable and just; and (4) interest as allowed by law.").

[59] TEX. CIV. PRAC. & REM. CODE § 114.004(a) ("The total amount of money awarded in an adjudication brought against a state agency for breach of an express provision of a contract subject to this chapter is limited to the following: (1) the balance due and owed by the state agency under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration if the contract expressly provides for that compensation; (2) the amount owed for written change orders; (3) reasonable and necessary attorney's fees based on an hourly rate that are equitable and just if the contract expressly provides that recovery of attorney's fees is available to all parties to the contract; and (4) interest at the rate specified by the contract or, if a rate is not specified, the rate for postjudgment interest under Section 304.003(c), Finance Code, but not to exceed 10 percent.").

[60] *See* BLACK'S LAW DICTIONARY 609 (10th ed. 2014).

[61] *Id.* at 1279.

[62] *Basic Capital Mgmt. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901 (Tex. 2011) ("Consequential damages are those damages that result naturally, but not necessarily, from the defendant's wrongful acts. They are not recoverable unless the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. Thus, to be recoverable, consequential damages must be foreseeable and directly traceable to the wrongful act and result from it.") (quoting *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998) (per curiam)).

something."[63] "[A]mount[s] owed as compensation for . . . owner-caused delays", allowed by Subsection (a)(1), are consequential damages that are recoverable by law, not merely contractual right.[64] Delay damages can be a "balance due and owed" only if that phrase is not limited to amounts stated in the contract.[65]

Furthermore, Section 271.153(b) excludes from the "[d]amages awarded . . . under a contract" consequential damages except as allowed in Subsection (a)(1). If the latter provision

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[63] *See* BLACK'S LAW DICTIONARY at 880; *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.' WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 609 (1985).").

[64] *See Jensen Constr. Co. v. Dallas Cnty.*, 920 S.W.2d 761, 770 (Tex. App.—Dallas 1996, writ denied) ("Generally, a contractor is entitled to recover damages for losses due to delay and hindrance of work if the contractor proves: (1) its work was delayed or hindered; (2) it suffered damages because of the delay or hindrance; and (3) the owner of the project was responsible for the act or omission which caused the delay or hindrance. However, no damage for delay provisions may preclude recovery of delay damages by the contractor." (citations and internal quotation marks omitted)), *overruled in part on other grounds by Travis Cnty. v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 251 (Tex. 2002); *Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 132-134 (Tex. App.—Beaumont 1993, writ denied); *Indus. Constr. Mgmt. v. DeSoto Indep. Sch. Dist.*, 785 S.W.2d 160, 162 (Tex. App.—Dallas 1989, no writ); *Shintech Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144, 148 (Tex. App.—Houston [14th Dist.] 1985, no writ); *City of Houston v. R.F. Ball Constr. Co., Inc.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.); *Housing Auth. of Dallas v. Hubbell*, 325 S.W.2d 880, 884-885, 890-891 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (holding NDFD clause did not bar delay damages found to have been caused by owner arbitrarily and capriciously—defined as "willful and unreasoning action without due consideration and in disregard of the facts, circumstances, and the rights of other parties involved"—even though NDFD clause barred delay damages "from any cause"); *U.S. ex rel. Wallace v. Flintco*, 143 F.3d 955, 964-965 (5th Cir. 1998) (holding NDFD clause did not preclude recovery of delay damages caused by owner's active interference with the contractor's performance, without considering impact of NDFD language); *see generally* P. V. Smith, Annotation, *Right of Building or Construction Contractor to Recover Damages Resulting from Delay Caused by Default of Contractor*, 115 A.L.R. 65 (1938).

[65] The dissent argues that because an amount cannot be "due and owed" unless it is "provided for or contemplated in" the contract, delay damages, which are expressly included in Section 271.153(a)(1), must also be "provided for or contemplated in" the contract. *Post* at ___. If the premise were true, then the conclusion would follow. "A including B" usually means that A is the larger group. But the dissent's "provided for or contemplated in" limitation simply is not in or suggested by the text. The "including" phrase proves the flaw in the dissent's position: "*any* amount as compensation for . . . delay damages" (emphasis added), which amount may or may not be provided for in the contract, cannot be included in "the balance due and owed . . . under the contract" if that phrase is limited to amounts provided for in the contract. Of course, "any Texas city, including Athens", to use the dissent's example, is limited to one, but the example, like the dissent's statutory construction, assumes a limitation to Texas cities when that is the very issue in dispute. A more apt example is "a city, including *any* named Athens", which is a longer list.

limited recovery to amounts stated in the contract, Subsection (b) would be surplusage: a claimant could recover all amounts stated in the contract, and all consequential damages stated in the contract. Read together, Subsections (a)(1) and (b) allow recovery of contract damages, including delay damages, but excluding other consequential damages. Nothing in the rest of Section 271.153 suggests that recoverable damages must be stated in the contract.[66]

In support of its argument, the Port cites two sentences from the remarks made by the bill sponsor introducing the Local Government Contract Claims Act during a House committee hearing. But we have repeatedly held that "[s]tatements made during the legislative process by individual legislators or even a unanimous legislative chamber are not evidence of the collective intent of the majorities of both legislative chambers that enacted a statute."[67] The Port also cites our opinion in

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[66] The dissent argues that damages "under" a contract are only those "provided for or contemplated in" the contract, but "under the contract" is used to refer generally to damages available on a contract claim. *See, e.g., CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 244 (Tex. 2002) (referring to "liability for money damages under the contract"); *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 950 S.W.2d 371, 373 (Tex. 1997) (referring to the need for "extrinsic evidence . . . to calculate damages under the contract"). Further, parties entering into a contract presumably contemplate that contract damages will be available if that contract is breached. *See City of Houston v. Williams*, 353 S.W.3d 128, 141 (2011) ("[I]t is 'settled that the laws which subsist at the time and place of the making of a contract . . . form a part of it, as if they were expressly referred to or incorporated in its terms.'") (suit by retired firefighters based in part on city ordinances could be characterized as one for breach of contract under Section 271.152); *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 626 (Tex. 1987) ("The law[] existing at the time a contract is made becomes a part of the contract and governs the transaction."); *Kerr v. Galloway*, 64 S.W. 858, 860 (Tex. 1901) ("Under a familiar rule, frequently announced, the law enters into the contract, and becomes a part of it."); *see also Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309, 315 (Tex. 1965) ("Contracting parties generally select a judicially construed clause with the intention of adopting the meaning which the courts have given to it."). The dissent argues that limiting recovery to contractual damages is no limit at all, but damages are but one item in a list that includes attorney fees and interest, even if not provided for in the contract. The dissent argues that allowing recovery of contractual damages under Section 271.153(a)(1) renders subsection (2) superfluous, but the latter provision clarifies that change orders can be the basis for recovery, even if it were argued that they were not "under the contract".

[67] *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011); *accord In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 466-467 (Tex. 2011); *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 191-192 (Tex. 2010) (Wainwright, J., dissenting); *AT&T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 528-529 (Tex. 2006); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993).

Kirby Lake, where we stated that the reimbursement obligation stated in the contract was "due and owed".[68] But we did not analyze the phrase, and we certainly did not suggest that damages not set out in the contract cannot be "due and owed".[69]

More than half a century ago, we observed that "[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained."[70] While the Legislature clearly intended to limit the recovery of consequential damages on contract claims permitted by the Act,[71] nothing in the Act suggests that the Legislature intended to create a unique and somehow limited standard for measuring direct damages for breach of contract. Generally, a contractor has a right to delay damages for breach of contract. The parties are free to modify or exclude it by agreement, but unless they do, the right provided by law is as much a part of the

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[68] *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 840 (Tex. 2010).

[69] The dissent also relies on *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011), for its argument that recoverable damages must be "provided for or contemplated in" the contract. In that case a city contracted for construction of a water supply system, and later the contractor sued for the cost of remediating injury to the system caused by the city's sewer contractors. *Id.* at 410-411. We concluded that the damages sought "were not those provided for or contemplated in the Water Supply Agreement and [were] not a 'balance due and owed' under that contract. Nor [were] these costs the 'direct result of owner-caused delays or acceleration . . . .'" *Id.* at 413. The dissent argues that the phrase, "provided for or contemplated in", was really intended to be a standard for determining whether an amount is "due and owed . . . under" a contract. But the Court clearly gave two independent reasons for concluding that the claimed damages were not recoverable: they were not "provided for or contemplated in" the contract, "and" they were not "due and owed under" the contract. Sharyland's claimed damages were not a "balance due and owed" because they were completely unrelated to the Water Supply Agreement. And by adding, "nor" were the damages for delay, referencing the "including" phrase in Section 157.053(a)(1), we suggested that if the damages had been for delay, they would have been recoverable even if neither "due and owed under" nor "provided for or contemplated in" the contract. We treated the "including" phrase in the statutory provision as stating independently that delay damages are recoverable. Instead of supporting the dissent, *Sharyland* contradicts it.

[70] *Stewart v. Basey*, 245 S.W.2d 484, 486 (Tex. 1952).

[71] "Consequential damages are those damages that result naturally, but not necessarily, from the defendant's wrongful acts." *Basic Capital Mgmt. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 901 (Tex. 2011); *El Paso Mktg., L.P. v. Wolf Hollow I, L.P.,* 383 S.W.3d 138, 144 (Tex. 2012). Delay damages are consequential damages.

contract as the rights the contract expressly creates.[72]

We conclude that the Local Government Contract Claims Act waives immunity for a contract claim for delay damages not expressly provided for in the contract.[73] We now turn to whether Zachry's claim is barred by the no-damages-for-delay provision of the contract.

III

We held in *Green International, Inc. v. Solis* that a contractor may generally agree to assume the risk of construction delays and not seek damages.[74] But we noted that the court of appeals in *City of Houston v. R.F. Ball Construction Co.*[75] had listed what it called "generally recognized

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[72] *See supra* note 66.

[73] The dissent notes that the State Agency Contract Claims Act, enacted in 2013, contains a provision similar to Section 271.153(a)(1) except that the "including" phrase permits recovery of delay damages only "if the contract expressly provides for that compensation". TEX. CIV. PRAC. & REM. CODE § 114.004(a)(1) (Act of May 26, 2013, 83rd Leg., R.S., ch. 1260, H.B. 586, § 1, http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/HB00586F.pdf#navpanes=0 (last visited August 25, 2014)). The dissent argues that the proviso states what is implicit in Section 271.153(a)(1). But if anything, the addition of the proviso suggests that it was not intended in the other three statutes waiving immunity from suit on contract claims.

It should also be noted that the State Contract Claims Act was amended in 2005 (Act of May 27, 2005, 79th Leg., R.S., ch. 988, H.B. 1940, § 1, 2005 Tex. Gen. Laws 3292), the same year the Local Government Contract Claims Act was adopted (Act of May 23, 2005, 79th Leg., R.S., ch. 604, H.B. 2039, § 1, 2005 Tex. Gen. Laws 1548), to provide for recovery of delay damages, but did so using the word "and" instead of "including". *Supra* note 59. Using the dissent's argument, one might contend that both statutes intended that delay damages be recoverable whether or not provided for by contract.

[74] 951 S.W.2d 384, 387 (Tex. 1997).

[75] 570 S.W.2d 75 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.); see also *Shintech Inc.*, 688 S.W.2d 144, 148 (Tex. App.—Houston [14th Dist.] 1985, no writ) ("a contractor is entitled to recover damages from an owner for losses due to delay and hindrance of its work if it proves: (1) that its work was delayed or hindered, (2) that it suffered damages because of the delay or hindrance, and (3) that the owner was responsible for the act or omission which caused the delay or hindrance") (citing *R. F. Ball*).

exceptions" to the enforcement of such agreements

> when the delay: (1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; (3) has extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; or (4) is not within the specifically enumerated delays to which the clause applies.[76]

And we also noted[77] that the court of appeals in *Green* had identified a fifth exception "based upon active interference" with the contractor "or other wrongful conduct", including "arbitrary and capricious acts"—"'willful and unreasoning actions,' 'without due consideration' and 'in disregard of the rights of other parties.'"[78] The issues in *Green* did not require us to determine whether the courts of appeals in that case and *Ball* were correct in their statement of the law. Zachry contends that the second and fifth exceptions apply here.

The jury found that Zachry's delay damages resulted from the Port's "arbitrary and capricious conduct, active interference, bad faith and/or fraud" as those terms were defined in the charge.[79] The court of appeals concluded that, assuming such conduct fell within the second exception, the exception could not apply if the parties intended the no-damages-for-delay provision to cover the Port's conduct.[80] The provision stated that Zachry could not recover from the Port "any damages

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[76] *Green*, 951 S.W.2d at 387 (citing *Ball*, 570 S.W.2d at 77 & n.1).

[77] *Id.* at 388.

[78] *Argee Corp. v. Solis*, 932 S.W.2d 39, 63 (Tex. App.—Beaumont 1995), *rev'd on other grounds sub. nom. Green Int'l, Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1997); *Housing Auth. of Dallas v. Hubbell*, 325 S.W.2d 880, 891 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.).

[79] *Supra* note 7.

[80] 377 S.W.3d 841, 850 (Tex. App.—Houston [14th Dist.] 2012).

arising out of or associated with any delay or hindrance" to its work, even if due to the Port's "negligence, breach of contract or other fault", and that its "sole remedy in any such case" would be "an extension of time." By "other fault", the court concluded, the parties intended to include the kind of misconduct by the Port found by the jury in awarding damages.[81] "As harsh as this result seems," the court explained, the parties must be bound by their agreement.[82] Rejecting Zachry's argument that enforcing the no-damages-for-delay provision made the contract illusory, allowing the Port to delay performance in perpetuity with impunity, the court responded simply that it would not deprive the Port of its bargain.[83]

As a matter of textual interpretation, it is doubtful whether the rule of *ejusdem generis* would allow "other fault", following "negligence" and "breach of contract", to include the kind of deliberate, wrongful conduct the Port was found by the jury to have engaged in.[84] That interpretation is especially doubtful, given the context in which no-damages-for-delay provisions are used. An amicus brief explains:

> Based on their years of experience, education, and training, [contractors] can assess potential delaying events when estimating and bidding public works. For example, they can make a judgment on the quality and completeness of the plans and specifications, determine potential delays resulting from material shortages, analyze

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[81] *Id.* at 850.

[82] *Id.*

[83] *Id.* at 851-852.

[84] *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010) ("[T]he principle of ejusdem generis warns against expansive interpretations of broad language that immediately follows narrow and specific terms, and counsels us to construe the broad in light of the narrow."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012) ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned".).

> historical weather data for potential delays, and assess possible delays from soil conditions by studying soil testing reports furnished by most owners. However, they cannot assess potential delays that may arise due to an owner's direct interference, willful acts, negligence, bad faith fraudulent acts, and/or omissions.[85]

Regardless, the purpose of the second *Ball* exception is to preclude a party from insulating himself from liability for his own deliberate, wrongful conduct.

We have indicated that pre-injury waivers of future liability for gross negligence are void as against public policy.[86] Generally, a contractual provision "exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."[87] We think the same may be said of contract liability. To conclude otherwise would incentivize wrongful conduct and damage contractual relations. This conclusion is supported by lower court decisions in Texas[88] and court decisions in at least 28 American jurisdictions.[89] We join this overwhelming

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[85] Brief of the Associated General Contractors of Texas, Inc. as Amicus Curiae, at 2. In support of Zachry's petition for review, we received amicus briefs and letters from the Texas Aggregates and Concrete Association; the Texas Civil Justice League; Associated General Contractors of Texas; Texans for Lawsuit Reform; Zurich Surety; Associated Builders and Contractors of Texas; Associated General Contractors – Texas Building Branch; the National Electrical Contractors Association; the National Systems Contractors Association; and the American Subcontractors Association and the American Subcontractors Association of Texas. Amicus briefs in support of the Port have been submitted by The Texas Conference of Urban Counties; the City of Houston; the Texas Municipal League and the Texas City Attorneys Association; Harris County; Travis County; the City of Fort Worth; the City of Arlington; the City of Dallas; and the Dallas/Fort Worth Airport Board.

[86] *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 687 (Tex. 2008) (Hecht, J., concurring); *Cromwell v. Hous. Auth. of Dallas*, 495 S.W.2d 887, 889 (Tex. 1973); *see also Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 219-222 (Tex. 2002) (suggesting that, generally, a tariff or contract provision including a pre-injury waiver of liability for gross negligence or willful misconduct may be so unreasonable as to violate public policy). Zachry also points out that we have noted that the courts of appeals have "found a pre-injury release of gross negligence invalid as against public policy". *Memorial Med. Ctr. of E. Tex. v. Keszler*, 943 S.W.2d 433, 435 (Tex. 1997).

[87] RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981).

[88] *Argee Corp. & Seaboard Sur. Co. v. Solis*, 932 S.W.2d 39, 52-53 (Tex. App.—Beaumont 1995), *rev'd on other grounds sub nom. Green Int'l, Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1997); *see also Alamo Cmty. College Dist. v. Browning Constr. Co.*, 131 S.W.3d 146, 162 (Tex. App.—San Antonio 2004, pet. dism'd by agr.); *City of Houston v. R.F. Ball Constr. Co., Inc.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.); *Hous.*

consensus. The Port argues that the cases from other jurisdictions are inapposite because those jurisdictions all recognize a party's duty of good faith in performing a contract, and Texas does not.[90] But the law need not impose a duty of good faith on a party to prohibit him from attempting to escape liability for his future, deliberate, wrongful conduct. The Port argues that withholding enforcement of a no-damages-for-delay provision is in derogation of freedom of contract. But that freedom has limits. "As a rule, parties have the right to contract as they see fit as long as their

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Auth. of Dallas v. Hubbell, 325 S.W.2d 880, 884-885, 890-891 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.).

[89] *See, e.g., U.S. Steel Corp. v. Mo. Pac. R.*, 668 F.2d 435, 438-439 (8th Cir. 1982) (Arkansas law); *Dynalectric Co. v. Whittenberg Constr. Co.*, No. 5:06-CV-00208-JHM, 2010 WL 4062787, at *8 (W.D. Ky. Oct. 15, 2010); *Law Co. v. Mohawk Const. & Supply Co., Inc.*, 702 F. Supp. 2d 1304, 1325-1327 (D. Kan. 2010); *Kiewit Constr. Co. v. Capital Elec. Constr. Co.*, No. 8:04 CV 148, 2005 WL 2563042, at *7-8 (D. Neb. Oct. 12, 2005); *Pellerin Constr., Inc. v. Witco Corp.*, 169 F.Supp.2d 568, 583-587 (E.D. La. 2001); *RaCON, Inc. v. Tuscaloosa Cnty.*, 953 So.2d 321, 339-340 (Ala. 2006); *Tricon Kent Co. v. Lafarge N.A,, Inc.*, 186 P.3d 155, 160-161 (Colo. App. 2008); *White Oak Corp. v. Dept. of Transp.*, 585 A.2d 1199, 1203 (Conn. 1991); *Wilson Contracting Co. v. Justice*, No. 508 CIV.A.1974, 1981 WL 377680, at *1-2 (Del. Super. Ct. Jan. 22, 1981); *Blake Constr. Co. v. C.J. Coakley Co.*, 431 A.2d 569, 578-579 (D.C. 1981); *Newberry Square Dev. Corp. v. S. Landmark, Inc.*, 578 So.2d 750, 752 (Fla. Dist. Ct. App. 1991); *M Electric Corp. v. Phil-Gets Int'l Trading Corp.*, No. CVA12-014, 2012 WL 6738260, at *9-11 (Guam Dec. 27, 2012); *Grant Constr. Co. v. Burns*, 443 P.2d 1005, 1012 (Idaho 1968); *J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 642 N.E.2d 1215, 1222 (Ill. 1994); *Owen Constr. Co. v. Iowa St. Dept. of Transp.*, 274 N.W.2d 304, 306-307 (Iowa 1979); *State Highway Admin. v. Greiner Eng'ng Sciences*, 577 A.2d 363, 372 (Md. Ct. Spec. App. 1990); *Phoenix Contractors, Inc. v. Gen. Motors Corp.*, 355 N.W.2d 673, 676-677 (Mich. Ct. App. 1984); *Tupelo Redev. Agency v. Gray Corp.*, 972 So.2d 495, 511-512 (Miss. 2007); *J.A. Jones Constr. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1014-1016 (Nev. 2004); *Edwin J. Dobson, Jr., Inc. v. State*, 526 A.2d 1150, 1153 (N.J. Super. Ct. App. Div. 1987); *Corinno Civetta Constr. Corp. v. New York*, 493 N.E. 2d 905, 909-910 (N.Y. 1986); *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Comm'rs*, 786 N.E.2d 921, 928 (Ohio Ct. App. 2003); *Guy M. Cooper, Inc. v. E. Penn Sch. Dist.*, 903 A.2d 608, 613-614 (Pa. Commw. Ct. 2006); *Ayers-Hagan-Booth, Inc. v. Cranston Hous. Auth.*, No. C.A. 74-2897, 1975 WL 174130, at *2-5 (R.I. Super. Nov. 24, 1975); *U.S. v. Metric Constructors, Inc.*, 480 S.E.2d 447, 448-451 (S.C. 1997); *Thomas & Assoc. v. Metro. Gov't of Nashville*, No. M2001-00757-COA-R3-CV, 2003 WL 21302974, at *14 (Tenn. Ct. App. June 6, 2003); *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983); *W. Eng'rs, Inc. v. State Road Comm'n*, 437 P.2d 216, 217 (Utah 1968); *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.*, 432 N.W.2d 584, 586 (Wis. 1988). *But see Wes-Julian Constr. Corp. v. Commonwealth*, 223 N.E.2d 72, 76-77 (Mass. 1967). *See generally* Maurice T. Bruner, Annotation, *Validity and Construction of "No Damage" Clause with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187, 201 § 2[a] (1976) ("it is well established, apart from a single jurisdiction, that there are certain exceptions" to NDFD clauses).

[90] *English v. Fisher*, 660 S.W.2d 521, 522 (Tex. 1983).

agreement does not violate the law or public policy."[91] Enforcing such a provision to allow one party to intentionally injure another with impunity violates the law for the reasons we have explained. The Port also argues that Zachry is a sophisticated party, a very large construction company that can protect itself. But the law's protection against intentional injury is not limited to the helpless. Finally, the Port argues that the conduct found by the jury does not qualify for the exception. But the jury charge tracked the language of the second and fifth exceptions. The charge correctly described the misconduct that cannot be covered by a no-damages-for-delay provision.

Accordingly, we conclude that the no-damages-for-delay provision, Section 5.07 of the parties' contract, was unenforceable.

IV

Several issues remain.

First: Zachry's contends that it is entitled to recover the $2.36 million that the Port withheld as liquidated damages for Zachry's failure to meet deadlines. For each progress payment, Zachry executed a document entitled "Affidavit and Partial Release of Lien", which contained the following language:

> [Zachry] hereby acknowledges and certifies that [the Port Authority] has made partial payment to [Zachry] on all sums owing on Payment Estimate Number [__] and that

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[91] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 (Tex. 2004); *accord Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 815 (Tex.1982) (recognizing "the parties' right to contract with regard to their property as they see fit, so long as the contract does not offend public policy and is not illegal"); *Curlee v. Walker*, 244 S.W. 497, 498 (Tex. 1922) ("The law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal."); *James v. Fulcrod*, 5 Tex. 512, 520 (1851) ("That contracts against public policy are void and will not be carried into effect by courts of justice are principles of law too well established to require the support of authorities.").

> it has no further claims against [the Port Authority] for the portion of the Work completed and listed on the Schedule of Costs in Payment Estimate Number [__].

Zachry contends that the releases covered only liens. The Port counters that the releases covered all claims for payment. The trial court concluded that the release language was ambiguous on the issue and charged the jury to determine its effect. The jury failed to find that the release language covered Zachry's claims for liquidated damages withheld by the Port. The court of appeals held that the releases unambiguously covered Zachry's claim for liquidated damages and reversed.[92] We agree that the releases are unambiguous, but we conclude that they do not cover Zachry's claim.

Section 6.07 of the contract conditioned the Port's obligation to make progress payments on Zachry's execution of "waivers and releases of liens" providing "that all amounts due and payable" to Zachry and all subcontractors and suppliers "have been paid in full" and that Zachry "waives, releases and relinquishes any lien . . . , security interest and claim for payment". The Port argues that the releases must be construed in light of this requirement because the contract and releases are related contracts and must be read together.[93] While Section 6.07 could be read to require Zachry to release its claims for liquidated damages withheld by the Port in order to obtain progress payments, that is not the issue. Had the Port insisted on express language to that effect, and had Zachry refused, the interpretation of Section 6.07 would be important. Now, however, the issue is not what releases Zachry was contractually required to execute, but the effect of the releases Zachry actually did execute.

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[92] 377 S.W.3d 841.

[93] *City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005).

The release forms were captioned "Affidavit and Partial Release of Lien". In the form language, Zachry acknowledged "partial payment . . . on all sums owing" on a specified invoice and stated that it had "no further claims against [the Port] for the portion of the Work completed and listed on" the invoice. The release plainly refers only to claims for work completed, not for liquidated damages withheld for delays—work *not* completed. Furthermore, Zachry actively disputed the Port's right to withhold liquidated damages from the first time the Port did so, and that dispute was never resolved. The purpose of progress payment releases is to ensure that the contractor will not accept payment for work performed and then insist on additional payment for that work. Zachry's releases can no more be interpreted to extend to its claim for liquidated damages the Port withheld than to its claim for delay damages. The jury failed to find that the releases *in fact* covered Zanhry's claim. We agree, as a matter *of law.*

Second: The trial court did not award Zachry the entirety of the $2.36 million in withheld payments because the jury found that the Port was entitled to an offset of $970,000 as damages for Zachry's use of defective wharf fenders. Zachry contends that the evidence is legally insufficient to support the jury's finding.

To prove its claim for the offset, the Port submitted evidence that the wharf fenders, which protect vessels from damage during the mooring process, were supposed to last for 30 years but became corroded after only 90 days. The Port's expert witness testified that this occurred because the fenders were improperly sealed and, as a result, "the aluminum pores [] remain[ed] open [and] filled with sea water." A lab analysis and tests that a structural fabrication company conducted supported the expert's conclusion. Zachry contends that the evidence does not establish that it

breached the contract because the sealing or coating on the fenders was "thinned" at 25% in accordance with the contract specifications, and if more thinning was required then the blame lies with the specifications and not with Zachry. Even if there were a breach of contract, Zachry argues that the evidence does not establish that the fenders were in fact defective or that the breach caused the damages that the jury awarded.

Viewing the evidence in the light most favorable to the verdict, we cannot agree that the evidence was legally insufficient to support the jury's verdict. Although Zachry submitted evidence that tended to contradict the Port's evidence, we conclude that there was "more than a mere scintilla" of evidence on which a reasonable jury could find that Zachry breached its obligation to provide fenders that were supposed to last 30 years by providing fenders that began corroding within 90 days, and that the Port sustained damages in the amount of $970,000 as a result, entitling it to an offset against the damages recovered by Zachry.

Third: The contract provided that "[i]f [Zachry] brings any claim against the Port Authority and [Zachry] does not prevail with respect to such claim, [Zachry] shall be liable for all attorney's fees incurred by the Port Authority as a result of such claim." The jury found that the Port incurred $10.5 million in attorney fees as a result of Zachry's claim for delay damages, plus additional fees on appeal. Separately, the jury found that the Port incurred $80,250 in attorney fees as a result of Zachry's claim to recover the payments that the Port withheld as liquidated damages, plus additional fees on appeal. In light of our holdings that Zachry prevails on both its claims for delay damages and to recover part of the withheld payments, we reverse the court of appeals' judgment awarding the Port attorney fees.

* * * * *

We hold that Zachry's claim for delay damages is not barred by immunity or by the no-damages-for-delay provision of the contract. We also hold that Zachry is entitled to recover the liquidated damages withheld by the Port, but that there is evidence to support the jury's award of an offset. We conclude that the court of appeals erred in awarding Zachry attorney fees. We reverse the court of appeals' judgment, and because the Port has raised a number of other issues, we remand the case to that court for further consideration.

Nathan L. Hecht
Chief Justice

Opinion delivered: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0772

ZACHRY CONSTRUCTION CORPORATION, PETITIONER,

v.

PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS, RESPONDENT

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

JUSTICE BOYD, joined by JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE LEHRMANN, dissenting in part.

Chapter 271 of the Texas Local Government Code waives a local governmental entity's immunity against suits for breach of written contracts for goods and services, but it does so only to allow contractors to recover "*the balance due and owed* by the local governmental entity *under the contract*." TEX. LOCAL GOV'T CODE § 271.153(a)(1) (emphases added). The Court holds that this waiver allows Zachry Construction Corporation to recover common law delay damages that are not part of "the balance due and owed . . . under the contract" it entered into with the Port Authority of Houston. In fact, in this contract, Zachry expressly agreed that the Port Authority would *never* owe damages for costs that Zachry incurred due to any delay or hindrance. The Court invalidates this no-damages-for-delay clause for public policy reasons. But even after striking that clause, the contract does not provide for or in any way contemplate that the Port Authority would pay for Zachry's delay costs. Because delay costs are not part of "the balance due and owed by [the Port Authority] under [this] contract," I would hold that Chapter 271 does not waive the Port

Authority's immunity against Zachry's claim for delay damages, and I would dismiss that claim for lack of jurisdiction. Because governmental immunity bars Zachry's claim for delay damages, I would not reach the issue of whether the no-damages-for-delay clause is void for public policy reasons. I therefore respectfully dissent in part.[1]

I.
Governmental Immunity Against Contract Actions

As a local governmental entity, the Port Authority "enjoy[s] governmental immunity from suit, unless immunity is expressly waived." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 836 (Tex. 2010). Governmental immunity includes both immunity from liability, "which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). A governmental entity that enters into a contract "necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit." *Id*. Unlike immunity from liability, immunity from suit deprives the courts of jurisdiction and thus completely bars the plaintiff's claim. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003).

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[1] For the reasons the Court explains, I agree with its holding in Part II(A) that section 271.153's limitation on recoverable damages is jurisdictional because chapter 271 "does not waive immunity from suit on a claim for damages not recoverable under Section 271.153." *Ante* at __. I would not reach the public policy issue in Part III of the Court's opinion. In Part IV of its opinion, the Court holds that Zachry can recover on its separate claim for $2.36 million that the Port Authority withheld as liquidated damages, less a $970,000 offset for damages resulting from Zachry's use of defective wharf fenders. *Ante* at __. I agree with this portion of the Court's opinion, for the reasons the Court has explained. The funds that the Port Authority withheld as liquidated damages were part of the monthly progress payments that the Port Authority agreed to make for Zachry's services and were part of "the balance due and owed . . . under the contract." Section 271.153 thus waives the Port Authority's immunity against Zachry's claim to recover those funds, and the courts have jurisdiction to resolve that claim. The mere fact that the Port Authority denies *liability* on the claim does not negate the statute's waiver of *immunity* from suit for damages that are provided for or clearly contemplated under the contract. *See* TEX. LOCAL GOV'T CODE §§ 271.152–.153.

While most damages awards justly impose the financial consequences of a party's wrongdoing on the wrongdoer, a damages award against a governmental entity imposes the financial consequences on innocent third parties: taxpayers. Thus, although "[t]he doctrine of governmental immunity arose hundreds of years ago from the idea that 'the king can do no wrong,' . . . it remains a fundamental principle of Texas law, intended 'to shield the public from the costs and consequences of improvident actions of their governments.'" *Lubbock Cnty. Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, ____ S.W.3d ___, ___ (Tex. 2014) (quoting *Tooke*, 197 S.W.3d at 331–32). In some circumstances, however, justice may demand that the government compensate innocent injured parties even though innocent taxpayers must pay the bill. The challenge is in deciding which circumstances justify a waiver of immunity to allow for such compensation.

Because this decision "requires balancing numerous policy considerations, we have consistently deferred to the Legislature, as the public's elected representative body, to decide whether and when to waive the government's immunity." *Lubbock Cnty*., ___ S.W.3d at ___. The Legislature may waive the government's immunity, and thereby "consent to suit[,] by statute or by legislative resolution." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). The Legislature has declared that we cannot construe a statute to waive immunity "unless the waiver is effected by clear and unambiguous language." TEX. GOV'T CODE § 311.034; *see also Tooke*, 197 S.W.3d at 328–29 (agreeing that statutory waiver of immunity must be "by clear and unambiguous language"). If a statute seeks to waive immunity, it "must do so beyond doubt." *Wichita Falls State Hosp*., 106 S.W.3d at 697.

For the first 154 years of Texas' existence, parties who contracted with the government could not recover for the government's breach unless they first convinced the Legislature to pass

a special resolution waiving immunity for their specific claim. *See Fed. Sign*, 951 S.W.2d at 408 (reaffirming previous holdings that "the State is immune from suit arising from breach of contract suits"); TEX. CIV. PRAC. & REM. CODE §§ 107.001–.005 (governing resolutions granting permission to sue the State). Not surprisingly, this often made it difficult for governmental entities to find qualified contractors who were willing to provide goods and services. In 1999, the Legislature enacted Chapter 2260 of the Texas Government Code, providing an administrative procedure through which parties to certain contracts with a State agency or department could recover damages for the agency's breach. *See* TEX. GOV'T CODE §§ 2260.001–.108. Chapter 2260 did not waive the State's immunity, *id*. § 2260.006, but instead provided an alternative administrative process through which the contractor could seek relief. *See id.* The statute provides this option only for parties to certain kinds of contracts, and it limits the administrative award to $250,000 unless the Legislature separately authorizes a higher award in a specific case. *See id.* § 2260.105.[2]

Although Chapter 2260 provides a limited avenue of relief for those who contract with State agencies and departments,[3] it provides no remedy at all for those who contract with a local governmental entity. The Legislature first addressed local governmental entities in 2003, when it enacted a limited waiver of immunity for certain breach of contract suits against Texas counties. *See* TEX. LOCAL GOV'T CODE § 262.007. Then, in 2005, the Legislature enacted the provisions of

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[2] Under chapter 2260, an administrative law judge can only award up to $250,000 for a valid breach of contract claim. *See* TEX. GOV'T CODE § 2260.105. Valid claims above $250,000 are referred to the Legislature to decide, in light of appropriate policy considerations, whether to authorize additional funds for payment of the claim. *See id.* § 2260.1055; *Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 596 (Tex. 2001).

[3] *See* TEX. GOV'T CODE § 2260.001(4) (defining "unit of state government").

Chapter 271 that are at issue in this case, providing the same limited waiver for certain breach of contract suits against all other types of local governmental entities. *See id.* §§ 271.151–.160. Most recently, in 2013, the Legislature enacted Chapter 114 of the Texas Civil Practice & Remedies Code, providing the same limited waiver of immunity from suits for certain contract claims against State agencies. *See* TEX. CIV. PRAC. & REM. CODE §§ 114.001–.013.

As it had done in Chapter 2260, the Legislature strictly limited the immunity waivers in Chapters 262, 271, and 114, not only in terms of the types of *contracts* under which a party can sue, but also in terms of the types and amounts of *damages* the party can recover. *See* TEX. LOCAL GOV'T CODE §§ 262.007(b), (c), 271.153; TEX. CIV. PRAC. & REM. CODE § 114.004. Thus, the Legislature has only recently acted to waive immunity for contract claims, and each time it has done so, it has strictly limited the scope of that waiver. Respectful of the Legislature's prerogative to decide whether, when, and how to waive the State's immunity, and mindful of our obligation to find waivers only in "clear and unambiguous language" that leaves "no doubt," we must carefully and strictly construe and apply these statutory limitations. I dissent in this case because the Court's holding that Zachry's delay damages are recoverable under section 271.153 ignores the statute's limitations.

II.
Section 271.153

Section 271.153 is entitled "*LIMITATIONS* ON ADJUDICATION AWARDS." *Id.* § 271.153 (emphasis added).[4] Consistent with its title, subsection (a) of section 271.153 identifies three exclusive categories of damages that a contractor *can* recover in a breach of contract suit against a local governmental entity, and subsection (b) lists three categories of damages that contractors *cannot* recover. *See* TEX. LOCAL GOV'T CODE § 271.153(a), (b). Specifically, contractors *can* recover:

> (1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;
>
> (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and
>
> (3) interest as allowed by law.

Id. § 271.153(a) (stating that "total amount of money" recoverable "is limited to" these three categories of damages). Conversely, contractors *cannot* recover:

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

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[4] All references and citations to section 271.153 in this opinion are to the version of the statute applicable to this suit, as it existed before amendments in 2009, 2011, and 2013. *See* Act of May 20, 2005, 79th Leg., R.S., ch. 604, § 1, 2005 Tex. Gen. Law 1548, 1548–49 (codified at TEX. LOCAL GOV'T CODE § 271.153(a)(1), (2) & (4)). The 2009 amendments added a fourth category of amounts that could be included in the "total amount of money awarded" under subsection (a): "reasonable and necessary attorney's fees that are equitable and just." Act of May 21, 2009, 81st Leg., R.S., ch. 1266, § 8, 2009 Tex. Gen. Law 4006, 4007 (codified at TEX. LOCAL GOV'T CODE § 271.153(a)(3)). The 2011 amendments added the phrase "including interest as calculated under Chapter 2251, Government Code" after "interest as allowed by law." Act of May 17, 2011, 82nd Leg., R.S., ch. 226, § 1, 2011 Tex. Gen. Law 809, 809 (codified at TEX. LOCAL GOV'T CODE § 271.153(a)(4)). And the 2013 amendments created an exception to this limitation on damages, permitting recovery of "[a]ctual damages, specific performance, or injunctive relief" in certain contracts involving the sale or delivery of reclaimed water. Act of May 22, 2013, 83rd Leg., R.S., ch. 1138, § 3, 2013 Tex. Gen. Law ___, ___ (codified at TEX. LOCAL GOV'T CODE § 271.153(c)). None of these amendments relate to or affect the issue in this case.

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

Id. § 271.153(b).

The Court holds that subsection (a)(1) authorizes Zachry to recover its delay damages. While I agree that delay damages *can* be part of "the balance due and owed by [a] local governmental entity under [*some*] contract[s]," I do not agree that they are part of "the balance due and owed by [the Port Authority] under [*this*] contract." To the contrary, this contract expressly provided that the Port Authority would have no liability for any delay damages. And while I agree that "the balance due and owed . . . under the contract" can include "compensation for . . . owner-caused delays," compensation for owner-caused delays are not part of the balance due and owed under *this* contract, which stated that the contractor "shall receive no financial compensation for delay or hindrance to the Work . . . EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF THE CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY."

A. The Balance Due and Owed Under the Contract

Chapter 271 does not define or describe what constitutes "the balance due and owed . . . under the contract." When a statute does not give words a specific definition or technical meaning, we use their common, ordinary meaning. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008). Typically, we look to dictionaries to determine the common meaning of words.[5] *See*

[5] *See, e.g.*, *Morton v. Nguyen*, 412 S.W.3d 506, 512 (Tex. 2013); *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 181 (Tex. 2013); *City of Hous. v. Bates*, 406 S.W.3d 539, 547 (Tex. 2013); *In re Nalle Plastics Family*

Epps v. Fowler, 351 S.W.3d 862, 873 (Tex. 2011) (Hecht, J., dissenting) ("The place to look for the ordinary meaning of words is . . . a dictionary."). When a word has multiple common meanings, we give it the meaning most consistent with the statutory context in which it is used. *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 180–81 (Tex. 2013); *see also* TEX. GOV'T CODE § 311.011(a).

In the context of payment obligations, the term "balance" means "the difference between the debits and credits of (an account)." BLACK'S LAW DICTIONARY 170 (10th Ed.). The term "due" means (1) "payable; owing; constituting a debt," when used in relation to a "fact of indebtedness," or (2) "immediately enforceable," when used in relation to "the time of payment." Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE, 298–99 (2nd ed.); *see also* BLACK'S LAW DICTIONARY 609 (10th Ed.). The Dictionary of Modern Legal Usage notes that the second definition, "immediately enforceable," is "almost invariably the applicable one" today. DICTIONARY OF MODERN LEGAL USAGE at 299. And the term "owing" means "[t]hat is yet to be paid; owed; due." BLACK'S LAW DICTIONARY 1279 (10th Ed.); *see also* DICTIONARY OF MODERN LEGAL USAGE at 633 (noting that "owed" is the preferred modern usage, over "owing"). The difference between the terms "due" and "owed" is reflected in the fact that something can be owed but not yet due because the date for payment or the contingency on which payment is conditioned has not yet come to pass. *See* DICTIONARY OF MODERN LEGAL USAGE at 299. A "balance" that is both "due" and "owed" is thus an amount by which an account's debits exceed its credits that is yet to be paid and immediately enforceable. Stated another way, a balance due and owed is a

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Ltd. P'ship, 406 S.W.3d 168, 171–72 (Tex. 2013); *Tex. Dep't of Transp. v. Perches*, 388 S.W.3d 652, 656 (Tex. 2012); *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 747 (Tex. 2012).

mature debt. This understanding of the phrase is consistent with both the statutory context, which relates to recoverable monetary obligations under a contract, and with our prior use of the phrase "due and owed" or "due and owing," both in our construction of this statute and more generally.[6]

Importantly, section 271.153 modifies the phrase "the balance due and owed" with the prepositional phrase "under the contract." TEX. LOCAL GOV'T CODE § 271.153(a)(1). Under the "rules of grammar," *see* TEX. GOV'T CODE § 311.011, a preposition (here, "under") imposes a relationship between its object (here, "the contract") and its antecedent (here, "the balance due and owed"). *See, e.g.*, THE CHICAGO MANUAL OF STYLE § 5.173, at 248 (16th ed.); Bryan A. Garner, THE REDBOOK: A MANUAL ON LEGAL STYLE, 176 (2nd ed.). As a result, section 271.153(a)(1) does not allow recovery of *all* amounts that may be "due and owed by the local governmental entity," but instead limits the recovery to a due-and-owed balance that arises "under" the written contract for goods and services to which the statute applies. *See* TEX. LOCAL GOV'T CODE §§ 271.151(2)(A), 271.153(a)(1). Thus, under section 271.153(a)(1), the amount recoverable "is limited to" the amount of all mature debts owed under a qualified contract, less any credits due.

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[6] *See, e.g.*, *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 840 (Tex. 2010) ("The existence of a balance 'due and owed' is thus incorporated within the contract—a balance that would come due when voters approve payment in a bond election."); *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 922 (Tex. 2010) ("After rigorous analysis, the trial court found that the alleged misrepresentation on each bill—an amount due and owing for a municipal charge—'is uniform to all members of the class . . . .'"); *Bailey v. Cherokee Cnty. Appraisal Dist.*, 862 S.W.2d 581, 587 (Tex. 1993) ("There is little question that debts, including ad valorem taxes, that are due and owing by an individual during his lifetime are liabilities of that individual.") (emphasis omitted); *Summers v. Consol. Capital Special Trust*, 783 S.W.2d 580, 581 (Tex. 1989) ("On October 1, 1983, the Sill note became due and owing."); *Sherman v. First Nat. Bank in Ctr., Tex.*, 760 S.W.2d 240, 241 (Tex. 1988) ("In December of 1981, Sherman received a letter from the Bank demanding the payment of several notes, including the $75,000 real estate note which was not due and owing at that time."); *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 641 (Tex. 1987) ("The developer, or the association, is a general creditor who . . . must stand in line along with [other creditors] for payment of sums due and owing.").

The Court, by contrast, concludes that "[a] 'balance due and owed . . . under the contract' is simply the amount of damages for breach of contract payable and unpaid." *Ante* at ___. I do not agree that a "balance due and owed . . . under a contract" includes all common law damages regardless of whether they are contemplated in the parties' contract. When a payment is not provided for under the contract, but instead arises under the common law, that payment may later be due and owed *under the court's judgment*, but it is not part of "the balance due and owed . . . *under the contract*." *See* TEX. LOCAL GOV'T CODE § 271.153(a)(1) (emphasis added).

The Court's construction of the statute is contrary to the statute's language and its structure. First, the Court's construction separates the phrase "balance due and owed" from the phrase "under the contract," and then alternatively reads each of them out of the statute. On the one hand, the Court equates the phrase "the balance due and owed" with the phrase "damages . . . payable and unpaid," *ante* at ___, and by doing so ignores the statute's actual words. On the other hand, the Court treats the phrase "under the contract" as if it said "under a court's judgment," but does so only by relying on court opinions that address *damages* under a contract, not a "balance due and owed . . . under a contract." *Ante* at ___ n. 62, 64. We must read the two phrases together, just as they appear in the statute, and the Court's alternatives for each simply are not equivalents. By equating "the balance due and owed . . . under the contract" with "the amount of damages for breach of contract payable and unpaid," the Court shifts the focus from the mature debt that exists "under the contract" when suit is filed to prospective liability that a Court may impose in a breach of contract action.

Second, by holding that "a 'balance due and owed . . . under the contract' is simply the amount of damages for breach of contract payable and unpaid," the Court renders subsection (a)(1) a tautology. Under the Court's construction, the amount of damages that is recoverable for a breach

of contract is "limit[ed]" to the amount of damages that is recoverable for a breach of contract. Under that construction, the amount of damages is not "limit[ed]" at all.[7]

Third, the Court's construction of subsection (a)(1) renders subsection (a)(2) superfluous. Subsection (a)(2) expressly authorizes the recovery of "the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract." TEX. LOCAL GOV'T CODE § 271.153(a)(2). If, as the Court holds, subsection (a)(1) authorizes the recovery of all common law damages recoverable for breach of the contract, then subsection (a)(1) already authorizes recovery of amounts owed for change orders and additional work, and subsection (a)(2) adds nothing to the mix.[8] But if, as I contend, subsection (a)(1) only authorizes recovery of the amounts actually provided for or contemplated within the contract (that is, "the balance due and owed . . . under the contract"), then subsection (a)(2) adds

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[7] In response, the Court contends that the statute does "limit[] recovery" because "damages are but one item in a list that includes attorney's fees and interest, even if not provided for in the contract." *Ante* at ___ n.66. But section 271.153(a) places "*LIMITATIONS* ON ADJUDICATION AWARDS" by authorizing courts to award only amounts that fall within the expressly enumerated categories, which under the current version of the statute include:

- certain types of *damages*: "the balance due and owed . . . under the contract" under section 271.153(a)(1) and "the amount owed for change orders or additional work" under (a)(2);
- certain types of *attorney's fees*: "reasonable and necessary attorney's fees that are equitable and just" under (a)(3); and
- all *interest* allowed by law under (a)(4).

See TEX. LOCAL GOV'T CODE § 271.153. The Court's reading of section (a)(1) does not alter the scope of recoverable attorney's fees or interest, it simply expands the scope of authorized damages to include *all* recoverable damages. Therefore, it does not limit recoverable damages at all.

[8] The Court responds that its construction does not render subsection (a)(2) superfluous because subsection (a)(2) "clarifies that change orders can be the basis for recovery, even if it were argued that they were not 'under the contract.'" *Ante* at ___ n.66. But this is exactly the point: under the Court's construction, there is no need for such clarification because *everything* that the law permits to be a basis for recovery in a breach of contract action (the *only* claim that can be brought under the statute) can be the basis for recovery under the 271.153(a), regardless of whether it is "under the contract."

to that any amounts owed for change orders and additional work that were not originally provided for or contemplated in the parties' contract.

Finally, under the Court's construction of subsection (a)(1), the exception to the exclusion of consequential damages in subsection (b)(1) would completely swallow the rule. Subsection (b)(1) provides that recoverable damages may not include "consequential damages, except as expressly allowed under Subsection (a)(1)." *Id.* § 271.153(b)(1). As the Court notes, "[d]elay damages are consequential damages." *Ante* at ___ n.71. If subsection (a)(1) authorizes the recovery of all common law damages for breach of contract, then consequential damages, which are recoverable for a breach of contract, are "expressly allowed under Subsection (a)(1)." And in that case, subsection (b)(1) would not exclude *any* consequential damages. *See* TEX. LOCAL GOV'T CODE § 271.153(a)(1), (b). In short, under the Court's construction, subsection (a), which says recoverable amounts are "limited" to those specified in subsections (a)(1) through (a)(4), does not in fact "limit" anything; and subsection (b), which says recoverable amounts "may not include" those listed in subsection (b)(1), does not in fact exclude anything.

In addition to the language of the statute, the Court's holding contradicts our precedent on this very point. We have addressed section 271.153(a)(1) in three prior decisions, and in each of them we have held, or at least indicated, that a "balance" is "due and owed . . . under the contract" only if it is "stipulated," "provided for," or at least "contemplated" within the parties' written agreement. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 413 (Tex. 2011) ("The kind of damages sought by Sharyland were not those provided for or contemplated in the Water Supply Agreement and are not a 'balance due and owed' under that contract."); *Kirby Lake*, 320 S.W.3d at 840 (holding that the damages sought were part of the balance due and owed under the contract because "the Agreements do stipulate the amount of reimbursement owed upon

approval of bond funds"); *Tooke*, 197 S.W.3d at 346 (holding that lost profits from additional work "are consequential damages excluded from recovery under the statute").

In *Tooke*, the Court held that the claimants could not recover after the City of Mexia prematurely terminated their service contract because they "claim[ed] only lost profits on additional work they should have been given," which "are consequential damages excluded from recovery under the statute." 197 S.W.3d at 346; *see* TEX. LOCAL GOV'T CODE § 271.153(b)(1). If, as the Court holds today, "a 'balance due and owed . . . under the contract' is simply the amount of damages for breach of contract payable and unpaid," *ante* at __, the Tookes should have been able to recover lost profits under section 271.153(a)(1), and they should not have been excluded as consequential damages under subsection (b)(1) because they fall within the exception for consequential damages expressly authorized under subsection (a)(1). In short, the lost profits in *Tooke* were consequential damages not authorized under the parties contract, just as the Court recognizes Zachry's delay damages to be. Yet we held that the Tookes' lost profits were not recoverable even though they, like Zachry's delay damages, were "damages . . . payable and unpaid" and recoverable under the common law for breach of contract.

Similarly, in *Sharyland*, the contractor, the Sharyland Water Supply Corporation, sought to recover its "increased cost to perform" its contractual duty to repair and maintain a water system, which allegedly resulted from the City of Alton's breach of its own contractual duties. 354 S.W.3d at 413. We held that section 271.153(a)(1) did not authorize Sharyland to recover its increased repair and maintenance costs because "[t]he kind of damages sought by Sharyland were not those

provided for or contemplated in the Water Supply Agreement and are not a 'balance due and owed' under that contract." *Id.*[9]

In *Kirby Lake*, by contrast, we held that the damages the claimant sought were recoverable as "the balance due and owed . . . under the contract" because "the Agreements *do stipulate the amount of reimbursement owed* upon approval of bond funds." 320 S.W.3d at 840 (emphasis added). Consistent with the language of the statute and our precedent, I would hold that section 271.153 does not authorize Zachry to recover its delay damages because those damages are not provided for or contemplated in the parties' agreement, which instead expressly bars recovery of delay costs, and thus are not part of "the balance due and owed by the [Port Authority] under the contract." *See* TEX. LOCAL GOV'T CODE § 271.153(a)(1).

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[9] The Court notes that, in the next sentence in *Sharyland*, the Court stated: "Nor were these costs the 'direct result of owner-caused delays or acceleration . . . .'" *Ante* at ___ n.69 (quoting *Sharyland*, 354 S.W.3d at 413). The Court asserts that, by this sentence, we treated the "including" clause at the end of subsection 271.153(a)(1) "as stating independently that delay damages are recoverable," and "we suggested that if [the damages sought had been for owner-caused delays], they would have been recoverable even if neither 'due and owed under' nor 'provided for or contemplated in' the contract." *Id*. The Court reads far too much into this language. What we actually said in *Sharyland* was:

> The kind of damages sought by Sharyland were not those provided for or contemplated in the Water Supply Agreement and are not a "balance due and owed" under that contract. Nor are these costs the "direct result of owner-caused delays or acceleration," or the "amount owed for change orders or additional work the contractor [was] directed to perform by [the] local governmental entity in connection with the contract."

Sharyland, 354 S.W.3d at 413. We thus addressed *all* provisions of subsections (a)(1) and (a)(2), demonstrating that there was no *possible* basis on which any of them could have authorized the recovery of the repair and maintenance costs that Sharyland sought. *See id.* Sharyland did not argue that its damages were independently recoverable as "owner-caused delay damages," and we did not address the issue for which the Court now cites this language. *See id.* Instead, we simply explained that the damages Sharyland sought did not fit within *any* of the descriptions in subsection (a)(1) or (a)(2). *See id.* And, consistent with *Tooke* and *Kirby Lake*, we equated "the balance due and owed . . . under the contract" with the amounts "provided for or contemplated" in the parties' agreement. *See id.* I address the issue of whether the "including" clause at the end of subsection (a)(1) authorizes delay damages that are not "due and owed . . . under the contract" in the next section.

B. "Including Any Amount Owed as Compensation for the Increased Cost to Perform . . ."

Relying on the language at the end of section 271.153(a)(1), the Court asserts that "Section 272.153(a)(1) does not require the 'balance due and owed . . . under the contract' to be ascertainable from the contract because, for one thing, this Section expressly includes 'any amount owed as compensation . . . for owner-caused delays,' an amount which cannot be determined in advance, when the contract is executed." *Ante* at __. To the extent the Court is arguing that the statute authorizes recovery of amounts that are not *quantified* in the contract or ascertainable at the time of contracting, I agree. Amounts need not be quantified in the contract or ascertainable at the time of contracting to be "due and owed . . . under the contract." Delay costs, in particular, cannot be quantified at the time of contracting because the parties cannot predict the length of the delay or how the delay will impact the contractor's work. But parties can, and sometimes do, agree that the owner will compensate the contractor for owner-caused delays, and when they do, the delay costs are recoverable under the statute. Here, however, the parties did not agree that the Port Authority would compensate Zachry for owner-caused delays; instead, they expressly agreed that Zachry would receive "no financial compensation for delay or hindrance to the Work. . . EVEN IF SUCH DELAY OR HINDRANCE" was owner-caused.

The Court misconstrues the language at the end subsection (a)(1) to independently authorize recovery of "any amount owed as compensation . . . for owner-caused delays," even if that amount is not part of "the balance due and owed . . . under the contract." *Ante* at ___. In doing so, the Court overlooks the key word that connects these two phrases: "including." The word "including" in this subsection does not expand the meaning of the words that come before it ("the balance due and owed"); rather, it limits the meaning of the words that come after it ("any [owner-

caused delay damages]") to "include" only those owner-caused delay damages that are in fact "due and owed." *See* BLACK'S LAW DICTIONARY at 766 (defining "include" to mean "contain as part of something"). The Court thus reads subsection (a)(1) as authorizing recovery of the balance due and owed . . . under the contract *and* (or *plus*) any delay damages, when in fact the statute authorizes recovery of "the balance due and owed . . . under the contract . . . , *including any amount owed*" as damages for owner-caused delays. TEX. LOCAL GOV'T CODE § 271.153(a)(1) (emphasis added).

For example, if a franchise agreement authorized a franchisee to operate "in any Texas city, including Athens," the agreement would permit operations in Athens, Texas, but not in Athens, Greece, or Athens, Georgia. The word "including" is not a synonym for the word "and." It does not expand the meaning of "any Texas city" to include Athens, Greece, or Athens, Georgia, merely because those cities are also named "Athens." Instead, it limits the scope of the reference to "Athens" to the "Texas city" by that name.[10] In the same way, the word "including" in subsection 271.153(a)(1) does not mean "and." It does not expand the meaning of "the balance due and owed . . . under the contract" to include "owner-caused delay damages" that are not due and owed under the contract. Instead, it limits the scope of the reference to "owner-caused delay damages" to those "owner-caused delay damages" that are part of "the balance due and owed . . . under the contract."

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[10] Or, to use the Court's "more apt example," *see ante* at ___ n.65, the phrase "a city, including any named Athens," includes any city named Athens, which (as the Court notes) is "a longer list," but it still only "includes" *cities* named Athens. It would not include a corporation, or person, or pet named "Athens," because the word "including" limits the second word "Athens" to those that fit within the first word "city." In the same way, the word "including" in section 271.153(a)(1) limits the second phrase "delay damages" to those that fit within the first phrase "balance due and owed . . . under the contract." Any delay damages that are not part of the balance due and owed under the contract are not "included" in the statute's waiver.

The language the Legislature used in its most recent statutory waiver of immunity for breach of contract suits further confirms this point. *See* TEX. CIV. PRAC. & REM. CODE § 114.004. In this statute, through which the Legislature waived immunity for certain contract claims against state agencies just last year, the Legislature used the same language it used in section 271.153, but added a final clause to further clarify that the amount recoverable "is limited to":

> the balance due and owed by the state agency under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration *if the contract expressly provides for that compensation* . . . .

Id. § 114.004(a)(1) (emphasis added). While the Court contends that the inclusion of the emphasized language gives this statute a meaning that is different than the meaning of section 271.153(a)(1), which does not include the emphasized language, that contention is unsupportable within this context. The language of sections 114.004 and 271.153 (and, for that matter, 262.007) are in all material respects the same, demonstrating that the Legislature intended to follow a uniform approach in strictly limiting the scope of these statutory waivers of immunity. More importantly, by using the same "including" language that appears in section 271.153, section 114.004 confirms that both statutes only permit recovery of owner-caused delay damages that are "included" within "the balance due and owed . . . under the contract." If anything, section 114.004(a)(1) narrows the scope of recoverable damages by requiring that the contract "*expressly* provide[] for" the payment of such compensation.

Parties to construction contracts often allocate unquantified costs between themselves, just as Zachry and the Port Authority did with delay costs. Zachry and the Port Authority allocated all of Zachry's delay-related expenses and losses to Zachry, even if the Port Authority was at fault for the delay. But parties to construction contracts sometimes choose a different allocation, obligating

an owner to reimburse the contractor for some or all owner-caused delay costs. *See, e.g.*, *MasTec N. Am., Inc. v. El Paso Field Servs., L.P.*, 317 S.W.3d 431, 452 (Tex. App.—Houston [1st Dist.] 2010) (involving construction contract in which owner agreed to compensate contractor for certain owner-caused delays) *rev'd,* 389 S.W.3d 802 (Tex. 2012) (holding that contract allocated all risk of unknown obstructions in construction path to contractor); *Shintech Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144, 148 (Tex. App.—Houston [14th Dist.] 1985, no writ) (involving contract that allocated to the owner's account undue expenses incurred by the contractor as a result of owner-caused delays). If this contract had included such a clause, I would agree that whatever portion of the delay costs the Port Authority had agreed to pay would constitute a balance due and owed by the Port Authority under the contract, and would thus be recoverable under section 271.153(a)(1). But since the Port Authority did not agree to pay any of Zachry's delay damages, and the contract does not provide for or contemplate the Port Authority's payment of such damages, those damages are not part of "the balance due and owed . . . under the contract" and thus are not recoverable under section 271.153.

III.
Conclusion

I agree with the Court that Zachry's claim to recover installment payments that the Port Authority withheld as liquidated damages are recoverable under section 271.153 and that Zachry did not unambiguously release that claim, but I would hold that section 271.153 does not waive the Port Authority's immunity against Zachry's claim for delay damages. Based on the language and our prior constructions of the statute, I would hold that section 271.153 permits an award of delay damages only if those damages are provided for or contemplated in the agreement and are thus part of "the balance due and owed . . . under the contract." Because this contract did not

provide for or contemplate the Port Authority's payment of Zachry's delay damages, I would hold that Zachry's delay damages are not part of "the balance due and owed . . . under the contract"; section 271.153 therefore does not authorize an award of those damages in this case; and thus section 271.152 does not waive the Port Authority's immunity against Zachry's suit for such damages.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0789

TENASKA ENERGY, INC., TENASKA ENERGY HOLDINGS, LLC, TENASKA CLEBURNE, LLC, CONTINENTAL ENERGY SERVICES, INC., AND ILLINOVA GENERATING COMPANY, PETITIONERS,

v.

PONDEROSA PINE ENERGY, LLC, RESPONDENT

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

Argued January 7, 2014

JUSTICE GUZMAN delivered the opinion of the Court.

Evident partiality of an arbitrator is a ground for vacating an arbitration award under both the Federal Arbitration Act and the Texas Arbitration Act. Adhering to United States Supreme Court precedent, we held almost two decades ago that a neutral arbitrator is evidently partial if she fails to disclose facts that might, to an objective observer, create a reasonable impression of her partiality. And we have held that a party does not waive an evident partiality challenge if it proceeds to arbitrate without knowledge of the undisclosed facts.

Today, we are asked to evaluate these standards in light of a partial disclosure. Here, the neutral arbitrator in question disclosed that the law firm representing one party to the arbitration had

recommended him as an arbitrator in three other arbitrations. He also disclosed that he was a director of a litigation services company and attended a meeting at the law firm, but there was no indication the firm and company would ever do business. The trial court found the arbitrator failed to disclose that all of his contacts at the 700-lawyer firm were with the two lawyers that represented the party to the arbitration at issue; he owned stock in the litigation services company that was pursuing business opportunities with the firm; he served as the president of the company's United States subsidiary; he conducted significant marketing in the United States for the company; he had additional meetings or contacts with the two lawyers in question to solicit business from the firm for the company; and he allowed one of the two lawyers to edit his disclosures to minimize the contact. The trial court vacated the arbitration award, but the court of appeals reversed, concluding the party waived its evident partiality claim by failing to object or inquire further when the disclosures occurred. We hold the failure to disclose this additional information might yield a reasonable impression of the arbitrator's partiality to an objective observer. We further hold that because the party making the evident partiality challenge was unaware of the undisclosed information, it did not waive the claim. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order vacating the award and requiring a new arbitration.

I. Background

Tenaska Energy, Inc., Tenaska Energy Holdings, LLC, Tenaska Cleburne, LLC, Continental Energy Services, Inc., and Illinova Generating Co. (collectively Tenaska) sold their interests in a power plant in Cleburne, Texas to Ponderosa Pine Energy, LLC (Ponderosa). The purchase agreement contained a broad arbitration clause requiring the parties to arbitrate any dispute arising

from or related to the agreement. The clause provided for a three-arbitrator panel, with each party selecting one arbitrator and those two arbitrators selecting the third. The parties conceded in the court of appeals that all three arbitrators were required to be neutral, which follows the current default protocol in arbitration. 376 S.W.3d 358, 361. The clause called for arbitration under the American Arbitration Association (AAA) rules but without AAA administration. It also contained a "baseball arbitration" provision, in which each party would submit a proposed settlement and the panel was bound to select one of the two proposals.

After the transaction closed, the parties disputed whether the agreement required Tenaska to indemnify Ponderosa for breaching certain representations and warranties in the agreement. Ponderosa demanded arbitration and sought more than $200 million in indemnity rights. Lawyers from Nixon Peabody LLP's New York office represented Ponderosa, which designated Samuel A. Stern as its arbitrator. Stern's curriculum vitae was attached to his designation, which indicated he was a director of twelve closely held companies with third-world involvement—including a company in India named LexSite.[1]

At the time, the AAA Commercial Arbitration Rules provided:

> Any person appointed or to be appointed as an arbitrator shall disclose . . . any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

[1] Stern later testified that he served on LexSite's advisory board but was not a director, as his curriculum vitae indicated.

Stern disclosed that Nixon Peabody had designated him as an arbitrator in three other proceedings, and that he—on behalf of LexSite—had a discussion at Nixon Peabody's offices about Nixon Peabody outsourcing litigation discovery tasks to LexSite. But the disclosures noted that "Nixon-Peabody and Lexsite have done no business, and it is not clear that Nixon-Peabody would ever have any business to give Lexsite." In response, Tenaska asked if Stern had a relationship with any of the sixteen bank entities that own Ponderosa, and Stern replied that he had no such relationships.

Tenaska designated Thomas S. Fraser as its arbitrator, and Fraser and Stern selected James A. Baker[2] as the third arbitrator. Tenaska asked Baker the same question it asked Stern, and Baker replied that his firm had represented some of the banks that own Ponderosa. At Baker's suggestion, the panel issued a scheduling order that contained a provision stating the parties had made full disclosures of actual and potential conflicts and knowingly waived actual and potential conflicts of interest. After extensive discovery, Ponderosa proposed a $125 million settlement and Tenaska proposed a $1.25 million settlement. A divided panel composed of Baker and Stern selected Ponderosa's $125 million settlement amount.

Ponderosa moved to confirm the award in state district court, and Tenaska moved to vacate it, asserting that Stern was neither impartial nor free from bias. After extensive discovery, the trial court held a hearing on the motions, where the parties admitted almost 500 exhibits. Those exhibits included the depositions of Stern, as well as Frank Penski and Constance Boland—the two lawyers at Nixon Peabody who represented Ponderosa.

[2] The late James A. Baker formerly served as a Justice on this Court.

The evidence showed that Stern was on the advisory board for LexSite, a legal outsourcing company in India that was seeking to obtain business from law firms in the United States. Stern gave LexSite business and legal advice, and owned 3,000 shares of LexSite stock. He was given options for an additional 10,000 shares, which he had not exercised. Stern contacted Penski in April 2006 to discuss the possibility of Nixon Peabody using LexSite's services. Stern arranged for Penski to meet LexSite's CEO that month. At the subsequent May 3 meeting at Nixon Peabody that Stern did disclose, he made several remarks, mostly asking the firm's associates for their impressions of performing discovery work. After the meeting concluded, Stern told Penski "if you have any arbitrations that would be fun, keep me in mind."

On June 16, Penski asked Stern to serve as a neutral party arbitrator in a matter involving Ada Co-Generation. Stern responded by accepting the appointment and asked if there was "[a]ny movement there" with LexSite. Penski replied that he had talked to numerous partners at Nixon Peabody in an effort to find something to send to LexSite but had "no luck so far." On the suggestion of Boland, another Nixon Peabody partner recommended Stern as an arbitrator in another arbitration on June 19. And on June 26, Penski recommended Stern as an arbitrator in this matter.

Boland later edited Stern's disclosures in two ways. First, she added the Ada-Cogeneration arbitration. Second, she added the disclaimer that "Nixon-Peabody and Lexsite have done no business, and it is not clear that Nixon-Peabody would ever have any business to give Lexsite."

After the parties agreed on the arbitrators, the scheduling order of October 23 established a waiver of conflicts. Three days later, Nixon Peabody changed its fee agreement with Ponderosa

from an hourly rate to a contingency fee of 15% of the first $50 million and 12.5% of any amount over $50 million.

LexSite later changed its name to Exactus. Stern incorporated Exactus U.S. and was the chairman of its board.[3] Stern charged LexSite $1,000 for use of his office and $5,000 per month for services. He also met with LexSite's CEO twice a month to discuss such topics as marketing.

LexSite's CEO continued to correspond with Boland during the arbitration. Boland informed LexSite's CEO in April 2007 that "we need to wait about one more month or so until we can continue our discussions. Would you be so kind as to send an email to me again on or about May 15?" LexSite's CEO agreed and noted he had recently met a lawyer from Nixon Peabody's Boston office, who Boland responded was "a good person to know and we can include him, or one of his team, in our meetings later on." On May 7, the panel issued its opinion and award. LexSite's CEO contacted Boland again at the end of May.

After the hearing on the motions, the trial court granted Tenaska's motion to vacate the award on the ground that Stern exhibited evident partiality due to "a calculated, deliberate attempt to minimize the relationship" between Stern and Penksi and Boland. Specifically, the trial court held that Stern did not disclose additional information it summarized as follows:

> When viewed in the totality of circumstances, including the fact that Arbitrator Stern failed to disclose that his contact[s] with Nixon Peabody were all with Mr. Penski or Ms. Boland, failed to disclose additional meetings or contacts regarding Lexsite with Ponderosa[]'s counsel, failed to disclose the true extent of his ties to Lexsite and his activities for Lexsite, and allowed Ponderosa[]'s counsel to modify his

[3] For ease of reference, this opinion will refer to LexSite throughout, even during the time LexSite had reorganized as Exactus.

> disclosures in a way that minimized the contact, . . . Stern's disclosures were intentionally incomplete and inaccurate.[4]

The trial court concluded that the Nixon Peabody/LexSite relationship was material rather than trivial and the undisclosed information might yield a reasonable impression that Stern was not impartial. Accordingly, the trial court granted the motion to vacate the arbitration award.[5]

The court of appeals reversed. 376 S.W.3d at 360. It held that Stern's disclosures regarding LexSite and the Ada Co-Generation arbitration were sufficient to put Tenaska on notice of potential partiality to require Tenaska to object or seek additional information. *Id.*

II. Discussion

Our standard of review in this proceeding is a familiar one. Here, the trial court made findings of fact regarding material information Stern failed to disclose and concluded the nondisclosures rendered Stern evidently partial. We defer to unchallenged findings of fact that are supported by some evidence. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696–97 (Tex. 1986). But in determining what the law is and applying the law to the facts, a trial court has no discretion. *Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996) (orig. proceeding). Thus, we determine whether the information the trial court found that Stern failed to disclose is supported by some evidence and

[4] The trial court also found that Stern's statements made in selecting the third arbitrator and during the arbitration and his failure to disclose certain bank relationships did not indicate Stern's evident partiality. Tenaska contends in this Court that Stern's statements also support a finding of evident partiality. As explained below, we agree with the trial court that Stern's failure to disclose the extent of his relationships with LexSite, Penksi, and Boland demonstrate evident partiality. Accordingly, we need not assess whether additional statements also demonstrate evident partiality.

[5] The trial court denied the motion to vacate on the grounds that (1) Ponderosa's counsel procured the award by corruption, fraud, or undue means; (2) the arbitrators acted in manifest disregard of the law; and (3) the arbitrators exceeded their power in amending the terms of the purchase agreement.

review de novo whether that undisclosed information demonstrates Stern's evident partiality. *Id.*; *McGalliard*, 722 S.W.2d at 696–97.

A. Evident Partiality

The parties agree the Federal Arbitration Act (FAA) governs this case and allows courts to vacate arbitration awards "where there was evident partiality." 9 U.S.C. § 10(a)(2). The United States Supreme Court has observed that "these provisions show a desire of Congress to provide not merely for any arbitration but for an impartial one." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968). In *Commonwealth Coatings*, a subcontractor sued a prime contractor's surety, and the neutral third arbitrator failed to disclose he obtained approximately $12,000 in business from the prime contractor over a four to five year period (but had done no business with the contractor in the year preceding the arbitration). *Id*. at 146. The Court likened arbitrator impartiality to the impartiality the constitution requires of judges, and observed that even the slightest pecuniary interest in an arbitration could be grounds to set aside the award. *Id*. at 148. Although it recognized arbitrators are not expected to sever their ties with the business world, the Court concluded it must be scrupulous in safeguarding the impartiality of arbitrators because they "have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id*. at 148–49. To further that goal, the Court imposed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id*. at 149.[6] Despite the fact that the Court found no evidence of actual bias, it found the arbitrator

[6] As Justice White explained in his concurrence:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved

evidently partial due to his failure to disclose his relationship with the prime contractor, justifying vacatur of the award. *Id*. at 146–47, 150.

We addressed evident partiality in *Burlington Northern Railroad Co. v. TUCO Inc.*, where we held that under *Commonwealth Coatings*, a neutral arbitrator exhibits evident partiality "if the arbitrator does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." 960 S.W.2d 629, 630 (Tex. 1997).[7] And "while a neutral arbitrator need not disclose relationships or connections that are trivial, the conscientious arbitrator should err in favor of disclosure." *Id*. at 637. There, TUCO Inc. and two carriers arbitrated a dispute over a rate adjustment in their contracts. *Id*. at 630. Unlike the present case (which follows the current default protocol to require impartiality or neutrality of all three arbitrators), only the third arbitrator in *TUCO* was required to be neutral. *Id*. The parties agreed to a neutral third arbitrator, George Beall, after he disclosed he had twice served as an expert witness for the law firm of the carriers' arbitrator.[8] *Id*. Those matters had concluded and involved a relatively small amount of time and fees. *Id*.

> and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. . . . [I]t is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity . . . .

Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring).

[7] Though *TUCO* involved an agreement under the Texas Arbitration Act (TAA), the TAA also requires courts to vacate awards if there has been "evident partiality by an arbitrator appointed as a neutral arbitrator." TEX. CIV. PRAC. & REM. CODE § 171.088(a)(2)(A).

[8] The evident partiality standard the Supreme Court announced in *Commonwealth Coatings*, which we followed in *TUCO*, applies in the context of party appointed arbitrators. *See TUCO*, 960 S.W.2d at 637. We need not decide what standard applies when an arbitration agreement does not allow parties the ability to select arbitrators.

Approximately three weeks before the arbitration hearing, a lawyer at the firm employing the carriers' arbitrator assisted in obtaining a referral on a substantial litigation matter for Beall. *Id*. at 631. There was no contention that the carriers' arbitrator knew of the referral or that the lawyer who assisted with the referral knew of the arbitration. *Id*. But the neutral arbitrator mentioned to the carriers' arbitrator at a subsequent meeting that "we've already begun work on the matter you folks were so kind to send over." *Id.* TUCO contended the undisclosed referral rendered Beall evidently partial, and we agreed. *Id*. at 630, 632, 639–40.

We observed that inherent in the arbitration process are two principles that are often in tension: expertise and impartiality. *Id*. at 635. Parties may prefer to resolve disputes through arbitration because they may choose arbitrators with extensive experience in the field related to the dispute. *Id*. But this heightened experience level may well result in an arbitrator having had previous business dealings with a party. *Id*. And while these dealings should not disqualify the arbitrator per se, disclosing the information can help the parties attain the impartiality they seek by evaluating potential bias at the outset of the arbitration. *Id*. This approach also preserves the independence and integrity of arbitration by allowing a party to assess potential bias before arbitrating rather than having a trial court weigh bias when a dissatisfied party challenges an award. *Id*. at 635–36.[9] Accordingly, *TUCO* makes clear that "evident partiality is established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes

[9] *See Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring) ("The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.").

partiality or bias." *Id*. at 636. Whether the undisclosed information actually establishes partiality or bias is a matter "better left to the parties." *Id*.

We held in *TUCO* that the referral "might have conveyed an impression of Beall's partiality to a reasonable person." *Id*. at 637. Notwithstanding the fact that the lawyer who suggested the referral was unaware of the arbitration and the carrier's arbitrator was unaware of the referral, we concluded that an objective observer could reasonably believe that Beall, grateful for the referral, would favor the firm and thus ultimately favor the carriers in the arbitration. *Id*.

In short, the standard for evident partiality in *Commonwealth Coatings* and *TUCO* requires vacating an award if an arbitrator fails to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality, but information that is trivial will not rise to this level and need not be disclosed. *Commonwealth Coatings*, 393 U.S. at 149; *TUCO*, 960 S.W.2d at 630, 637.

We next apply the standard for evident partiality to these facts. Tenaska asserts the information the trial court found Stern did not disclose (which Ponderosa does not challenge on appeal) might create a reasonable impression of partiality to an objective observer because the extent of Stern's relationship with LexSite and Nixon Peabody were more significant and concerning than what he disclosed. Ponderosa counters that, unlike in *Commonwealth Coatings* and *TUCO*, Stern disclosed every relationship Tenaska now complains of. We agree with Tenaska.

Stern disclosed that Nixon Peabody recommended him to three arbitrations in addition to the one at issue, and he met with Nixon Peabody on behalf of LexSite about outsourcing litigation discovery tasks, but stated that "Nixon-Peabody and Lexsite have done no business, and it is not

clear that Nixon-Peabody would ever have any business to give Lexsite." The trial court found that Stern did not disclose additional information, and our review of the record confirms this additional information is supported by some evidence:

1. Stern was a shareholder in LexSite and had the option to purchase additional shares;[10]
2. When LexSite changed its name to Exactus, Stern incorporated Exactus U.S. and served as its President;[11]
3. The address and telephone number for Exactus U.S. were Stern's business address and telephone number;[12]
4. Stern met with LexSite's CEO twice a month to discuss such topics as marketing;[13]
5. Stern's contacts with the 700-lawyer firm of Nixon Peabody were with Penksi and Boland;
6. In addition to the May 2006 meeting Stern disclosed, there was a second, earlier meeting in April 2006 for LexSite to solicit business from Nixon Peabody;[14]
7. The two meetings resulted from phone calls by Stern to Penski;
8. Ten days after Stern emailed Penski to inquire whether there was "any movement" on Nixon Peabody plans to use LexSite, Ponderosa appointed Stern as arbitrator;

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[10] Stern testified that he purchased 3,000 shares of LexSite stock and was given stock options for an additional 10,000 more shares but refused to exercise them.

[11] Stern testified that he served as Chairman of the Board of Exactus U.S. and was thus the principal U.S. officer.

[12] Stern testified that he charged LexSite $1,000 for use of his office and $5,000 per month for services.

[13] Stern testified that he met with LexSite's CEO approximately twice a month from 2006 through the time of his deposition in November 2007.

[14] Stern testified that the meeting was to introduce Penski to LexSite's CEO.

9. Penski and Boland also recommended or assisted with getting Stern recommended as arbitrator in three proceedings just after the May 2006 meeting;

10. LexSite's CEO (not Stern) contacted Penski and Boland at least twice from November 2006 to April 2007 to discuss possible LexSite business with Nixon Peabody;

11. Boland edited Stern's disclosures, including the addition of the sentence "Nixon-Peabody and Lexsite have done no business, and it is not clear that Nixon-Peabody would ever have any business to give Lexsite."

Ponderosa does not challenge these findings of fact on appeal, and they are binding on us as they are supported by some evidence. *McGalliard*, 722 S.W.2d at 696–97.[15]

When we examine this undisclosed information together against what Stern actually disclosed,[16] we conclude the information is not trivial and might have conveyed an impression of Stern's partiality toward Penski and Boland's client to a reasonable person. The parties do not dispute that—beyond what he disclosed—Stern owned shares of LexSite, was being paid for office space and services given to LexSite, marketed LexSite in the United States, was actively soliciting business for LexSite from Nixon Peabody (specifically through Penski and Boland), and discussed in communications with Penski regarding the arbitrations the possibility of LexSite and Nixon

[15] The trial court also found that Stern failed to disclose that Ponderosa's parent company was the parent company of Ada Co-Generation, which Nixon Peabody recommended Stern to arbitrate a dispute for. Because Stern's nondisclosures regarding his relationship with Penski and Boland via LexSite constitute evident partiality, we need not also address whether the nondisclosures regarding the Ada Co-Generation arbitration constitute evident partiality.

[16] Ponderosa asserts that in cases such as this where part but not all of a relationship is disclosed, a reviewing court should assess not only the information that was withheld but also the information that was disclosed. We agree, and this concern is part of the basis for our holding in *TUCO* that "trivial" information need not be disclosed. 960 S.W.2d at 637. Whether undisclosed information in a partial disclosure situation is trivial should involve comparing the undisclosed information to the disclosed information.

Peabody doing business. Taken together, this undisclosed information might cause a reasonable person to view Stern as being partial toward Penski and Boland's client, Ponderosa, to gain their favor in securing business for LexSite from Nixon Peabody. And when compared to the information Stern did disclose (that Nixon Peabody recommended him for four arbitrations and he attended one meeting between LexSite and Nixon Peabody), we cannot say this undisclosed information is trivial. Accordingly, Stern's failure to disclose the extent of his relationship with LexSite and his attempts to secure business for LexSite from Nixon Peabody through Penski and Boland demonstrate evident partiality and support the trial court's vacatur of the award. *See Commonwealth Coatings*, 393 U.S. at 149; *TUCO*, 960 S.W.2d at 630, 636.

Ponderosa contends that disclosure of each relationship suffices under *Commonwealth Coatings* and *TUCO*. But if disclosing each relationship were sufficient, the Supreme Court in *Commonwealth Coatings* and this Court in *TUCO* would have simply established that threshold as the operative test. Instead, the test for evident partiality asks whether the undisclosed "information" might convey an impression of the arbitrator's partiality to an objective observer. *TUCO*, 960 S.W.2d at 635–36 (also referring to disclosing "any dealings" and "facts" that might convey an impression of partiality). Adopting Ponderosa's reformulation of the test would serve to encourage partial disclosures. Such a standard for evident partiality negates the Supreme Court's directive to be "scrupulous to safeguard the impartiality of arbitrators" in a process not subject to appellate review. *Commonwealth Coatings*, 393 U.S. at 149.

Finally, both parties argue we should revisit our holding in *TUCO*. Tenaska asserts that if a court finds disclosures intentionally misleading, evident partiality is established and the inquiry

ends. But the standard articulated in *Commonwealth Coatings* and *TUCO* is an objective one (involving what an objective observer might think). *See Mariner Fin. Grp., Inc. v. Bossley*, 79 S.W.3d 30, 32 (Tex. 2002). And although intent may be relevant to establishing actual bias or partiality, we made clear in *TUCO* that evident partiality is established from the nondisclosure itself. 960 S.W.2d at 636. A party need not prove actual bias to demonstrate evident partiality. *Id.*

Ponderosa asks us to adopt the more deferential standard some other courts have employed to only set aside an award for evident partiality if a "reasonable person *would have to conclude* that [the] arbitrator was partial." *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (emphasis added). As support, Ponderosa contends that adhering to the *TUCO* standard will encourage private investigation by parties that lose in arbitration and require trial courts to more frequently vacate awards. We note that when we adopted the Supreme Court's "full disclosure" rule in *TUCO*, we addressed a similar assertion by one of the parties. 960 S.W.2d at 637. We observed that requiring full disclosure minimizes the role of the courts and, "[i]f faithfully adhered to, it will ultimately lead to fewer post-decision challenges to awards based on bias or prejudice." *Id*. As this is only the second time we have addressed evident partiality in the intervening seventeen years since we decided *TUCO*, our prediction rings true. *See Bossley*, 79 S.W.3d at 30. We cannot agree with Ponderosa's contention that "a losing arbitral party would seize on every undisclosed detail as a material omission" because trivial information will not meet the standard we articulated in *TUCO*. 960 S.W.2d at 637.

Accordingly, we decline Tenaska's request to adopt an intent-based approach to evident partiality and Ponderosa's request to heighten the evident partiality standard we established in

TUCO. Stern's failure to disclose information that might lead an objective observer to question his partiality establishes his evident partiality.

B. Waiver

Ponderosa contends that Tenaska nonetheless waived its complaint as to Stern's partiality by proceeding with Stern after he disclosed each relationship at issue and agreeing to a waiver of conflicts in a scheduling order in the arbitration. Tenaska responds that it did not waive a conflict it was unaware of. The court of appeals agreed with Ponderosa, but we agree with Tenaska.

Our jurisprudence on waiver of an evident partiality challenge demonstrates that a party may waive such a challenge by proceeding to arbitrate based on information it knows. In *TUCO*, the neutral third arbitrator disclosed having previously served as an expert witness on two matters for the law firm that employed the carriers' arbitrator. 960 S.W.2d at 638. TUCO consented to the arbitrator, who did not disclose the firm assisted with obtaining a referral for him during the course of the arbitration. *Id*. at 637-38. The carriers argued that TUCO's consent after full disclosure of the expert witness matters amounted to waiver. *Id*. at 638. We rejected that assertion, concluding that "it is for the parties to determine, after full disclosure, whether a particular relationship is likely to undermine an arbitrator's impartiality." *Id*. We also observed that an objective observer might differentiate between a past relationship (such as the expert witness matters) and one that arises shortly before or during the arbitration (such as the referral). *Id*.

Likewise, we addressed waiver of an evident partiality challenge in *Bossley*, 79 S.W.3d at 33. There, after the arbitration award was issued, one party's witness discovered that she had testified at a deposition two-and-a-half years before that the attorney who chaired the arbitration

panel had committed malpractice. *Id*. at 31–32. When the party moved to vacate the award, the opposing party asserted they waived their evident partiality challenge by not raising it before submission. *Id.* at 32–33. We disagreed, holding that they "could not waive an objection that is based on a prior adverse relationship . . . they knew nothing about." *Id*. at 33. Likewise, the concurrence in *Bossley* observed that "[t]here could be waiver of evident partiality based on nondisclosure if the complaining party knew all the facts before the arbitration concluded and did not complain." *Id.* at 36 (Owen, J., concurring).

Here, Tenaska is challenging Stern's partiality based on the information he failed to disclose. Tenaska did not waive its evident partiality challenge by proceeding to arbitration based upon information it was unaware of at that time. *Bossley*, 79 S.W.3d at 33; *TUCO*, 960 S.W.2d at 638. To hold otherwise "would put a premium on concealment" in a context where the Supreme Court has long required full disclosure. *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982). And we do not share Ponderosa's fear that our adherence to *Commonwealth Coatings*, *TUCO*, and *Bossley* will result in vacating a host of arbitration awards even when a party had reason to know of a potential conflict. If waiver cannot be predicated on undisclosed information, that information must nonetheless be more than trivial to satisfy the standard for evident partiality in *Commonwealth Coatings* and *TUCO*.

Similarly, Tenaska did not waive its partiality challenge in the scheduling order's waiver of conflicts provision because that provision was expressly predicated on a full disclosure that never occurred. The clause provides that Tenaska, Ponderosa,

> and each member of the Panel in this Arbitration hereby confirm that, as of the date below, they have each: (i) *fully disclosed all conflicts of interest and potential conflicts of interest* with respect to the designation of the members of the Panel in this Arbitration; and (ii) knowingly waived any and all conflicts of interest and/or potential conflicts of interest relating to the designation of the members of the Panel in this Arbitration (emphasis added).

Thus, the parties waived conflicts and potential conflicts for what was fully disclosed. We express no opinion as to whether parties may contractually agree to forego the full disclosure requirement. Because the waiver clause was conditioned on a full disclosure that did not occur, Tenaska has not waived its partiality challenge.

As a final matter, we reiterate that our holding should not be read as indicating that Stern[17] was actually biased. Reasonable people could debate whether Stern's relationship with Nixon Peabody was likely to affect his partiality in the arbitration. But such a debate is for the parties after a full disclosure—which did not occur here. *See TUCO*, 960 S.W.2d at 638.

III. Conclusion

We have long held that an arbitrator is evidently partial, and an award may be vacated, if the arbitrator fails to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality. *Id.* at 630. As we have observed, the most capable arbitrators often have ties to the business community. *Id*. at 639. Regardless of whether such ties demonstrate actual bias here, Stern's failure to disclose the extent of his relationship with LexSite and the two lawyers

[17] Stern clerked for Chief Justice Earl Warren before embarking on a distinguished practice of law in Washington, D.C.

who represented Ponderosa in this arbitration might yield a reasonable impression of the arbitrator's partiality to an objective observer. Thus, Stern had a duty to disclose the additional information, and his failure to do so constitutes evident partiality. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order vacating the award and requiring a new arbitration.

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Eva M. Guzman
Justice

OPINION DELIVERED: May 23, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0804

GARY WAYNE JASTER, PETITIONER,

v.

COMET II CONSTRUCTION, INC., JOE H. SCHNEIDER, LAURA H. SCHNEIDER, AND AUSTIN DESIGN GROUP, RESPONDENTS

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

Argued October 9, 2013

JUSTICE BOYD announced the Court's disposition and delivered a plurality opinion, in which JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE DEVINE joined.

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

CHIEF JUSTICE HECHT filed a dissenting opinion, in which JUSTICE GREEN and JUSTICE GUZMAN joined, and in which JUSTICE BROWN joined in all but Part II.

Chapter 150 of the Texas Civil Practice and Remedies Code requires "the plaintiff" in "any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional" architect, engineer, land surveyor, or landscape engineer to file a supporting expert affidavit "with the complaint." The issue in this case is whether this requirement applies to a defendant or third-party defendant who files a third-party claim or cross-claim against a licensed or registered professional. Concluding that cross-claimants and third-party plaintiffs are

not "the plaintiff" in an "action or arbitration proceeding," we hold that the statute's expert affidavit requirement does not apply to them.

I.
Background

Mahmoud Dawoud purchased a home from Comet II Construction, Inc. About ten years later, Dawoud sued Comet[1] for negligence, negligent misrepresentations, fraud, deceptive trade practices, and breach of contract, alleging that Comet defectively designed and constructed the home's foundation. Comet denied any liability and asserted third-party claims against Austin Design Group, from whom Comet had purchased the foundation plans, and against Gary Wayne Jaster, the licensed professional engineer who had prepared the plans. Comet sought contribution and indemnity from the third-party defendants, alleging that they "are or may be liable to [Comet] for all or part of [Mahmoud's] complaint." Austin Design Group filed a counterclaim against Comet and a cross-claim against Jaster, seeking contribution and indemnity and asserting that, "[t]o the extent there is any defect in the foundation, whether by design or construction, it is the fault of [Jaster or Comet] and not the fault of Austin Design Group."

Jaster filed a motion to dismiss Comet's third-party claim and Austin Design Group's cross-claim, arguing that they were each "the plaintiff" as to those claims, that he was a licensed professional engineer, and that they had failed to file an expert affidavit (which the statute refers to as a "certificate of merit") as chapter 150 requires. In response, Comet filed an amended third-party

[1] Dawoud also sued Comet's principals, Joe and Laura Schneider. We refer to all three defendants jointly as "Comet."

petition, this time attaching a certificate of merit.[2] Jaster then filed an amended motion to dismiss, arguing that Comet did not comply with the statute because it did not file the certificate of merit with the original third-party petition and thus did not file it "with the complaint."

The trial court denied Jaster's motion to dismiss, and Jaster filed this interlocutory appeal.[3] With one justice dissenting, the court of appeals affirmed, concluding that chapter 150 does not require third-party plaintiffs or cross-claimants to file a certificate of merit. 382 S.W.3d 554. Jaster filed a petition for review, which we granted.

II.
"The Plaintiff" in an "Action" Under Section 150.002

Jaster contends that section 150.002 of the Texas Civil Practice and Remedies Code requires dismissal of the claims that Comet and Austin Design Group asserted against him in this case. The 2005 version of this section, which governs this action, provided:

> In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, registered professional land surveyor, or licensed professional engineer competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim.

Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 847, 896–97, *amended by* Act of May 12, 2005, 79th Leg., R.S., ch. 189, § 4, 2005 Tex. Gen. Laws 348, 348 *and* Act of

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[2] Comet later filed a second amended third-party petition, attaching the same certificate of merit.

[3] The statute expressly authorizes an interlocutory appeal from an order granting or denying a motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(f).

May 27, 2005, 79th Leg., R.S., ch. 208, § 2, 2005 Tex. Gen. Laws 369, 370 *and* Act of May 27, 2009, 81st Leg., R.S., ch. 789, § 2, 2009 Tex. Gen. Laws 1991, 1992 (current version codified at TEX. CIV. PRAC. & REM. CODE § 150.002).[4] "The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant" and "[t]his dismissal may be with prejudice." *Id.* § 150.002(e).[5]

The parties do not dispute that Jaster is a licensed professional engineer and thus a "licensed or registered professional,"[6] or that the claims that Comet and Austin Design Group assert against him arise out of the provision of professional services. Neither Comet nor Austin Design Group filed a certificate of merit when they originally filed their claims against him. The only issue in this appeal is whether the statute required them to do so.

Jaster argues: (1) for purposes of section 150.002, "there is no meaningful distinction" between an original "plaintiff" and a third-party plaintiff or a cross-claimant because they all assert affirmative claims for relief and are subject to the same pleading requirements; (2) third-party claims and cross-claims are "actions," and thus must comply with the statute's requirements for "any

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[4] Our references to section 150.002 are to the 2005 version of the statute, which the parties agree governs this case. The Legislature has since amended section 150.002, but the current version still imposes the certificate-of-merit requirement on "the plaintiff" in "any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional," including a licensed professional engineer. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a). Thus, our construction of the 2005 version also applies to the current version of the statute.

[5] This provision was found in subsection (d) in the 2005 version of the statute and was substantively the same for purposes of this case. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 847, 896–97 (amended 2005, 2009) (current version codified at TEX. CIV. PRAC. & REM. CODE § 150.002(e)).

[6] Chapter 150 defines "licensed or registered professional" to include licensed architects, licensed professional engineers, registered professional land surveyors, registered landscape architects, and firms in which such licensed or registered professionals practice. *See* TEX. CIV. PRAC. & REM. CODE § 150.001(1-a).

action"; and (3) not applying the requirement to third-party plaintiffs and cross-claimants thwarts "the statute's purpose to protect licensed professionals from unmeritorious or frivolous claims." In response, Comet and Austin Design Group contend: (1) because the statute uses the word "plaintiff" rather than the more inclusive term "claimant," the certificate-of-merit requirement applies only to a party that initiates a lawsuit; (2) requiring a defendant who denies the plaintiff's allegations to file a certificate of merit that supports the plaintiff's claims would be "absurd," "unfair," and "unreasonable"; and (3) if applying the requirement only to "the plaintiff" undermines the statute's purpose, the Legislature should address that problem, not the courts.[7] After briefly reviewing the courts of appeals' decisions addressing this issue, we consider the language of the statute and its context, and conclude that they compel us to agree with Comet and Austin Design Group.

A. Judicial Constructions of Section 150.002

Three Texas courts of appeals have addressed section 150.002's certificate-of-merit requirement in the context of third-party plaintiffs or cross-claimants.[8] First, in *DLB Architects, P.C. v. Weaver*, the Dallas Court of Appeals applied the requirement to a defendant who asserted third-party claims for contribution and indemnity against out-of-state architects. 305 S.W.3d 407, 411 (Tex. App.—Dallas 2010, pet. denied). The third-party plaintiff argued that the requirement applies only to architects licensed in Texas, and the court rejected that argument. *Id.* at 410–11. But neither

[7] Comet and Austin Design Group argue additional grounds for affirming the appellate court's judgment, but we need not reach them in light of our construction of the statute.

[8] We recently addressed section 150.002 in *CTL/Thompson Tex., L.L.C. v. Starwood Homeowners Ass'n*, but that appeal did not involve the issue of whether the certificate-of-merit requirement applies to parties other than a "plaintiff." 390 S.W.3d 299 (Tex. 2013).

party argued that the requirement did not apply to third-party plaintiffs, and the court applied the requirement without addressing that issue. *Id.*

Next, the Fort Worth Court of Appeals became the first to expressly address the issue in *CTL/Thompson Texas, LLC v. Morrison Homes*, 337 S.W.3d 437 (Tex. App.—Fort Worth 2011, pet. denied). In that case, a homebuilder sued a land developer and several engineers over a real estate transaction and filed a certificate of merit with the original petition. *Id.* at 439. The land developer brought cross-claims against the engineers, but instead of filing a certificate of merit, he incorporated the homebuilder's certificate of merit into his cross-petition by reference. *Id*. The engineers argued that the statute required the developer to file his own certificate of merit to support the cross-claims. *Id.* at 440. The court of appeals held that the statute does not apply to a defendant who merely files cross-claims against another defendant. *Id*. at 445–46. The court rejected the engineer's reliance on *DLB Architects* on the ground that it involved a defendant who filed third-party claims against a new third-party defendant, rather than cross-claims against a defendant who was already in the case. *Id*. The court reasoned that there is no need to require a cross-claimant to file a certificate of merit because "the plaintiff will have already filed [one]," or "if not, the plaintiff's claims are subject to dismissal." *Id.* at 445. But because the plaintiff will not have already filed a certificate of merit addressing the conduct of a new third-party defendant, the court reasoned that a third-party plaintiff should be required to do so, even if a cross-claimant is not. *Id*. at 445–46.

Finally, in the case before us today, the Austin Court of Appeals held that the statute does not require third-party plaintiffs or cross-claimants to file a certificate of merit. The court identified many respects in which third-party plaintiffs and cross-claimants are both similar to and yet different

from original plaintiffs. 382 S.W.3d at 559–60. The majority observed that "the statute does not specifically address defendants filing third-party complaints and cross-claims" and suggested that "there are multiple options of how the certificate-of-merit requirement could be applied to them," depending on whether the claims are original to the defendant or derived from the plaintiff's claims and whether they assert the claims against new parties or parties already in the suit. *Id*. at 560. After considering the potential "unintended consequences of an expansive definition of 'plaintiff,'" *id*. at 561, the majority noted that the statute uses the word "plaintiff" instead of "claimant" and does so without defining it to include third-party plaintiffs and cross-claimants. *Id*. at 561–62. Considering the "difficulties in judicially imposing . . . a broader definition of 'the plaintiff,'" the majority decided to "resist the urge to judicially create a solution to the statute's failure to address third-party complaints and cross-claims," and held that the statute "does not require a certificate of merit from a defendant who files a third-party complaint or cross-claim." *Id*. at 562.

The dissenting justice in the Austin Court of Appeals concluded that requiring plaintiffs who sue certain professionals to file a certificate of merit but not requiring defendants who sue such professionals to do so is "an absurd result." *Id*. at 565 (Henson, J., dissenting). In her view, the majority's construction undermines the statute's purpose "to provide a method by which courts can quickly dismiss meritless claims" and ignores the reality that, from the licensed or registered professional's perspective, "third-party plaintiffs and cross-claimants are certainly 'plaintiffs' with regard to the third-party claims and cross-claims[.]" *Id*. at 564–65.

B. The Language of the Statute

We resolve the issue in this case by looking to the language of the statute, which we construe de novo. *Nathan v. Whittington*, 408 S.W.3d 870, 872 (Tex. 2013). We must enforce the statute "as written" and "refrain from rewriting text that lawmakers chose." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009). We limit our analysis to the words of the statute and apply the plain meaning of those words "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). While we must consider the specific statutory language at issue, we must do so while looking to the statute as a whole, rather than as "isolated provisions." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). We "endeavor to read the statute contextually, giving effect to every word, clause, and sentence." *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). We thus begin our analysis with the statute's words and then consider the apparent meaning of those words within their context.[9]

1. The Words of the Statute

Section 150.002 requires "the plaintiff" in "any action or arbitration proceeding" to file a certificate of merit. Chapter 150 does not define the terms "plaintiff" or "action," so we must give them their common, ordinary meaning unless the statute clearly indicates a different result. *See Molinet*, 356 S.W.3d at 411. That is not to say that we must (or may only) give undefined words their

[9] By contrast, the dissent begins with its own conclusion, suggesting that the resolution of this case should "be pretty easy" because, after all, it says (without citation), "a third-party *plaintiff* is, in name itself, a plaintiff, and a suit is an action." *Post* at ___ (Hecht, C.J., dissenting) (emphasis in original). We cannot be quite so cavalier when fulfilling our duty to construe Texas statutes, and we cannot begin our analysis with our own unsupported conclusions on the very issue before us. We begin, instead, with the language of the statute.

only meaning, for words can have more than one meaning. The dissent asserts that, "[w]hen a word is used sometimes to mean one thing and sometimes another, neither is 'plain,' 'common,' or 'ordinary' to the exclusion of the other." *Post* at ___. We disagree. When a statute uses a word that it does not define, our task is to determine and apply the word's common, ordinary meaning. The fact that the word may sometimes be used to convey a different meaning is the very reason why we look for its *common, ordinary* meaning. To determine its common, ordinary meaning, we look to a wide variety of sources, including dictionary definitions, treatises and commentaries, our own prior constructions of the word in other contexts, the use and definitions of the word in other statutes and ordinances, and the use of the words in our rules of evidence and procedure.[10]

We begin by reviewing dictionary definitions of the words "plaintiff" and "action." *See Epps v. Fowler*, 351 S.W.3d 862, 873 (Tex. 2011) (Hecht, J., dissenting) ("The place to look for the ordinary meaning of words is . . . a dictionary."). Dictionaries consistently define a "plaintiff" as a party or person who brings or files a "civil suit" or "legal action." *See, e.g.*, BLACK'S LAW DICTIONARY 1171 (7th ed. 1999) (defining "plaintiff" as "[t]he party who brings a civil suit in a

[10] Examples of our reliance on these various sources to determine a word's common, ordinary meaning are too numerous to cite, but for examples from opinions we issued just within the past two years, see *Zanchi v. Lane*, 408 S.W.3d 373, 378 (Tex. 2013) (relying on dictionary definitions, our prior decisions, the rules of procedure, and statutory definitions for the common meaning of "party"); *Rachal v. Reitz*, 403 S.W.3d 840, 845 (Tex. 2013) (relying on dictionary definitions and treatises for the common meaning of "agreement"); *Morton v. Nguyen*, 412 S.W.3d 506, 510–12 (Tex. 2013) (relying on our prior decisions, dictionary definitions, and the Restatement for the common meanings of "rescission" and "refund"); *City of Hous. v. Bates*, 406 S.W.3d 539, 545–47 (Tex. 2013) (relying on dictionary definitions and a city ordinance for the common meanings of "leave" and "salary"); *State v. $1,706.00 in U.S. Currency*, 406 S.W.3d 177, 181 (Tex. 2013) (per curiam) (relying on dictionary definition of "novelty"); *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 512 n.16 (Tex. 2012) (relying on dictionary definitions and our prior opinions for the common meaning of "requisite"); *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 382–83 (Tex. 2012) (relying on our prior opinions, other statutes, and treatises for the common meaning of "property"); *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 747 (Tex. 2012) (relying on dictionary definition for common meanings of "distribution" and "transmission").

court of law"); Garner, Bryan, A DICTIONARY OF MODERN LEGAL USAGE 665 (2nd ed. 1995) (defining "plaintiff" as "the party who brings suit in a court of law"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 888 (10th ed. 1993) (defining "plaintiff" as "a person who brings a legal action"). Thus, both the statute and the dictionary definitions recognize a direct relationship between the words "plaintiff" and "action." Jaster contends that "any action," as used in section 150.002, includes each separate claim or cause of action that any party may assert, including an original plaintiff's claims, third-party claims, and cross-claims. This, however, is not the common, ordinary meaning of "action."

The common meaning of the term "action" refers to an entire lawsuit or cause or proceeding, not to discrete "claims" or "causes of action" asserted within a suit, cause, or proceeding. BLACK'S LAW DICTIONARY at 28 (defining "action" as "[a] civil or criminal judicial proceeding"). "The term 'action' is generally synonymous with 'suit,' which is a demand of one's rights in court." *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995); *see also In re Marriage of Combs*, 958 S.W.2d 848, 850 (Tex. App.—Amarillo 1997, no pet.) (holding that an "action" is "a demand for one's legal right and has been held synonymous with 'suit'"). A suit, in turn, is "any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him." *H.H. Watson Co. v. Cobb Grain Co*., 292 S.W. 174, 176 (Tex. 1927) (citing *Weston v. City Council of Charleston*, 27 U.S. 449, 464 (1829)). Although the word "suit" can be "more general in its comprehension than the word 'action,'" both terms refer to a judicial proceeding in which parties assert claims for relief. *Id*. Thus, under the common definition, "[a]n action is a judicial proceeding, either in law or in equity, to obtain certain relief at the hands of the court." *Elmo v. James*, 282 S.W.

835, 839 (Tex. Civ. App.—Fort Worth 1926, writ dism'd w.o.j.). Historically, "action" referred to a judicial proceeding in a court of law, while "suit" referred to a proceeding in a court of equity. BLACK'S LAW DICTIONARY at 29.

A "cause of action," by contrast, "has been defined 'as a fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.'" *A.H. Belo Corp. v. Blanton*, 129 S.W.2d 619, 621 (Tex. 1939) (quoting 1 TEX. JUR. p. 61 sec. 15). As we recently noted, this is "the generally accepted meaning" of the term "cause of action." *Loaisiga v. Cerda*, 379 S.W.3d 248, 255 (Tex. 2012) (quoting *In re Jorden*, 249 S.W.3d 416, 421 (Tex. 2008)). Thus, a "cause of action" and an "action" are not synonymous; rather, the "cause of action" is the right to relief that entitles a person to maintain "an action." *Id*. "The right to maintain an action depends upon the existence of a cause of action, which involves the combination of a right on the part of the plaintiff and a violation of such right by the defendant." *Bell v. Moores*, 832 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1992, writ denied).[11]

A "cause of action" is thus similar to a "claim," in that they both refer to a legal right that a party asserts in the suit that constitutes the action. *See Torch Energy Advisors Inc. v. Plains Exploration & Prod. Co*., 409 S.W.3d 46, 56 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (noting that the ordinary meaning of "claim" is "the assertion of an existing right; any right to payment or

[11] *See also Magill v. Watson*, 409 S.W.3d 673, 679 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (a "cause of action" consists of "those facts entitling one to institute and maintain an action at law or in equity"); *City of Texarkana v. Cities of New Boston*, 141 S.W.3d 778, 788 (Tex. App.—Texarkana 2004, no pet.) (stating that a "pleading" is the vehicle for "alleging a cause of action" and thus the "means by which one party institutes a lawsuit."); *Elmo v. James*, 282 S.W. 835, 839 (Tex. Civ. App.—Fort Worth 1926, writ dism'd w.o.j.) ("The facts necessary to be alleged and proved in order to obtain the relief sought, and on account of which the action is instituted, logically constitute the cause of action.").

to an equitable remedy," and "the aggregate of operative facts giving rise to a right enforceable by a court"). Thus, a "cause of action may exist before a suit is instituted." *Magill*, 409 S.W.3d at 679. But for there to be a "suit" or "action," it is "essential that it rest in a court, with the power to hear it. Without such a forum, it is not 'a suit,' since it lacks that which is as necessary to make it a suit as the petition itself." *United Prod. Corp. v. Hughes*, 152 S.W.2d 327, 330 (Tex. 1941) (quoting *Pecos & N. T. Ry. Co. v. Rayzor*, 172 S.W. 1103, 1104 (Tex. 1915)). Recognizing these distinctions, this Court has used the terms "case," "cause," "suit," "lawsuit," "action," and "proceeding" interchangeably, while using the terms "claim," "cause of action," and "chose in action" to refer to the facts giving rise to a right that is enforceable in that proceeding. *See, e.g.*, *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 698–708 (Tex. 1996).

Consistent with the common, ordinary usage of these terms, the Dallas Court of Appeals has expressly concluded that "the term *action* in section 10.01 [of the Civil Practice and Remedies Code] means 'suit,'" not "cause of action." *Bradley v. Etessam*, 703 S.W.2d 237, 241 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (emphasis in original). Similarly, the Amarillo Court of Appeals has concluded that a counter-claim is not an "action" as the Family Code uses that term. *Combs*, 958 S.W.2d at 850.[12]

[12] Generally, our rules of civil procedure also recognize the distinction between an "action," "suit," or "cause" and a "cause of action" or "claim." *Compare, e.g.*, TEX. R. CIV. P. 86 (referring to transfer of venue "from the county where *the action* is pending") (emphasis added) *and* TEX. R. CIV. P. 89 (providing that the "cause" shall be transferred and "such suit" filed in the new county, but if "the cause" is "severable as to parties defendant" it must be "ordered transferred as to one or more defendants but not as to all") *with* TEX. R. CIV. P. 91a.7 (providing for dismissal of a baseless "cause of action" and award of attorney's fees incurred "with respect to the challenged cause of action," except in "an action" by or against a governmental entity or public official).

Thus, according to the terms' common, ordinary meanings, section 150.002 requires "the plaintiff" to file a certificate of merit in "any [lawsuit] or arbitration proceeding" against a licensed professional, and "the plaintiff" is a party who initiates the "action" or suit, not any party who asserts claims or causes of action within the suit. Third-party plaintiffs and cross-claimants do not initiate a lawsuit or legal proceeding. Because they share some similarities with plaintiffs, the law treats them similarly in limited respects. *See, e.g.*, *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 800 (Tex. 1992) (noting that a defendant who asserts a cross-claim "becomes a plaintiff *for res judicata purposes*" with respect to compulsory claims relating to the cross-claim) (emphasis added); TEX. R. CIV. P. 85 (providing that a defendant's original answer "may present a cross-action, which *to that extent* will place defendant in the attitude of a plaintiff) (emphasis added). But that does not mean that the law treats them similarly in *all* respects. We thus conclude that, under the common, ordinary meaning of the terms, Comet and Austin Design Group are not "the plaintiffs" in this "action," because they are not the parties who initiated the suit.

2. The Context of the Words

Having identified the common meaning of the terms "plaintiff" and "action," we must also consider the context in which those words appear within section 150.002 and the statute as a whole.[13]

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[13] We agree with the concurring opinion's observation that, because our "tools for analyzing isolated words have limitations, context becomes essential to clarity." *Post* at ___ (Willett, J., concurring). But as the concurring and dissenting justices have previously acknowledged, *both* the words *and* the context matter. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 632 (Tex. 2008) ("When Searching for Statutory Meaning, Words Matter—And So Does Context.") (Willett, J., joined by Hecht, J., dissenting). If we have engaged in an "exhaustive" (if not "masterful," "splendid," and "impressive") analysis, *post* at ___ (Hecht, C.J., dissenting), of the common, ordinary meanings of "plaintiff" and "action," we have done so only and precisely because "words matter." Far from being "detached from reality," *post* at __ (Hecht, C.J., dissenting), when it comes to fulfilling our role of interpreting statutes, the language of the law *is* our reality, at least unless we decide to start writing the law ourselves. Because the statute does not define the determinative words, we determine and apply their plain, ordinary, common meaning "*unless* a different meaning is apparent from the

The dissent considers it obvious that "a third-party plaintiff is a plaintiff." *Post* at ____. We agree that the terms "plaintiff" and "action" may sometimes be used more broadly than their common meanings would support.[14] To conclude that they are used that way here, however, either a statutory definition or the context of the language must clearly demonstrate that they are. So we must consider the entire statute in this case, to determine whether something other than the words' common meaning "is apparent from the context" here. *Molinet*, 356 S.W.3d at 411. Doing so, we conclude that the context does not support a different meaning but instead confirms the common meanings we have identified.

We begin our review of the context by recognizing that the statute requires the plaintiff to file a certificate of merit in "any action *or arbitration proceeding*." TEX. CIV. PRAC. & REM. CODE § 150.002(a) (emphasis added). By using the terms "action" and "arbitration proceeding" together with the conjunction "or," the statute treats the two terms as having a similar meaning. The meaning of individual words "may be ascertained by reference to words associated with them in the statute; and . . . where two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other." *Harris Cnty. v. Eaton*, 573 S.W.2d 177, 181 (Tex. 1978). Giving the term

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context." *Molinet*, 356 S.W.3d at 411 (emphasis added). Having determined the words' common, ordinary meanings, we now consider whether the context compels a different meaning.

[14] We have identified one instance within the Civil Practice and Remedies Code, for example, where it appears that the term "plaintiff" is used interchangeably with the broader term "claimant." *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) ("If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice."). Similarly, we have identified one instance within our Rules of Civil Procedure where it appears that the term "action" is used as a short-hand reference to refer to a cross-claim. *See* TEX. R. CIV. P. 85 (providing that a defendant's original answer may "present a cross-action").

"action" its common meaning recognizes its similarity and relationship to the term "arbitration proceeding," so that in both terms the statute refers to a legal proceeding in which a plaintiff asserts a claim or cause of action. Indeed, if the term "action" referred to a claim or cause of action rather than a lawsuit or legal proceeding, there would be no reason for the statute to refer to an "arbitration proceeding" at all, because parties resolve claims and causes of action in both types of legal proceedings. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 171.002 (addressing "claims" subject to arbitration); *In re Labatt Food Serv. L.P.*, 279 S.W.3d 640, 645–46 (Tex. 2009) (holding that a wrongful death "cause of action" must be resolved through arbitration, which "merely changes the forum in which the claims are to be resolved").

Next, we consider that the statute requires the plaintiff to file a certificate of merit "*in*" an action or arbitration proceeding. TEX. CIV. PRAC. & REM. CODE § 150.002(a) (emphasis added). As a matter of ordinary language, it would be at least unusual, if not grammatically incorrect, to say that a plaintiff is "required to file" something "in" a "claim" or "in" a "cause of action." Rather, a party asserts a claim or cause of action "in" a pleading that is filed "in" a lawsuit or "action." The context of section 150.002(a), which requires the plaintiff to file the certificate of merit "with the complaint" and "in any action," thus indicates the common meaning of the term "action" as a lawsuit or legal proceeding.

Similarly, we note that the statute requires the certificate of merit to "set forth specifically" the defendant's conduct giving rise to liability "for *each theory of recovery*" and "the factual basis for *each such claim*." TEX. CIV. PRAC. & REM. CODE § 150.002(b) (emphases added). Rather than requiring the factual support for "the action," as if that term meant a "claim" or "cause of action,"

this language demonstrates the statute's recognition of the difference between a "claim" and an "action." Subsection (a) requires the plaintiff to file a certificate of merit "in an action," and subsection (b) requires the certificate to state the factual basis for each legal theory or "claim" asserted in that action.

Turning to the meaning of the term "plaintiff," we observe that, throughout the Civil Practice and Remedies Code, the definitions and usage of the term "plaintiff," as opposed to the term "claimant," are consistent with its common meaning. When addressing frivolous pleadings and claims in chapter 9, for example, the statute uses the term "claimant," rather than the term "plaintiff," and expressly defines the term "claimant" to include "a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, or intervenor, seeking recovery of damages." TEX. CIV. PRAC. & REM. CODE § 9.001(1). The statute consistently utilizes the same approach when addressing proportionate responsibility in chapter 33, *see id*. § 33.011(1), damages in chapter 41, *see id.* § 41.001(1), liability for stalking in chapter 85, *see id*. § 85.001(1), and liability for a year 2000 computer failure in chapter 147, *see id*. § 147.001(2). And when addressing medical liability claims (to impose an expert affidavit requirement similar to chapter 150's certificate-of-merit requirement), the statute uses a similar but slightly different approach, using the term "claimant" and defining that term to mean any person "seeking or who has sought recovery of damages in a health care liability claim." *Id*. § 74.001(a)(2). These provisions demonstrate that when the Legislature wants to use a single term that encompasses third-party plaintiffs, cross-claimants, and counter-claimants along with plaintiffs, it uses the term "claimant," and defines that term accordingly.

By contrast, the Code repeatedly uses the word "plaintiff" to refer to a party who initiates the suit, rather than to every party who asserts a claim for relief within a suit. When addressing the general rule for venue in chapter 15, for example, the statute provides that "all *lawsuits shall be brought*," when other rules do not apply, "in the county in which *the plaintiff* resided at the time of the accrual of the cause of action." *Id.* § 15.002(a)(4) (emphases added). Similarly, although (as noted above) the medical liability act generally refers to "claimants," when addressing discovery procedures it refers instead to "*the plaintiff*," who must serve standard discovery answers and responses "within 45 days after the date of *filing of the original petition*." *Id.* § 74.352(a) (emphases added). And when addressing forum non conveniens motions in chapter 71, the statute uses the word "plaintiff" and defines it broadly to mean "a party seeking recovery of damages for personal injury or wrongful death," but the statute then expressly provides that "[t]he term does not include a counterclaimant, cross-claimant, or third-party plaintiff." *See id.* § 71.051(h)(2). These provisions demonstrate that when the Legislature wants to use a term that includes only a party who initiates a lawsuit, thus excluding third-party plaintiffs, cross-claimants, and counter-claimants, it uses the term "plaintiff," rather than the term "claimant."[15]

[15] We note that, as the Civil Practice and Remedies Code recognizes, there may be more than one plaintiff in a single lawsuit, "whether the plaintiffs are included by joinder, by intervention, because the lawsuit was begun by more than one plaintiff, or otherwise." TEX. CIV. PRAC. & REM. CODE § 15.003(a). The recognition that those added to the suit by joinder or intervention may become "plaintiffs" is also consistent with the common meaning of the term, as such joinder or intervention simply places them among those who initiated the suit. *See, e.g.*, TEX. R. CIV. P. 40 (explaining circumstances in which "[a]ll persons may join in *one action as plaintiffs*") (emphasis added). Because this case does not present the issue of whether section 150.002 requires each individual plaintiff in a multi-plaintiff suit and those added as plaintiffs by joinder or intervention to file separate certificates of merit, we may not address that issue here without rendering an advisory opinion.

Finally, we note that this Court's practice in the Texas Rules of Civil Procedure is also consistent with the common meanings and the statutory usage of the terms "plaintiff" and "third-party plaintiff" to refer to distinct types of parties in a suit. Rule 38, for example, which governs third-party practice, provides that "a defending party, as a third-party plaintiff," may bring claims against a non-party "who is or may be liable *to him* or *to the plaintiff*." TEX. R. CIV. P. 38(a) (emphases added).[16] The person against whom the third-party plaintiff asserts such claims, "hereinafter called the third-party defendant," may then assert any defenses "the *third-party plaintiff* has to *the plaintiff's* claim." *Id.* (emphases added). The third-party defendant must assert any compulsory counterclaims against the third-party plaintiff and any compulsory cross-claims against "other third-party defendants," and "[t]he plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of *the plaintiff's* claim against the *third-party plaintiff*." *Id.* (emphases added). And our rules are also consistent with the statute's broader usage of the term "claimants." *See* TEX. R. CIV. P. 169(a)(1) (creating expedited procedure for certain suits in which "all claimants, other than counter-claimants" seek monetary relief aggregating $100,000 or less).

Having identified the common meanings of the terms "plaintiff" and "action" as referring to a party who initiates a lawsuit, in contrast to a "claimant" who asserts a claim for relief within a lawsuit, and having determined that the context of those terms supports those common meanings,

[16] Thus, as the dissent agrees, a third-party plaintiff, under Rule 38, is not a "plaintiff" but "a *defendant* suing a non-party." *Post* at ___ (emphasis added).

we conclude that section 150.002's certificate-of-merit requirement applies to a party who initiates the lawsuit, and not to defendants or third-party defendants who assert claims for relief within a suit.

C. Absurdity and the Purpose of the Statute

Jaster argues that construing section 150.002 to allow a party to bring third-party claims or cross-claims without filing a certificate of merit when a certificate of merit would be required if the same party filed the same claim as a separate suit achieves "an absurd result" and "thwarts" the purpose of the statute. *See* 382 S.W3d at 565 (Henson, J., dissenting). Jaster is correct that courts should not enforce the plain meaning of a statute's text if doing so "leads to absurd or nonsensical results." *Molinet*, 356 S.W.3d at 411. We do not agree, however, that the application of the common meanings of the words used in section 150.002 leads to "absurd results," and we will not ignore the words' common meanings to achieve a purpose or object that is ambiguous at best.

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." *Combs v. Health Care Serv. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013).[17] While the dissent and others may think it "odd" for the statute to require claimants to file a certificate of merit when

[17] One example of an absurd result may be found in section 150.002(a)'s use of the word "complaint." As the dissent notes, while parties in federal courts file "complaints," *see, e.g.*, FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court."), parties in Texas courts file "petitions," *see, e.g.*, TEX. R. CIV. P. 22 ("A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk."), so a "'complaint' . . . is not part of Texas civil procedure." *Post* at ___. The dissent wonders why we do not "hold that Chapter 150 is dead letter because it applies only to the filing of a 'complaint', which is certainly not a 'petition.'" *Post* at __. The absurdity doctrine answers that question. To construe section 150.002 of the *Texas* Civil Practice & Remedies Code so that it does not apply to any suit filed in *Texas* courts would present the kind of "exceptional" result that would qualify as "absurd." At a minimum, it would completely nullify the statute as to all such suits, and we cannot "lightly presume that the Legislature may have done [such] a useless act." *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 996 S.W.2d 482, 485 (Tex. 1998). We therefore construe the term "complaint" to mean "petition," contrary to its common meaning, but we do so because the context of the term within the statute as a whole compels that result, not because we think doing so promotes a better public policy or would be more effective in promoting what we assume to be the statute's purpose.

they initiate a lawsuit but not when they assert claims as part of an existing lawsuit, there are legitimate reasons why the Legislature may have chosen this approach. For one, as the majority in the court of appeals noted, third-party plaintiffs and cross-claimants do not control the time and place of suit, and may not have adequate time to obtain the necessary expert analysis by the time their third-party claim or cross-claim is due. 382 S.W.3d at 560.[18]

In addition, as Comet and Austin Design Group argue and the court of appeals' majority also noted, many defendants (like Comet in this case) deny the existence of any design defect, but alternatively assert third-party claims against a design professional, seeking contribution and indemnity in the event that the plaintiff prevails. It would be far more "odd" to require such defendants to file an expert's certificate supporting the merits of the plaintiff's claim, thus requiring the defendants to abandon their denial of the merits. Instead of trying to craft a necessarily complicated certificate-of-merit requirement that would appropriately address defendants who dispute any defect and those who do not, those who seek contribution and indemnity and those who seek affirmative rather than derivative relief, and those who file only cross-claims against existing defendants and those who file third-party claims against new defendants, the Legislature may have decided that the better course was to impose a simpler requirement that applies only to a plaintiff who initiates a lawsuit.

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[18] The dissent suggests that section 150.002(c) alleviates any such time-crunch issues because the "time may be extended by motion or agreement." *Post* at ___. The "such time" to which this provision refers, however, appears to be the thirty-day extension that subsection (c) grants for cases "in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that [a certificate of merit] could not be prepared." TEX. CIV. PRAC. & REM. CODE § 150.002(c). Although the parties do not present, and we do not decide, that issue here, it at least appears that subsection (c)'s justice-based extension is available only when the plaintiff files the action within 10 days before limitations expires. If that is so, then subsection (c) would not be nearly as adequate as the dissent suggests.

Ultimately, the most that can be said about the alleged "absurdity" of the statute as we read it is that it provides licensed and registered professionals with early protection against most, but not all, meritless claims. Even so, all claimants who assert such claims must support them with adequate and sufficient evidence, and summary judgment will be appropriate against those who cannot. Though some might argue that this approach was not the best policy choice, "we read unambiguous statutes as they are written, not as they make the most policy sense." *Health Care Servs.*, 401 S.W.3d at 629. Even if the result seems to us to be unreasonable, "reasonableness is not the standard for eschewing plain statutory language." *In re Blair*, 408 S.W.3d 843, 859 (Tex. 2013) (Boyd, J., concurring). That high standard is absurdity, and we cannot say that this statute achieves an absurd result.

Nor can we conclude that the statute's plain meaning is inconsistent with the statute's purpose. Ultimately, the dissent concludes that interpreting the statute in accordance with the common, ordinary meaning of its words "partially impairs the statute's purpose." But with regard to the issue before us, all we know of the statute's purpose is that its purpose is to require "the plaintiff" in "any action" to file a certificate of merit "with the complaint." Other than that, the statute does not express its purpose.

Nevertheless, the dissent asserts that the statute's "manifest object" is "to require a prima facie showing of liability at the time certain professionals are sued for malpractice," *post* at ___, and this Court has observed, albeit in a different context, that its purpose is "to deter meritless claims and bring them quickly to an end." *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 301 (Tex. 2013). But deciding exactly *which* licensed and registered professionals the

Legislature intended to protect (those sued as defendants, those brought into a case as third-party defendants, or both?) and *which* meritless claims the Legislature intended to bring quickly to an end (those filed by a party who initiates a lawsuit, those filed by defendants after they are brought into a lawsuit, or both?) presents a different question. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). We must look to the statute's text to determine the policy choices that the Legislature made when deciding how to achieve the "manifest object" of section 150.002. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id*. at 526. We "are bound, not only by the ultimate purposes [the Legislature] has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co*., 512 U.S. 218, 231 n.4 (1994). The language of section 150.002 indicates that its purpose is to deter and end meritless claims that "the plaintiff" asserts "with the complaint" that initiates an "action." The Legislature has to balance many interests, and for the reasons we have explained, it may have decided that requirement strikes the proper balance. We must rely on the words of the statute, rather than rewrite those words to achieve an unstated purpose.

Finally, we address the dissent's complaint that our analysis of the statute demands too much "precision" from the Legislature, at least if the goal of our analysis is to "giv[e] effect to the Legislature's intent in the enactment." *Post* at ___. We disagree and instead conclude that "[w]e must assume that the Legislature has done its very best to express its intent in the words of the statute

itself." *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328 (Tex. 1994) (Hecht, J., concurring and dissenting). We can acknowledge the possibility that, although the Legislature used the words "plaintiff" and "action" in chapter 150, it really meant "claimant" and "cause of action." Indeed, "[i]t is at least theoretically possible that legislators—like judges or anyone else—may make a mistake." *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004). But even if that's the case here, "courts are not empowered to 'fix' the mistake by disregarding direct and clear statutory language that does not create an absurdity." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 638 (Tex. 2010) (citing *Brown*, 156 S.W.3d at 566). "Courts are not responsible for omissions in legislation, but we are responsible for a true and fair interpretation of the law as it is written." *Id.* at 637. In other words, as today's dissenting justice has explained, "[a] court must be careful not to substitute its own view of what should have been intended for what *was* intended." *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 321 (Tex. 2000) (Hecht, J., concurring).

We conclude that construing the terms "the plaintiff" and "any action" in section 150.002 according to their common meanings does not lead to absurd results or undermine the statute's stated purpose.

III.
Conclusion

We hold that the certificate-of-merit requirement in section 150.002 of the Civil Practice and Remedies Code applies to "the plaintiff" who initiates an action for damages arising out of the provision of professional services by a licensed or registered professional, and does not apply to a

defendant or third-party defendant who asserts such claims. We therefore affirm the court of appeals' judgment upholding the trial court's denial of Jaster's motion to dismiss.

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Jeffrey S. Boyd
Justice

Opinion delivered: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0804

GARY WAYNE JASTER, PETITIONER,

v.

COMET II CONSTRUCTION, INC., JOE H. SCHNEIDER, LAURA H. SCHNEIDER, AND AUSTIN DESIGN GROUP, RESPONDENTS

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

JUSTICE WILLETT, joined in part by JUSTICE LEHRMANN, and joined by JUSTICE DEVINE, concurring.

I join the plurality opinion[1] but write separately to underscore the centrality of semantic context in statutory interpretation and the perils of resting on a statute's supposed purpose.

I. Context Indicates that Third-Party Plaintiffs Need Not Comply with Section 150.002.

I agree with the dissent that some words, taken in isolation, do not yield a platonic form free of ambiguity. However, context sheds light on meaning, and I believe the language of this statute, viewed in context, excludes third-party plaintiffs from the expert-affidavit requirement. Thus, the plurality opinion's analysis of the context does not just support its analysis of isolated words—it forms an essential foundation for understanding those words.

[1] JUSTICE LEHRMANN does not join the plurality opinion, but joins the remainder of this concurrence.

Judges must navigate a narrow course "between a sterile literalism which loses sight of the forest for the trees, and a proper scruple against imputing meanings for which the words give no warrant."[2] For that reason, "[l]anguage cannot be interpreted apart from context."[3] Meaning is bound to and bound by context. Words derive substance from the ecosystem of language in which we find them, and we must "consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[4] The meaning of language, plain or not, must be drawn from the surrounding context, particularly everyday words and phrases that are inordinately context-sensitive. Such a contextual reading here demonstrates that "the plaintiff" who files "the complaint" in an "action . . . for damages" refers to the original plaintiff in the suit, and not a third-party plaintiff.

I agree with the plurality opinion's analysis of the word "action" in light of the statute's context and briefly add several other contextual considerations that support the plurality opinion's conclusion that the statute does not require third-party plaintiffs to file expert affidavits.

A. "Plaintiff" Refers Only to the Original Plaintiff.

If action refers to a civil suit as a whole and not to individual claims, the meaning of "plaintiff" is necessarily circumscribed. The statute says "*the* plaintiff." Use of "the" indicates that the language is trying to pinpoint one particular party in the action or arbitration proceeding. Since "action" must be referring to the suit as a whole, this singular emphasis on a *particular* plaintiff seems to rest most naturally with the plaintiff who initiated the suit. Likewise, the required affidavit

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[2] *N.Y. Trust Co. v. Comm'r of Internal Revenue*, 68 F.2d 19, 20 (2d Cir. 1933) (L. Hand, J.).

[3] *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011).

[4] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 167 (2012).

is to be filed with "*the* complaint." Again, this signals a focus on a particular party at a particular moment in the lawsuit. "*The* complaint" most naturally refers to the initial pleading that puts the "action" or suit into motion. Of course, other plaintiffs may come along through intervention or joinder. But when "the" shows up before both "plaintiff" and "complaint," it indicates the targeting of someone and something specific—the plaintiff and petition that put the suit in motion. This makes sense in light of the role of motions to dismiss—they are designed as sentinels that guard the gate and thus most naturally target the party who first comes knocking. Moreover, the manifest object of the provision is fulfilled after the initial plaintiff meets the requirement. There is no obvious need to require each additional plaintiff who sues the defendant to file a separate affidavit in order for this threshold protection to be provided because the initial affidavit has already provided the desired filtering effect.

B. A Claim Seeking Contribution and Indemnity Is Not an Action "For Damages."

Additionally, section 150.002 does not apply to third-party plaintiffs seeking indemnity and contribution because the affidavit requirement is limited to actions "for damages." I would read this as damages sought by "the plaintiff" who seeks a direct right to recover against the design professional. Here, Comet does not seek damages—it seeks only contribution and indemnity. When a defendant files a third-party action against a third-party defendant seeking contribution and indemnity, the defendant does not increase the possible scope of damages that the plaintiff will ultimately recover. The only changing dynamic is the proportionate share of the damages to be paid. Thus, a claim for contribution and indemnity is not an action "for damages" because it does not provide an independent basis for any new damages. It only adds another variable in determining how

the damages already sought by the original plaintiff will be allocated among co-liable parties. Thus, actions for contribution and indemnity are not actions "for damages."

When the language of section 150.002 is viewed as a whole, the meaning of "plaintiff" becomes clear. "Action" refers to civil proceedings, or the lawsuit as a whole. "The plaintiff" therefore is the original plaintiff. Moreover, a third-party plaintiff seeking only contribution and indemnity does not have a claim "for damages." Thus, a third-party plaintiff need not comply with the expert-affidavit requirement.

II. Analysis of "Action" and "Plaintiff" in Isolation Does Not Free Them of Ambiguity.

In analyzing "action" and "plaintiff," the plurality opinion relies on dictionaries, other statutory provisions, and caselaw. These are helpful tools but often insufficient. "[T]he choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures."[5] Reliance on caselaw definitions faces a similar problem. In both circumstances, the words are not considered in the context of their use in the statute before us. With caselaw, the problem is exacerbated because entirely different circumstances may have animated our former interpretation of a particular word. Evidence of meaning from other statutes is also useful, but this can be tricky, as words in statutes may take on unique or varying shades of meaning depending on the context and the purpose for which they are used. Because these tools for analyzing isolated words have limitations, context becomes essential to clarity.

[5] Frank H. Easterbrook, *Text, History, and Structure in Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994).

III. Jaster's Purposive Approach Does Not Dethrone the Primacy of Text.

Jaster and the court of appeals' dissent rely more heavily than CHIEF JUSTICE HECHT on the statute's alleged purpose. Both advocate use of the absurdity doctrine to effectuate the statute's purpose. That purpose, according to Jaster, is to shelter design professionals from the waste of defending non-meritorious claims. He complains that Comet's reading of the statute would frustrate this purpose because the design professional directly sued by the original plaintiff is protected, while the design professional who is dragged into the lawsuit by a defendant eager to pass along or share liability is not. Parties similarly situated are treated differently, which may seem illogical and unfair. But this result does not rise to the kind of absurdity that would justify deviation from a fair reading of the text in favor of a putative purpose.

Liberal use of the absurdity doctrine too often devolves into purposive interpretation of statutes. And reliance on legislative purpose always tempts but rarely tempers. That temptation reaches its zenith when the upshot of a straightforward reading seems illogical or unjust. But a fair reading may well require an unfair result. When interpreting the Legislature's words, we cannot revise them under the guise of interpreting them. "Making law *work* is a proper goal for judges only at the retail level; substance is in the main for the political branches."[6]

Plus, careful textual commitment can encourage careful drafting. When legislatures come to see courts as editors rather than adjudicators, busy legislators may leave the judiciary to tighten the screws on loose language down the road. Vague legislation is sometimes inadvertent and

[6] *Id.* at 64 (emphasis in original).

sometimes intentional, but it is always a recipe for increased litigation and judicial guesswork. By sticking to our limited role, judges do more to improve the quality of the law than they ever could by decamping from text to hunt the snark of unvoiced legislative purpose.

In order to carefully police our limited role, the bar for application of the absurdity doctrine must remain high. Peculiarity or unfairness is not sufficient to trigger the absurdity doctrine. As we held recently—and unanimously—statutory language "can often work peculiar outcomes, including over- or under-inclusiveness . . . . [but] mere oddity does not equal absurdity . . . . The absurdity backdrop requires more than a curious loophole."[7] In general, "if the legal deck is stacked via technical statutory requirements, the Legislature should reshuffle the equities, not us."[8] Here, the failure of the statute to protect design professionals from third-party plaintiff claims while furnishing protection from original plaintiffs may be "quirky," but that is "quite different from proving it was quite impossible that any rational Legislature could have intended it."[9]

Indeed, a rational Legislature could have wanted to exclude third-party plaintiffs because requiring their compliance with section 150.002 creates a "quirky" result of its own. Section 150.002 requires submission of an expert affidavit along with the complaint that sets forth "specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim." It is not clear whether this affidavit must lay out some factual basis for each essential element of a negligence claim, but it must at least lay out the factual basis for the "negligent

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[7] *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013).

[8] *Roccaforte v. Jefferson Cnty.*, 341 S.W.3d 919, 928 (Tex. 2011).

[9] *Combs*, 410 S.W.3d at 631.

act, error, or omission." A persuasive affidavit regarding a negligent act will often require evidence of the alleged defect resulting from the design professional's supposed negligence. However, this kind of evidence will often also constitute evidence helpful to establish the original plaintiff's claim against the defendant home-builder before the plaintiff has presented his case-in-chief, moved for summary judgment, or even engaged in full discovery. In other words, application of section 150.002 to a third-party plaintiff will often place the defendant/third-party plaintiff in the unenviable position of either breaking ground for his own burial or foregoing his right to indemnity or contribution. While this may not amount to an absurd result, it certainly awakens our sense of unfairness in the same manner as the supposed absurdity of not holding third-party plaintiffs to the same heightened pleading requirement as original plaintiffs. It is not our place to choose between these anomalous results.

Careful textual analysis here points to a clear result, and the plurality opinion rightly declines to engage in the purposive analysis urged by Jaster. Here, context clearly indicates that the text does not require third-party plaintiffs to file an expert affidavit with the third-party petition.

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Don R. Willett
Justice

OPINION DELIVERED: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0804

GARY WAYNE JASTER, PETITIONER,

v.

COMET II CONSTRUCTION, INC., JOE H. SCHNEIDER,
LAURA H. SCHNEIDER, AND AUSTIN DESIGN GROUP, RESPONDENTS

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

CHIEF JUSTICE HECHT, joined by JUSTICE GREEN and JUSTICE GUZMAN, and in all but Part II by JUSTICE BROWN, dissenting.

In this case and another decided today, *In re Ford*,[1] the Court has written more on the subject of who is a "plaintiff" than I imagine all the other courts in the English-speaking world have ever written, all together. The distinction is a dubious one.

The cases are quite different, of course — the issue in this case is who *the* plaintiff is, while in *Ford* the issue is who *a* plaintiff is, and although both cases involve statutes in the Texas Civil Practice and Remedies Code,[2] the statutes are in separate volumes. So it is hardly surprising that the cases reach different, and arguably contradictory, outcomes. Without trying to put too fine a point

[1] ___ S.W.3d ___ (Tex. 2014).

[2] Unless otherwise indicated, all statutory references are to the Texas Civil Practice and Remedies Code.

on it, the Court holds in this case that a third-party plaintiff cannot be *the* plaintiff in any action, and is of two minds about whether an intervenor can be *the* plaintiff, while in *Ford* the Court holds that *both* a third-party plaintiff *and* an intervenor can be *a* plaintiff, so long as they are not also defendants. Not to complicate matters, the author of the Court's opinion in *Ford* agrees that this case is correctly decided, but the author of the Court's opinion in this case dissents in *Ford*. And another dissenter in *Ford* joins the opinion in this case — but that begins to complicate matters.

I suspect that these cases will leave many readers scratching their heads. Though the Court is trying to adhere to the statutory text, whatever the result, it opens itself to the criticism that its analysis is picky and detached from reality. Intending to be careful, the Court risks being viewed as conducting a contest among the Pharisees in the Temple of Textualism over who is the most devout.

Faithfulness to the principle that the words of a statute are the law may necessitate embracing a result that is peculiar or worse, yet unavoidable. But *unnecessarily* embracing such a result undermines the principle by suggesting that more and less reasonable interpretations are to be treated equally. The Judiciary's sole objective in interpreting statutes is to give effect to the Legislature's intent expressed in its words. Out of respect for the Legislative Branch, we must read their words the way they have written them — to make sense. I am not confident we have achieved that result in this case and therefore respectfully dissent.

I

By statute, "the plaintiff" in "any action or arbitration proceeding" for malpractice by certain professionals must ordinarily file "with the complaint" an affidavit supporting each theory of

recovery.[3] All we have to decide is whether this requirement applies when a professional is sued by a third-party plaintiff — a defendant suing a non-party.[4] One might think this would be pretty easy: a third-party *plaintiff* is, in name itself, a plaintiff, and a suit is an action, so yes, the requirement applies. But the reader will by now have seen from the plurality and concurring opinions that the issue is far more complicated than that.

The answer, according to the plurality opinion, depends on the "plain", "common", and "ordinary" meaning of the statute's operative words, "the plaintiff" and "any action".[5] The plurality

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[3] TEX. CIV. PRAC. & REM. CODE § 150.002(a) ("In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who: (1) is competent to testify; (2) holds the same professional license or registration as the defendant; and (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's: (A) knowledge; (B) skill; (C) experience; (D) education; (E) training; and (F) practice."); § 150.002(b) ("The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim."); § 150.002(c) ("The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires."); § 150.001(1-a) ("'Licensed or registered professional' means a licensed architect, licensed professional engineer, registered professional land surveyor, registered landscape architect, or any firm in which such licensed or registered professional practices, including but not limited to a corporation, professional corporation, limited liability corporation, partnership, limited liability partnership, sole proprietorship, joint venture, or any other business entity.").

[4] TEX. R. CIV. P. 38(a) ("At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action.").

[5] *Ante* at ___ ("We limit our analysis to the words of the statute and apply the plain meaning of those words 'unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.'"; *id.* at ___ ("Chapter 150 does not define the terms 'plaintiff' or 'action,' so we must give them their common, ordinary meaning unless the statute clearly indicates a different result.").

opinion then embarks on what is the most exhaustive treatment of that subject in the law of Texas, if not all of American jurisprudence. It is masterful. I would not challenge a word, and there is certainly nothing left to add. All I can do of any use is to summarize the plurality opinion's analysis and then offer a few reflections.

According to the plurality opinion:

The word "action" is sometimes used "more broadly" to refer to a "cause of action", but an "action" is really an entire lawsuit, and a "cause of action" is only a "right to relief", or at least a "claim" to such a right.[6] A person with a "cause of action" can bring an "action", which is "generally synonymous with 'suit'", except that "the word 'suit' can be 'more general in its comprehension than the word "action"'".[7] Historically, an "action" was a legal proceeding and a "suit" was an equitable one.[8] The important thing is that both an "action" and a "suit" are "proceedings", though actually, all three words, while different, have been used interchangeably, along with "case", "lawsuit", and "cause".[9] An "action" is a "cause", but it is not a "cause of action". That is, except for one time in Rule 85 of the Texas Rules of Civil Procedure.[10]

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[6] *Ante* at ___.

[7] *Ante* at ___.

[8] *Ante* at ___.

[9] *Ante* at ___.

[10] *Ante* at ___ n.11; *see* TEX. R. CIV. P. 85 ("The original answer . . . may present a cross-action . . . .").

Furthermore:

Dictionaries define "plaintiff" as the person who initiates an "action" or "suit".[11] Third-party plaintiffs and cross-claimants "share some similarities" with "plaintiffs", and the law treats them similarly "in limited respects". For example, third-party plaintiffs and cross-claimants initiate proceedings against third-party defendants and cross-defendants, and they are plaintiffs for res judicata purposes.[12] But third-party plaintiffs and cross-claimants are not "plaintiffs" in an "action" because they initiated only part of the suit, not the whole suit.[13] There must be "a direct relationship between the words 'plaintiff' and 'action.'"[14] All "plaintiffs" are "claimants", but not all "claimants" are "plaintiffs", and "[t]hroughout the Civil Practices and Remedies Code," that is the way those words are defined and used. When the Legislature says "plaintiff", it means the person initiating suit, and when it says "claimant", it means "plaintiffs" and others who assert "causes of action".[15] Actually, that is not quite right. Chapter 74 uses the terms "plaintiff" and "claimant" interchangeably in the very same sentence.[16] Also, some "plaintiffs" do not initiate suit but intervene or are

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[11] *Ante* at ___.

[12] *Ante* at ___.

[13] *Ante* at ___.

[14] *Ante* at ___.

[15] *Ante* at ___.

[16] *Ante* at ___ & n.14; *see* TEX. CIV. PRAC. & REM. CODE § 74.351(c) ("If the claimant does not receive notice of the court's ruling granting the extension [to file an expert report] until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.").

involuntarily joined, but by being included among the "plaintiffs" who do initiate suit, they become "plaintiffs", though maybe not under the statute in this case, a question we need not decide.[17]

Conclusion: Third-party plaintiffs are not plaintiffs.

To the plurality opinion's splendid analysis and conclusion, I respectfully offer five reservations.

First: The plurality opinion has proven beyond any doubt that sometimes third-party plaintiffs are plaintiffs and sometimes not, sometimes third-party actions are actions and sometimes not, and while sometimes the variations can be explained, sometimes they cannot be. Any remaining doubt is quickly dispelled by searching caselaw and statutes for the terms "third-party plaintiff", "third-party action", and "third-party cause of action", and noting the various, inconsistent ways in which those terms are used. When a word is used sometimes to mean one thing and sometimes another, neither is "plain", "common", or "ordinary" to the exclusion of the other. Ironically, the plurality opinion's labors to prescribe definite meanings for "plaintiff" and "action" only demonstrate that for it, the words "plain", "common", and "ordinary" have no real meaning at all.

Second: The underlying assumption of the plurality opinion's approach is that when it finally arrives at the real meaning of the inescapably imprecise words, "plaintiff" and "action", trudging through dictionaries, cases, and statutes, parsing and explaining, and finally discarding what it considers to be misuses of the words, the end result will be what the Legislature intended without going through the same process. When lawyers and judges have put words to various, inconsistent

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

uses over time, legislators simply cannot be presumed, alone of all creatures, to be precise — or closer to the point, to have been more precise in one statute than they were in others. And in Chapter 150, they, in fact, were not precise at all.

For example, a "complaint", with which a certificate must be filed, is not part of Texas civil procedure. Obviously, a "petition" is intended. Would the Court hold that Chapter 150 is dead letter because it applies only to the filing of a "complaint", which is certainly not a "petition"? Heavens, no, the plurality opinion says. That would be absurd.[18]

For another example, a certificate must be filed by "the plaintiff" in an "arbitration proceeding", but in an arbitration proceeding, the person seeking relief is uniformly referred to as a "claimant", not as a "plaintiff".[19] Does this mean that certificates of merit need never be filed in arbitration proceedings? I suppose the Court would think that absurd, too.

Yet if there is any justification for interpreting "action" strictly, "plaintiff" somewhat strictly, and "complaint" loosely, all three words in the same sentence, it is not apparent. More importantly, the process of interpreting statutes cannot legitimately ascribe a precision to them that the process of writing them gave no indication, and probably was incapable, of producing. At least, it cannot

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[18] *Ante* at ___ n.17.

[19] *See Rules and Procedures*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/aaa/faces/rules (last visited July 1, 2014) (no reference in rules to "plaintiff"); *Code of Arbitration Procedure*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, http://www.finra.org/ArbitrationAndMediation/Arbitration/Rules/Codeof ArbitrationProcedure/ (last visited July 1, 2014); Rules of the Judicial Arbitration and Mediation Services, available at *ADR Clauses, Rules, and Procedures*, JAMS, http://www.jamsadr.com/rules-clauses/ (last visited July 1, 2014); *Arbitration Rules*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/amc/en/arbitration/rules/ newrules.html (last visited July 1, 2014); *ICC Rules of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE, http:// www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration (last visited July 1, 2014); *Rules and Procedures*, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, https://www.icdr.org/icdr/faces/i_search/i_rule? (the international division of AAA).

do so with the professed purpose of giving effect to the Legislature's intent in the enactment. Judicial interpretation should not imagine a Legislature that does not exist.

Third: As the plurality opinion candidly acknowledges, "the terms 'plaintiff' and 'action' may sometimes be used more broadly than their common meanings would support."[20] When the Legislature has used the same words to mean different things from time to time, at least once in the same sentence, how is it possible to determine *from the words alone* what it meant *this time*? In Chapter 74 of the Civil Practice and Remedies Code, the Legislature uses "plaintiff" to mean "claimant", which includes third-party plaintiffs.[21] How can the Court ascertain, from nothing more than the words themselves, that the Legislature did not intend the same meaning in Chapter 150?

Fourth: The plurality opinion demonstrates that judicial interpretation of statutes cannot focus on text alone; it must examine the text in context. The plurality and concurring opinions profess agreement that context is important, but by context, both mean only surrounding words, not the reality they are intended to affect. The concurring opinion warns against "a sterile literalism which loses sight of the forest for the trees", but staring at little clumps of trees — losing sight of the forest for the groves — is no more fertile an approach.

The context the Court ignores is the world in which the words it has so carefully examined operate. It has long been the Court's rule 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

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[20] *Ante* at ___.

[21] *Supra* note ___.

and the other defeat such manifest object, it should receive the former construction."[22] But the rule is disregarded in a Rabbinic fixation with individual words. The plurality opinion's impressive analysis may be correct *in the abstract*. It may be that "plaintiff" and "action" should always have only the meanings the Court ascribes to them. But that has never been true — hence, the need for lengthy analysis — and to demand such exactitude in this case impairs the statute's purpose.

The manifest object of Chapter 150 is to require a prima facie showing of liability at the time certain professionals are sued for malpractice. Remarkably, and tellingly, the Court states that it simply cannot tell what the manifest object of Chapter 150 is because it cannot be sure exactly which professionals are to be protected or precisely from what claims. An obvious answer, especially when the Legislature has not said otherwise, is: *all*. The concurring opinion admits that imposing the requirement only on a plaintiff suing a defendant and not on a third-party plaintiff suing a third-party defendant "may be 'quirky'",[23] but the concurring opinion and the plurality opinion conceive two reasons why this was exactly what the Legislature intended.

One is that a third-party plaintiff may be caught off-guard by a lawsuit and not have enough time to procure the required affidavit before the third-party petition must be filed.[24] But the third-party plaintiff will never have less than 51 days,[25] and that time may be extended by motion or agreement. It is possible that the Legislature could have considered this time pressure sufficient

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[22] *Citizens Bank of Bryan v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex. 1979).

[23] *Ante* at ___.

[24] *Ante* at ___.

[25] A defendant sued on Monday has 21 days in which to answer, TEX. R. CIV. P. 15, and 30 more days in which to file a third-party petition as a matter of right, TEX. R. CIV. P. 38.

reason to except an entire group of claims from a requirement intended to protect all professionals, but it is just as likely that the Legislature thought the opposite and did not create the loophole the Court finds today.

Another motive the Court thinks the Legislature might have had for excluding third-party plaintiffs from the statutory requirement is that to include them is "necessarily complicated" because third-party plaintiffs and cross-claimants may be seeking "affirmative rather than derivative relief" or only "contribution and indemnity".[26] But the Court simply presumes that it is "appropriate[]" to tailor the affidavit requirement to each such situation. It is far simpler, and no less appropriate, to treat all claimants the same: a charge of malpractice cannot be made against these professionals without something more than mere allegations to back it up. And the cross-claimant seeking only contribution and indemnity can use a certificate previously filed by a plaintiff.

Fifth: Despite every effort, the Court itself cannot plough a straight furrow. Third-party plaintiffs are not covered by the statute, even if the third-party action is severed, so that the third-party plaintiff becomes *the plaintiff* in the severed action and its initiator, just as if the third-party action had been filed separately to begin with. And when parties joined as plaintiffs after the action has been initiated are the first to assert a malpractice claim against a professional, the Court cannot say for sure whether they are plaintiffs or not. It feebly hints that they may be plaintiffs by association, falling prey to the smudging of meanings it is trying to rectify, then declines to answer its own question lest its explanation be advisory.[27]

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[26] *Ante* at ___.

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

II

And the plough hits a rock in *Ford*. That case involves Section 71.051 regarding *forum non conveniens*. The statute requires dismissal of actions falling under that doctrine, as determined by applying several factors, but excepts cases in which "the plaintiff is a legal resident of this state."[28] The statute also defines "plaintiff" as "a party seeking recovery of damages for personal injury or wrongful death" but expressly excludes third-party plaintiffs.[29]

The problem in the case is this. A nonresident plaintiff sued his deceased brother's estate for injuries suffered in a vehicular accident in Mexico in which the brother, who owned and maintained the vehicle, was killed. The estate, in turn, sued Ford, and then so did the plaintiff. At that point, the case could have been dismissed under Section 71.051. But the decedent's wrongful death beneficiaries, some of whom are residents, intervened, also suing Ford, but not, of course, suing the defendant estate. If the intervenors are plaintiffs, the case cannot be dismissed. But are they third-party plaintiffs, statutorily excluded from "plaintiffs"? No, the Court holds, because in context, the third-party plaintiffs referred to in the statute must also be defendants, and the intervenors are more aligned with the plaintiff than with the defendant.

I join in the Court's opinion in *Ford*, though the Court's detailed analysis of the text and the alignment of the parties is similar to the Court's analysis in the present case, which as I have said, I find misguided. Unquestionably, however, had the intervenors filed their own suit, it could not

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[28] TEX. CIV. PRAC. & REM. CODE § 71.051(e).

[29] *Id*. § 71.051(h)(2) (counterclaimants and cross-claimants are also excluded).

have been dismissed and could have been consolidated with the original plaintiff's suit, or if that suit had been dismissed, the plaintiff could have intervened in the other suit. Thus, the action involving all the parties and claims can be brought in Texas without being dismissed under Section 71.051. So the question becomes: are the procedural differences in the way the case was brought and the way it could have been brought significant to the ostensible purpose of Section 71.051? The answer is plainly no. Without answering that question, the dissents would dismiss the intervenors' claims because, in this action, they are more aligned with the defendant's. In the dissents' view, the intervenors simply made an error that cost them their case in Texas.

In my view, while it is possible to read the statute as the dissents do, it is at least as reasonable to read it as the Court does, and it is impossible to think the Legislature intended, as between the two, the interpretation that leads to different results for essentially identical parties. And we should not think, as the dissents do, that the Legislature, in trying to preserve a Texas forum for Texas residents, craftily laid a trap so that by suing one way rather than another, they would lose their rights altogether.

In both this case and *Ford*, we must interpret statutory language that, in the circumstances presented, is imprecise. In both cases, the statutory purpose is evident, not something that we must supply. "The evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words."[30] When that purpose can be determined from the text, as it can easily be in these cases, "[a] textually permissible interpretation that furthers rather than obstructs [a statute's]

[30] ANTONIN SCALIA & BRYAN GARNER, READING LAW 20 (2012).

purpose should be favored."[31]

III

Finally, I add a brief word in response to the argument that a stricter judicial adherence to text will produce more careful statutory drafting. For one thing, I doubt whether that is true, or even possible. This Court pores over every word, every comma, in its opinions, trying to be as exact as possible, and still disagreements regularly arise — often even among us — about what was really said. The legislative process does not usually allow for the same care to be taken in the choice of language. There are many authors, the text is subject to amendments of all sorts, friendly and unfriendly, and in the end, the product is often one of compromise, which is essential to the legislative process.

More importantly, the Judiciary is not, in my view, entitled to insist that the Legislature write for our approval. Our objective in interpreting statutes is to find *the Legislature's* intent in the words *it* enacted, not what a group of grammarians and researchers might have intended by those words. This does not justify substituting our meaning for the Legislature's, or what we might consider desirable policies for those it has chosen. But proper statutory interpretation does require us to give careful consideration to the reality in which and for which the Legislature acted. For legislators, each statute has a purpose, which is the context in which the words speak. When we can find that purpose without inventing it, and pursue it without adding or detracting from it, it should inform our interpretation.

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[31] *Id.* at 63.

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Since the Tower of Babel, expression is inexact. Joseph Heller has written powerfully of the importance of context:

> "Help!" he shrieked shrilly in a voice strangling in its own emotion, as the policemen carried him to the open doors in the rear of the ambulance and threw him inside. "Police! Help! Police!" The doors were shut and bolted, and the ambulance raced away. There was a humorless irony in the ludicrous panic of the man screaming for help to the police while policemen were all around him. Yossarian smiled wryly at the futile and ridiculous cry for aid, then saw with a start that the words were ambiguous, realized with alarm that they were not perhaps, intended as a call for police but as a heroic warning from the grave by a doomed friend to everyone who was not a policeman with a club and gun and a mob of other policemen with clubs and guns to back him up. "Help! Police!" the man had cried, and he could have been shouting of danger.[32]

The starting point of textual analysis must be the words chosen, but it cannot be the ending point, lest the exercise be criticized as verbomania. In my view, the Court in this case rejects a simple, reasonable — and yes, plain — interpretation of a statute in favor of a demanding but inconsistent word analysis that partially impairs the statute's purpose. The Court narrowly avoids doing the same thing in *Ford*. We would not interpret our own work this way, and it is no more appropriate because the work is that of another Branch of Government. I respectfully dissent.

Nathan L. Hecht
Chief Justice

Opinion delivered: July 3, 2014

[32] JOSEPH HELLER, CATCH-22 425 (Dell ed. 1985) (1961).

IN THE SUPREME COURT OF TEXAS

NO. 12-0838

PHILIP BOERJAN, MESTENA OPERATING, LLC, FORMERLY KNOWN AS MESTENA OPERATING, LTD., MESTENA INC., AND MESTENA URANIUM, LLC, PETITIONERS,

v.

J. JESUS RODRIGUEZ AND M. CARMEN NEGRETE, INDIVIDUALLY, AND AS CO-REPRESENTATIVES OF THE ESTATES OF NICOLAS LANDEROS-ANGUIANO, ANGELINA RODRIGUEZ-NEGRETE, AND CLAUDIA LAURA LANDEROS RODRIGUEZ, AND AS NEXT FRIENDS OF A.L.R., A MINOR, RESPONDENTS

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

PER CURIAM

In this case, we address the duty a landowner or occupier owes to a trespasser. Here, a driver trespassed on a ranch while transporting a family. After being confronted by a ranch employee, the trespassing driver fled at high speed, and the vehicle rolled over, killing the family. The decedents' family (the Rodriguezes) filed wrongful death claims, including negligence and gross negligence. Because our case law makes clear that a land occupier owes only a duty to avoid injuring a trespasser wilfully, wantonly, or through gross negligence, a claim for simple negligence must fail. *See Tex. Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997) (citing *Burton Constr. & Shipbuilding Co. v. Broussard*, 273 S.W.2d 598, 603 (Tex. 1954)). As to gross negligence, we hold

that the trial court properly granted a no-evidence summary judgment motion because the Rodriguezes failed to raise a genuine issue of material fact.

A mother, father, and child from Mexico hired Jose Maciel, a "coyote," to provide transport to either Houston or New Orleans. Maciel collected the family, along with another immigrant named Oscar Vasquez-Lara, from a house in Texas. Maciel arrived at the private Jones Ranch before dawn, told the family and Vasquez-Lara to move from the back seat to the floor, and used keys to open a locked gate to enter the ranch.

An employee of the ranch operator—the parties dispute whether it was Philip Boerjan or non-party Ray Dubose—stopped Maciel and asked him why he had entered the property. The employee, who could see only Maciel and an unidentified front-seat passenger, wrote down the truck's license-plate number. Maciel then fled at high speed over the unlit caliche road. Again, the parties dispute the facts. The ranch operators, who claim Dubose stopped Maciel, also claim Dubose merely followed Maciel's caliche dust trail to find the truck, and then waited for Boerjan to arrive. The Rodriguezes claim Boerjan pursued Maciel at high speed. For support, the Rodriguezes rely on the testimony of Vasquez-Lara, who was kneeling on the floor in the back of the truck's cab while the family sat next to him.[1] Vasquez-Lara testified that the speedometer reached "about 80, 90." Maciel fled for approximately five miles before his truck rolled over, ejecting and killing all three

[1] The petitioners argue that Vasquez-Lara's position would make it impossible to see if anyone followed Maciel; if true, Vasquez-Lara's testimony would provide no evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 812 (Tex. 2005). But it stretches credulity that Vasquez-Lara could not have shifted position to see through the window during the approximately five miles of Maciel's flight.

family members and injuring Vasquez-Lara. After the accident, Maciel and the unidentified passenger fled.

The Rodriguezes, the deceased mother's parents, sued the ranch's operators (Mestena Operating, Ltd.; Mestena Inc.; and Mestena Uranium, LLC) and employee Philip Boerjan (collectively, Ranch Petitioners), bringing claims for wrongful death; negligence; gross negligence; assault; and negligent entrustment, retention, and supervision. The Ranch Petitioners filed traditional summary judgment motions asserting that the unlawful acts doctrine barred all claims. Boerjan and Mestena Uranium also jointly filed a no-evidence summary judgment motion on all claims. The trial court granted all the motions and rendered final judgment dismissing all the Rodriguezes' claims.

The court of appeals applied the unlawful acts doctrine, but concluded that the decedents' acts were not "inextricably intertwined" with their claims against the Ranch Petitioners; thus, it held that the trial court erred by granting the traditional motion for summary judgment on wrongful death, negligence, gross negligence, and assault. 399 S.W.3d 223, 229–30. On the no-evidence motion, the court found that fact issues remained and reversed the trial court on the wrongful death, negligence, and gross negligence claims. *Id.* at 232–34. The court affirmed the no-evidence dismissal of the assault and negligent entrustment, retention, and supervision claims because the Rodriguezes waived any complaint by failing to present any argument or authority demonstrating error. *Id.* at 233 (citing TEX. R. APP. P. 38.1(i)). The Rodriguezes do not challenge that ruling here.

We address whether the court of appeals erred by reversing: (1) the traditional summary judgment based on the unlawful acts doctrine; (2) the no-evidence summary judgment on negligence; and (3) the no-evidence summary judgment on gross negligence.

We review a grant of summary judgment de novo. *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam). In a traditional motion for summary judgment, a movant must state specific grounds, and a defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment. *Id.* (citing TEX. R. CIV. P. 166a(c)). In a no-evidence motion for summary judgment, the movant contends that no evidence supports one or more essential elements of a claim for which the nonmovant would bear the burden of proof at trial. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the nonmovant raises a genuine issue of material fact on each challenged element. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam) (citing TEX. R. CIV. P. 166a(i)).

All the Ranch Petitioners moved for traditional summary judgment, arguing that the unlawful acts doctrine barred the Rodriguezes' claims. Under the doctrine, "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." *Gulf, C. & S. F. Ry. Co. v. Johnson*, 9 S.W. 602, 603 (Tex. 1888). In our recent opinion in *Dugger v. Arredondo*, 408 S.W.3d 825 (Tex. 2013), we held that the comparative responsibility scheme under Chapter 33 of the Texas Civil Practice and Remedies Code abrogated the unlawful acts doctrine. *Id.* at 832. Applying *Dugger* to this case, the unlawful acts doctrine cannot provide the basis for summary judgment. We therefore affirm that part of the court of appeals' judgment.

Next, we address Mestena Uranium and Boerjan's no-evidence motion for summary judgment on the negligence claim. The court of appeals performed a foreseeability analysis to conclude that Boerjan owed a duty of reasonable care to not injure the family by "allegedly initiating and maintaining a high speed chase over a caliche road." 399 S.W.3d at 231–32. The Ranch Petitioners argue that this imposes a new duty on landowners to protect trespassers from the actions of other trespassers.

In a negligence case, the threshold inquiry is whether the defendant owes a legal duty to the plaintiff. *Centeq Realty, Inc. v. Siergler*, 899 S.W.2d 195, 197 (Tex. 1995). Duty presents a legal question. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). As we stated in *Texas Utilities Electric Co. v. Timmons*, the "only duty the premises owner or occupier owes a trespasser is not to injure him wilfully, wantonly, or through gross negligence." 947 S.W.2d at 193 (citing *Broussard*, 273 S.W.2d at 603).[2] The court of appeals' foreseeability analysis ignored this well-established rule, under which the Ranch Petitioners owed the decedents only a duty to avoid injuring them wilfully or wantonly, or through gross negligence. *See id.*[3] By its plain language, this

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[2] *Accord* 65A C.J.S. *Negligence* § 483 (2010) ("[T]here may be liability for injury to a trespasser resulting from . . . the act of the owner or person in charge thereof where such injury was willfully or wantonly inflicted . . . or where the person [was] guilty of negligence so gross as to warrant an inference of a disregard of consequences or willingness to inflict the injury.") (footnotes omitted); 57A AM. JUR. 2D *Negligence* § 87 (2004) ("The duty owed to a trespasser by an employer, owner of a place of employment, or owner of a public building to refrain from willfully and intentionally injuring the trespasser also applies in an ordinary negligence case.") (citation omitted); RESTATEMENT (SECOND) OF TORTS § 333 (1965) (noting the general rule that "a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care (a) to put the land in a condition reasonably safe for their reception, or (b) to carry on his activities so as not to endanger them").

[3] The Legislature has codified this common-law rule, although the statute does not apply in this case because it went into effect after the accident. *See* Act of May 9, 2011, 82nd Leg., R.S., ch. 101, § 3, 2011 Tex. Gen. Laws 558, 559. "An owner, lessee, or occupant of land does not owe a duty of care to a trespasser on the land and is not liable for any injury to a trespasser on the land, except that an owner, lessee, or occupant owes a duty to refrain from injuring a trespasser wilfully, wantonly, or through gross negligence." TEX. CIV. PRAC. & REM. CODE § 75.007(b).

duty does not support a simple negligence claim. *See also* RESTATEMENT (SECOND) OF TORTS § 333 cmt. b (1965). Because the Ranch Petitioners did not owe the decedents an ordinary negligence duty, the Rodriguezes' claim must fail as a matter of law. The court of appeals erred when it held otherwise. We reverse that part of the court of appeals' judgment.

Finally, we address the no-evidence summary judgment on gross negligence. Again, only Boerjan and Mestena Uranium joined this motion. Gross negligence requires a showing of two elements:

> (1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed[s] in conscious indifference to the rights, safety, or welfare of others.

Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 785 (Tex. 2001) (citing *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994)); *see* TEX. CIV. PRAC. & REM. CODE § 41.001(11). Under the first, objective element, an extreme risk is "not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998). Under the subjective element, "actual awareness means the defendant knew about the peril, but its acts or omissions demonstrated that it did not care." *Id.* Circumstantial evidence may suffice to prove either element. *Id.* The court of appeals, having found a fact issue on both elements, reversed the trial court's no-evidence summary judgment. 399 S.W.3d at 232–34. We disagree.

We must "review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009) (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). No-evidence summary judgment is improper when the nonmovant's evidence amounts to "more than a scintilla of probative evidence to raise a genuine issue of material fact." *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009).

As to the objective element, the Rodriguezes contend, and the court of appeals accepted, that the evidence indicates Boerjan chased Maciel at high speed over unlit roads, creating an extreme risk of harm to the decedents. *See* 399 S.W.3d at 233. If the evidence permitted such an inference, it might create a fact issue. But, even viewing the evidence in the light most favorable to the Rodriguezes, *see Timpte Indus., Inc.*, 286 S.W.3d at 310, the evidence provides no such support. Vasquez-Lara testified that Boerjan's white truck was "coming behind" for "[q]uite a bit of time." Vasquez-Lara said nothing about whether Boerjan made any aggressive moves, how closely Boerjan followed Maciel's truck, or how fast Boerjan was traveling. At most, we might infer that Boerjan followed Maciel. But that does not create "the likelihood of serious injury to the [decedents]." *See Ellender*, 968 S.W.2d at 921. Simply following a trespasser's truck is a far cry from the sort of objective risk that would give rise to gross negligence. *See Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1994) (requiring some evidence that the defendant's conduct created an extreme risk of harm). Because the Rodriguezes have failed to meet the objective element of gross negligence, we need not reach the subjective element.

For clarity's sake, we review our holding. The trial court granted a traditional summary judgment motion based on the unlawful acts doctrine; this was error, and therefore we affirm the part of the court of appeals' judgment reversing that ruling. Because Mestena Operating and Mestena, Inc. joined only this motion (and not the no-evidence motion for summary judgment), those parties will face all remaining claims (wrongful death; negligence; gross negligence; assault; and negligent entrustment, retention and supervision). As to negligence and gross negligence, the court of appeals found fact issues on both claims. This was error, and the trial court properly granted Mestena Uranium and Boerjan's no-evidence summary judgment motions on negligence and gross negligence. Because the wrongful death claim derives from the Rodriguezes' other claims, *see In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009), and no claims remain against Mestena Uranium and Boerjan, the trial court also correctly rendered no-evidence summary judgment on the wrongful death claims.[4] We reverse the court of appeals' judgment as to Boerjan and Mestena Uranium's no-evidence motion for summary judgment on negligence, gross negligence, and wrongful death. We grant the petition for review and, without hearing oral argument, reverse in part and affirm in part the court of appeals' judgment and remand this case to the trial court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 27, 2014

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[4] *See* TEX. CIV. PRAC. & REM. CODE § 71.002(b) ("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."); *Diaz v. Westphal*, 941 S.W.2d 96, 101 (Tex. 1997) (rendering a take-nothing judgment in a wrongful death action where the statute of limitations barred the underlying claim and, thus, the wrongful death claim).

IN THE SUPREME COURT OF TEXAS

NO. 12-0839

AMEDISYS, INC. D/B/A AMEDISYS TEXAS, LTD., PETITIONER,

v.

KINGWOOD HOME HEALTH CARE, LLC D/B/A HEALTH SOLUTIONS HOME HEALTH, RESPONDENT.

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

Argued October 10, 2013

JUSTICE BOYD delivered the opinion of the Court.

The parties in this case dispute the validity of the plaintiff's attempt to accept the defendant's settlement offer under chapter 42 of the Civil Practice & Remedies Code and rule 167 of the Texas Rules of Civil Procedure. We hold that the plaintiff presented uncontroverted evidence that it accepted the material terms of the defendant's offer. We therefore reverse the court of appeals' judgment and remand for that court to consider the defendant's remaining challenges to the trial court's summary judgment in favor of the plaintiff.

I.
Background

Amedisys, Inc. and Kingwood Home Health Care, L.L.C. are competitors. After two Amedisys employees left to work for Kingwood and allegedly began soliciting business from

Amedysis clients, Amedisys sued Kingwood for tortious interference with Amedisys's non-solicitation agreements with the employees.[1] Kingwood alleges that in subsequent settlement discussions Amedysis repeatedly stated that it would not accept anything less than a "six-figure" offer. Believing that amount was significantly more than Amedisys could recover at trial, Kingwood invoked rule 167, which authorizes a party to recover certain litigation costs if the party made, and the party's opponent rejected, a settlement offer that was significantly more favorable than the judgment obtained at trial. *See* TEX. R. CIV. P. 167.2(a), 167.4(a). Kingwood then delivered a written offer, "in accordance with" rule 167 and chapter 42 of the Civil Practice & Remedies Code, to pay Amedisys $90,000 within fifteen days after Amedisys's acceptance of the offer. Consistent with rule 167.2(b)(5), Kingwood gave Amedisys fourteen days to accept the offer or it would be "deemed rejected and can serve as the basis for litigation costs under Texas Civil Practice & Remedies Code Chapter 42 and Texas Rule of Civil Procedure 167."

Five days after receiving the settlement offer, Amedisys filed its designation of expert witnesses. After another five days, Kingwood filed its own expert designations and moved to strike Amedisys's designations on the ground that, because Amedisys was the party seeking affirmative relief, its deadline to designate experts had passed nearly a month earlier. Four days later, apparently to Kingwood's surprise, Amedisys sent a letter, by facsimile and as an email attachment, "accepting" Kingwood's $90,000 offer. As it turns out, Kingwood did not want Amedisys to accept the offer and

[1] Amedisys also sued the two former employees, but it settled those claims and they are not before us.

made it only because Amedisys said it would not accept an offer under six figures. Instead, Kingwood made the offer merely to trigger a right to recover its litigation costs under rule 167.

During the next two weeks, Amedisys's attorney emailed Kingwood's attorney twice, suggesting they "discuss the terms of the settlement agreement." Kingwood did not respond to the first email but did respond to the second, stating that it would send "a letter shortly explaining [Kingwood's] position on why the consideration fails for the offer that was previously extended to [Amedisys]." When no such letter arrived and the deadline for payment under the settlement had passed, Amedisys demanded payment and threatened to file an emergency motion to enforce the settlement agreement. Kingwood responded that the agreement "failed for consideration" because Amedisys had missed its expert designation deadline, and asserted that Amedisys had "fraudulently induced" Kingwood's settlement offer by repeatedly stating "that it would 'never settle' for less than six figures."

A few days later, Kingwood attended the previously scheduled hearing on its motion to strike Amedisys's expert designations. Believing that the settlement mooted that motion, Amedisys did not file a response or attend the hearing. When it learned that Kingwood had appeared at the hearing and the trial court had granted Kingwood's motion to strike, Amedisys filed an emergency motion asking the court to enforce the settlement agreement, reconsider the order striking its expert designations, and stay the case until the settlement dispute was resolved. In response, Kingwood argued that the agreement was unenforceable because it lacked consideration and was fraudulently induced. Kingwood later filed a "Notice of Withdraw[al] of Consent to Alleged Settlement Agreement," and on the same day, Amedisys filed a "Notice of Rule 11 Agreement."

Amedisys amended its pleadings to assert a breach of contract claim based on the alleged settlement agreement and moved for summary judgment on that claim. In support of its motion, Amedisys submitted copies of the offer and acceptance letters and argued that the settlement agreement was binding on Kingwood as a settlement offer under rule 167, as a contract under general contract law, and as an agreement between attorneys under rule 11 of the Texas Rules of Civil Procedure. In its response, Kingwood agreed that general contract law applies but asserted that the agreement failed for lack of consideration because Amedisys failed to timely designate experts and that Amedisys fraudulently induced the offer by stating that it would not accept an offer less than six figures. Kingwood also argued that the settlement was unenforceable because it had withdrawn its consent. In reply, Amedisys asserted that Kingwood's fraud and failure of consideration defenses were legally inapplicable, that Kingwood had waived them by not pleading them, and that Kingwood had failed to support them with any competent summary judgment evidence.[2] Amedisys disputed Kingwood's contention that withdrawal of consent relieved Kingwood of its contractual obligations.

The trial court granted Amedisys's summary judgment motion without stating its grounds for doing so. Kingwood appealed, arguing that it had created fact issues regarding its affirmative defenses of fraudulent inducement and failure of consideration.[3] Addressing this argument in its

[2] Amedisys moved to strike the two affidavits that Kingwood filed with its summary judgment response, and the trial court granted that motion.

[3] Kingwood raised two additional issues on appeal related to the trial court's decision to strike parts of Kingwood's summary judgment affidavits.

appellate brief, Kingwood included a paragraph in which it contended no agreement existed because "an acceptance that does not mirror the terms of the offer is both a rejection of the original offer and a counteroffer." Kingwood pointed out that it had offered in its letter "to pay a total sum of $90,000 to settle all claims asserted *or which could have been asserted* by Amedisys," while Amedisys's letter had accepted Kingwood's "offer to settle all monetary *claims asserted* against [Kingwood] for the total sum of $90,000." Because Amedisys's acceptance letter "omitted the idea that a settlement would not only resolve all claims asserted but also all claims not asserted," Kingwood argued that the letter "constituted a rejection of Kingwood's offer." In its brief, Amedisys argued that Kingwood had not challenged the validity or effectiveness of the acceptance letter in the trial court and could not do so for the first time on appeal.

A majority of the court of appeals agreed with Kingwood and reversed the trial court's judgment, concluding that no settlement agreement existed because Amedisys had not accepted all of the offer's material terms. 375 S.W.3d 397, 400–01. The court observed in a footnote that, even though Kingwood had not raised that argument in the trial court, it could "challenge for the first time on appeal the legal sufficiency of the evidence supporting Amedisys's motion, including the evidence supporting the existence of a contract." *Id.* at 400 n.3. Having found that Amedisys failed to prove that it accepted the settlement offer, the majority did not address whether Kingwood had created a fact issue on its fraudulent inducement, failure of consideration, and withdrawal defenses. The dissenting justice concluded that Amedisys's acceptance letter and the email to which it was attached formed an enforceable agreement because they "indicate[d] a clear intention" to accept Kingwood's offer without challenging any of its terms. *Id.* at 402–03 (Jamison, J., dissenting). The

dissent would thus have "proceed[ed] to address [Kingwood's] remaining issues and grounds for reversal." *Id.* at 403. We granted Amedisys's petition for review.

II.
Burdens of Proof and Preservation of Error

We begin by addressing whether Kingwood failed to preserve its argument that Amedisys did not accept all of the material terms of Kingwood's offer by failing to make that argument in the trial court. As the party moving for traditional summary judgment, Amedisys had the burden to submit sufficient evidence that established on its face that "there is no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c). *See Broussard v. Moon*, 431 S.W.2d 534, 536–37 (Tex. 1968). When a movant meets that burden of establishing each element of the claim or defense on which it seeks summary judgment, the burden then shifts to the non-movant to disprove or raise an issue of fact as to at least one of those elements. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979) (discussing evolution and purpose of shifting burdens in summary judgment practice). But if the movant does not satisfy its initial burden, the burden does not shift and the non-movant need not respond or present any evidence. *See id.*; *State v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in U.S. Currency ($90,235)*, 390 S.W.3d 289, 292 (Tex. 2013). This is because "summary judgments must stand or fall on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right" to judgment. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993) (citing *Clear Creek Basin*, 589 S.W.2d at 678).

Thus, a non-movant who fails to raise any issues in response to a summary judgment motion may still challenge, on appeal, "the legal sufficiency of the grounds presented by the movant." *Id.* "The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment motion when the movant's summary judgment proof is legally insufficient." *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999) (citations omitted).

In this case, Amedisys had the burden to submit sufficient evidence to support each element of its breach of contract claim, and this burden required evidence that a contract in fact exists. Kingwood contends that the letter and email that Amedisys submitted to prove its acceptance of Kingwood's offer prove no such thing, but instead prove that Amedisys made a counteroffer by changing a material term of the offer. We therefore review Amedisys's letter and email to determine whether they constitute evidence that Amedisys accepted Kingwood's settlement offer. If they constitute evidence of acceptance, they were uncontroverted evidence because Kingwood did not present any evidence to disprove or create a fact issue on the acceptance element. But if the letter and email constitute no evidence of acceptance, Amedisys did not satisfy its burden of proof and was not entitled to summary judgment.

III.
Acceptance

We now turn to the issue of whether the summary judgment evidence establishes that Amedisys accepted Kingwood's settlement offer. Amedisys contends that, in resolving this issue,

the court of appeals erred by applying common law contract principles of offer and acceptance because rule 167 and chapter 42 govern the parties' dealings and displace the common law. Alternatively, Amedisys contends that, even under the common law, it accepted Kingwood's settlement offer. We hold that the common law governs Amedisys's breach of contract claim, but we agree with Amedisys that its email and letter constituted uncontroverted evidence of acceptance.

A. Common Law Principles of "Acceptance" Apply

Amedisys first argues that the court of appeals erred by applying the common law rule that an acceptance is effective only if it matches the material terms of the offer to which it responds. *See, e.g.*, *United Concrete Pipe Corp. v. Spin-Line Co.*, 430 S.W.2d 360, 364 (Tex. 1968) ("It is well settled that an acceptance must not change or qualify the terms of the offer. If it does, the offer is rejected."). In support, Amedisys contends that chapter 42 and rule 167 govern the validity of the parties' settlement agreement, and they do not expressly require an acceptance to match the terms of the offer. Amedisys argues that imposing general contract law's acceptance doctrine on settlement offers under chapter 42 and rule 167 would undermine their purpose by impeding, rather than facilitating, settlement agreements. We disagree that chapter 42 and rule 167 govern here, and hold that Amedisys was required to prove a valid "acceptance" under contract law to prevail on its breach of contract claim.

When applicable, chapter 42 and rule 167 provide a method by which parties in certain cases who make certain offers to settle certain claims can recover certain litigation costs, if the offeree rejects the offer and "the judgment to be awarded [on those claims] is significantly less favorable to the offeree than was the offer." TEX. R. CIV. P. 167.4(a); *see* TEX. CIV. PRAC. & REM. CODE §§

42.002–.005; TEX. R. CIV. P. 167.1–167.7. This applies only to "an offer made substantially in accordance with this rule," TEX. R. CIV. P. 167.1, and "[a] settlement offer not made in compliance with this rule, or a settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule as to any party." TEX. R. CIV. P. 167.7. If the issue in this case were whether Kingwood is entitled to recover its litigation costs, rule 167 and chapter 42 would govern the resolution of that issue. But the issue here is whether Amedisys submitted sufficient evidence to obtain summary judgment on its claim for breach of a settlement agreement, not whether it can recover its litigation costs. Therefore, contract law governs resolution of the issue.

Certainly, the Legislature can alter, and in some circumstances has altered, the legal requirements for enforcing a settlement agreement.[4] But chapter 42 and rule 167 govern the requirements for awarding litigation costs, not the requirements for breach of contract claims. To the contrary, they expressly provide that they do "not limit or affect a party's right to make a settlement offer that does not comply with this rule," but a non-conforming offer "cannot be the basis for awarding litigation costs under this rule[.]" TEX. R. CIV. P. 167.7; *see also* TEX. CIV. PRAC. & REM. CODE § 42.002(d).

We agree with Amedisys that Texas has a public policy preference for the settlement of legal disputes, and that chapter 42 and rule 167 encourage such settlements. But more fundamental Texas

[4] *See, e.g.*, TEX. FAM. CODE § 153.0071(d), (e) (listing requirements for a binding mediated settlement agreement in suits affecting the parent-child relationship and providing that, when a mediated settlement agreement meets the requirements, "a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law").

policies prohibit us from binding parties to contracts to which they never agreed. *See Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 95–96 (Tex. 2011) (observing that freedom of contract is a fundamental Texas policy and that "contracts when entered into freely and voluntarily shall be held sacred") (quoting *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008)). We find that the authorities on which Amedisys relies are not persuasive in this case. *See, e.g.*, *Poster v. S. Cal. Rapid Transit Dist.*, 801 P.2d 1072, 1075 (Cal. 1990) (holding that judgment could be entered under California statute based on acceptance of offer during statutory 30-day period, even though the accepting party made counteroffers before accepting the original offer). Here, Amedisys sought to enforce a contract, not to recover litigation costs, and to prevail on that claim it had to establish the existence of a valid contract under the common law, including the elements of offer and acceptance.

B. Amedisys Accepted Kingwood's Settlement Offer

Under the common law, an acceptance may not change or qualify the material terms of the offer, and an attempt to do so results in a counteroffer rather than acceptance. *See United Concrete Pipe*, 430 S.W.2d at 364; *see also Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 74 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) ("A purported acceptance that changes or qualifies an offer's material terms constitutes a rejection and counteroffer rather than an acceptance."). But the materiality of the altered term is key, and an immaterial variation between the offer and acceptance will not prevent the formation of an enforceable agreement. *See United Concrete Pipe*, 430 S.W.2d at 364–65 (holding that change in pricing terms from "contract price"

to "unit price" did not "change the legal effect of the language" and thus was not material and did not prevent formation of an enforceable contract).

Generally, the materiality of a contract term is determined on a contract-by-contract basis, in light of the circumstances of the contract. *See T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) ("Each contract should be considered separately to determine its material terms."); *see also Parker Drilling*, 316 S.W.3d at 74 ("Contracts should be examined on a case-by-case basis to determine which terms are material or essential.") (citing *T.O. Stanley Boots*, 847 S.W.2d at 221). In construing a contract, a court's primary concern is to ascertain the intentions of the parties as expressed in the instrument. *See, e.g.*, *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

Here, the court of appeals concluded that "Amedisys did not accept all material terms of [Kingwood's] offer" because Kingwood offered to settle the claims "asserted or which could have been asserted" against Kingwood while Amedisys's acceptance referenced only the claims "asserted" against Kingwood. 375 S.W.3d at 400–01. In reaching this conclusion, the court did not analyze the materiality of this variation. *See id.* The dissent disagreed, concluding that the language in Amedisys's acceptance letter "is best viewed as merely a shorthand reference to the offer made" by Kingwood, and that Amedisys's communications "unconditionally responded to the offer using the same and similar language used in the offer." *Id.* at 402 (Jamison, J., dissenting). In the dissent's view, "[t]here is no indication in the response that material terms were being challenged, qualified, or changed." *Id.* at 402–03. We agree with the dissent that, under the summary judgment record in

this case, the variation in language between Kingwood's offer and Amedisys's acceptance is not material and did not convert Amedisys's acceptance into a counteroffer.

The offer letter that Kingwood sent to Amedisys, titled "Rule 167 Statutory Offer of Settlement,"[5] stated:

> Please accept this letter as an offer of settlement regarding the above referenced matter. Specifically, my client, [Kingwood] makes this offer to pay your client, [Amedisys] to settle *all monetary claims between the parties* in accordance with Texas Civil Practice & Remedies Code Chapter 42 and Texas Rule of Civil Procedure 167.
> . . .
>
> ***Offer of Settlement***
>
> [Kingwood] offers to settle with Amedisys the following claims in accordance with Texas Civil Practice & Remedies Code Chapter 42 and Texas Rule of Civil Procedure 167:
>
> [Kingwood] offers a total sum of $90,000 to settle *all claims asserted or which could have been asserted* by Amedisys against [Kingwood] in the above referenced case. This full and final offer is for *all monetary damages claimed* – including attorney[']s fees, costs and interest that were recoverable as of the date of this offer by [Kingwood]. A lump-sum payment in the amount of $90,000 will be made by [Kingwood] within fifteen (15) days after acceptance. If your client agrees, please indicate so by affixing your signature below and returning to me.
>
> Amedisys may accept this settlement offer by serving written notice on [Kingwood's] counsel before June 25, 2010, which is at least fourteen (14) days after this offer is served. If this offer is not accepted by 5:00 p.m. on June 25, 2010, it is deemed rejected and can serve as the basis for litigation costs under Texas Civil Practice & Remedies Code Chapter 42 and Texas Rule of Civil Procedure 167.

(Emphasis added.)

[5] The subject line of the letter identified the cause number of this case in the trial court, the style of the case, and the trial court in which it was pending.

Amedisys responded in a letter that it delivered both by facsimile and as an attachment to an email. The email stated: "Attached please find Amedisys' acceptance *of the settlement offer you sent* pursuant to Rule 167. Please let me know when you are available Monday to discuss the terms of the settlement agreement." (Emphasis added.) The attached letter stated:

> Pursuant to Rule 167.3(b) of the Texas Rules of Civil Procedure, [Amedisys] hereby accepts [Kingwood's] offer to settle *all monetary claims asserted* against [Kingwood] for the total sum of $90,000, for which a lump sum payment shall be tendered to Amedisys by [Kingwood] within fifteen days after acceptance.
>
> I will contact you early next week to discuss the preparation and execution of settlement agreement that memorializes all necessary settlement terms.

(Emphasis added.)

Kingwood argues that Amedisys did not accept Kingwood's offer because "[c]onspicuously missing from Amedisys' letter was its acceptance to settle any claim that *could have been asserted* against [Kingwood] as well as all *non-monetary claims* such as the injunctive relief as had been asserted by Amedisys." We begin with an analysis of the materiality of the offer's reference to claims that "could have been asserted," and then address the reference to "non-monetary" claims.

First, we note that Kingwood's letter is itself internally inconsistent in its descriptions of the claims that Kingwood was offering to settle. Initially, it offers to settle "all monetary claims between the parties," omitting any reference to non-monetary claims and claims that had not been asserted between the parties. It then describes the claims as "all claims asserted or which could have been asserted," which includes claims not yet asserted and arguably could include non-monetary claims. But it then states that "the offer is for all monetary damages asserted," again omitting any reference to non-monetary claims and damages not asserted. Based on the second description, of

"all claims asserted or which could have been asserted," we conclude that the offer was intended to settle all claims, including any that had not been asserted. But if this is what Kingwood intended by its second description, then it must have intended its first and third descriptions ("claims between the parties" and "damages asserted") as shorthand references to the second.

In response, Amedisys stated in its email that it accepted "the settlement offer you sent," and in its letter it described the claims to be settled as "all monetary claims asserted." In the context of Kingwood's settlement offer, and in light of Amedisys's expressed intent to accept "the settlement offer you sent," we read this description to be a shorthand reference to the claims that Kingwood had offered to settle, just as we read Kingwood's first and third descriptions of those same claims. Although the language in the email is not, by itself, controlling,[6] that language, when combined with the description in the letter, constitutes prima facie evidence of a clear intent to accept Kingwood's settlement offer.

Moreover, Amedisys's failure to reference claims "that could have been asserted" is not material under these circumstances. There is no evidence in this summary judgment record that Amedisys has or had any claims or potential claims against Kingwood other than those that it asserted in this lawsuit. And even if there were such claims or potential claims, the record provides no basis to find that Amedisys could pursue those claims in any post-settlement action. Generally, once parties settle a lawsuit and a judgment is entered, res judicata bars the parties from

[6] If, for example, Amedisys had sent the same email but attached a letter purporting to accept Kingwood's offer to settle "for $250,000," the fact that the email purported to accept "the settlement offer you sent" would not necessarily have transformed the attached letter into a valid acceptance of the $90,000 offer. Here, however, the letter's description of the claims to be settled is not materially different from two of Kingwood's own shorthand descriptions of the claims, and the email supports the letter's attempt to accept the offer to settle those claims.

subsequently pursuing any claims arising out of the subject matter of the lawsuit that they could have brought in the previous suit.[7] *See, e.g.*, *Compania Financiara Libano, S.A. v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001) ("The doctrine of res judicata in Texas holds that a final judgment in an action bars the parties and their privies from bringing a second suit 'not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit.'") (quoting *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 630 (Tex. 1992)). There is no indication in this record that the parties have any unrelated dealings or disputes, or that the parties were concerned about unrelated matters when settling this dispute.

As to the issue of whether the offer's reference to "all claims" included non-monetary claims, we note that Kingwood did not argue in the court of appeals that Amedisys's acceptance was ineffective because it was limited to settlement of "monetary claims." To the extent Kingwood makes that argument here, we disagree. Amedisys's original petition requested injunctive relief, but only against its former employees, and it dropped those claims after it resolved its dispute with its former employees. According to the record before us, Amedisys never requested injunctive relief against Kingwood, and there were therefore no injunctive claims for Kingwood to settle.[8] Kingwood

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[7] The parties appealed from the trial court's summary judgment as a final judgment disposing of all claims and parties, and Texas law affords final judgments res judicata effect even during the pendency of an appeal. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

[8] We note also that chapter 42's settlement procedures "apply only to claims for monetary relief," TEX. CIV. PRAC. & REM. CODE § 42.002(a), and an offer under rule 167 "must not include non-monetary claims." TEX. R. CIV. P. 167.2(d). The fact that Kingwood repeatedly stated that its offer was made pursuant to chapter 42 and rule 167 thus indicates that the offer's reference to "all claims" did not include non-monetary claims.

has not identified, and we have not found, any other non-monetary claims that Amedisys asserted against Kingwood.

Under these circumstances, we cannot conclude that the slight variation in language from Kingwood's offer to Amedisys's acceptance is sufficient, on its face, to convert Amedisys's purported acceptance into a counteroffer. The uncontroverted evidence demonstrates that Amedisys intended to accept Kingwood's offer, did not intend to make a counteroffer, and did not intend that the settlement be dependent on any alteration of the offer's terms. And Kingwood does not appear to have doubted Amedisys's intent to accept its settlement offer until this case was on appeal.

The shifting burden of proof in the summary judgment context is important to the disposition of this case. If the divergence in language between Kingwood's offer and Amedisys's purported acceptance was material on its face, Amedisys's letter and email would have been no evidence of acceptance and Amedisys would not have been entitled to summary judgment. *Cf. Schriver v. Tex. Dep't of Transp.*, 293 S.W.3d 846, 851 (Tex. App.—Fort Worth 2009, no pet.) (holding that settlement offer to purchase all interests in property for specified amount was not accepted by response agreeing to convey only party's own interest in property when record demonstrated that parties had different understandings of whether settlement required conveyance of third parties' leasehold interests). Or if Amedisys's communications had been patently ambiguous about whether Amedisys intended to accept Kingwood's offer, the communications would have, themselves, created a fact issue on acceptance and Amedisys would not have been entitled to summary judgment. *See Coleman v. Reich*, 417 S.W.3d 488, 493–94 (Tex. App.—Houston [14th Dist.] July 2, 2013, no pet.) (holding that ambiguity prevented summary judgment when purported acceptance repeatedly

stated that it constituted an offer to settle, rather than acceptance of previous offer, and included a place for other party to sign if accepted).

Here, however, Amedisys's email and letter constitute prima facie evidence of a clear intent to accept Kingwood's settlement offer and did not indicate that acceptance was conditioned on the alteration of any material terms. Amedisys thus satisfied its initial summary judgment burden, and the burden shifted to Kingwood to produce evidence raising an issue of fact. *See Kerlin v. Arias*, 274 S.W.3d 666, 668 (upholding summary judgment in favor of party who produced prima facie evidence of a valid deed and noting that party did not have burden to prove age or marital status of grantor because opposing party did not produce evidence raising a fact question on those issues) (citing *Centeq Reality, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) ("Once the defendant produces sufficient evidence to establish the right to summary judgment, the plaintiff must present evidence sufficient to raise a fact issue.")). But Kingwood did not submit any contrary evidence, nor did it challenge the validity of the acceptance at all until after the trial court granted summary judgment. Under these circumstances, we conclude that Amedisys conclusively established through its summary judgment evidence that it accepted Kingwood's settlement offer.

IV.
Conclusion

Because we hold that the summary judgment evidence established that Amedisys accepted Kingwood's settlement offer, we reverse the court of appeals' judgment. Amedisys urges us to reinstate the trial court's judgment, but Kingwood argued to the court of appeals that fact issues regarding its fraudulent inducement and failure of consideration defenses also preclude summary

judgment, even if Amedisys accepted Kingwood's offer. Because the court of appeals did not reach or address those issues, Kingwood requests that we remand this case to that court "to consider the outstanding undecided issues." Because neither of the parties has briefed those issues to this Court, we remand to the court of appeals for further proceedings consistent with this opinion.

_____

Jeffrey S. Boyd
Justice

Opinion delivered: May 9, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0843

RIO GRANDE VALLEY VEIN CLINIC, P.A., D/B/A RGV VEIN LASER & AESTHETIC CLINIC, PETITIONER,

v.

YVETTE GUERRERO, RESPONDENT

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

PER CURIAM

In *Bioderm Skin Care, LLC v. Sok*, we held that a claim for improper laser hair removal is a health care liability claim because expert health care testimony was necessary to prove or refute the claim that the procedure was performed improperly. __ S.W.3d __, __ (Tex. 2014). Specifically, we concluded expert health care testimony was needed because federal regulations restrict the laser to supervised use in a medical practice, and the claimant there did not rebut the presumption that her claim was a health care liability claim.

Likewise, here we conclude the claimant has not rebutted the presumption that her claim for improper laser hair removal is a health care liability claim. The laser used in this case is subject to the same federal regulations discussed in *Bioderm*. Because the claimant has not rebutted the presumption, her failure to serve an expert report precludes her suit against a health care provider

and physician. And because the trial court denied the defendant's motion to dismiss and the court of appeals affirmed, we reverse the court of appeals' judgment and remand for the trial court to dismiss the claim.

Yvette Guerrero alleges she suffered burns and scarring on her face, chin, and neck while receiving laser hair removal treatments at the Rio Grande Valley Vein Clinic, P.A., d/b/a RGV Vein Laser & Aesthetic Clinic (RGV Clinic) in October 2008. In October 2010, she sued the RGV Clinic for negligence. In its answer, the clinic expressly asserted that the Medical Liability Act applied to limit Guerrero's recovery. After 120 days had passed, the RGV Clinic moved to dismiss and requested its attorney's fees and costs because Guerrero had not served an expert report as required by the Medical Liability Act for health care liability claims. The trial court denied the motion to dismiss, and a divided panel of the court of appeals affirmed. __ S.W.3d __, __. The dissent would have concluded the claim is a health care liability claim, and that disagreement on a question of law material to the disposition of the case confers jurisdiction on this Court over this interlocutory appeal. TEX. GOV'T CODE §§ 22.001(a)(1), 22.225(c).

Under the Medical Liability Act, a health care liability claim must satisfy three 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.

Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 179–80 (Tex. 2012) (citing TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)). Additionally, the Medical Liability Act "creates a rebuttable presumption that a patient's claims against a physician or health care provider based on facts

implicating the defendant's conduct during the patient's care, treatment, or confinement" are health care liability claims. *Loaisiga v. Cerda*, 379 S.W.3d 248, 252 (Tex. 2012).

Guerrero does not dispute that, as a professional association, the RGV Clinic is a health care provider and physician. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(12)(A) (defining "health care provider" to include a professional association); *id*. § 74.001(a)(23)(B) (defining "physician" to include a professional association). Additionally, Guerrero alleges her injury was caused due to the care she received for laser hair removal from the RGV Clinic. And she completed forms for medical history, informed consent, and medical information disclosure, indicating she was a patient. Because she asserts she was injured while receiving care or treatment from a health care provider and physician, the rebuttable presumption that Guerrero's claim is a health care liability claim applies. *Loaisiga*, 379 S.W.3d at 252.

We next determine whether Guerrero has rebutted the presumption. The parties agree the first element of a health care liability claim is satisfied because the RGV Clinic is a health care provider and physician. And the third element is satisfied because the clinic's care or treatment of Guerrero allegedly caused her injury. Thus, Guerrero may only rebut the presumption that her claim is a health care liability claim by proving her claim does not constitute an alleged departure from accepted standards of medical or health care. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Loaisiga*, 379 S.W.3d at 252; *Tex. W. Oaks*, 371 S.W.3d at 179–80. As explained below, Guerrero has not rebutted this presumption because expert health care testimony is necessary to prove or refute the merits of her claim.

The Medical Liability Act defines health care as "any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10). In *Texas West Oaks*, we held that if expert medical or health care testimony is necessary to prove or refute accepted standards of medical or health care and their breach, the claim is a health care liability claim. 371 S.W.3d at 182.

Expert health care testimony is necessary to prove or refute Guerrero's claim against a health care provider and physician because, as we recently held in *Bioderm*, federal regulations provide that the laser used in the procedure here may only be acquired by a licensed medical professional for supervised use in her medical practice. __ S.W.3d at __. The United States Food and Drug Administration classifies the pulsed dye laser used for Guerrero's treatment as a Class II surgical device, 21 C.F.R. § 878.4810(b)(1), the use of which federal regulations specify is "not safe except under the supervision of a practitioner licensed by law to direct the use of such device, and . . . to be sold only to or on the prescription or other order of such practitioner for use in the course of his professional practice," *id*. § 801.109(a)(2). Moreover, federal regulation of this restricted surgical device indicates that its proper operation is not plainly within the common knowledge of laypersons. *See Bioderm*, __ S.W.3d at __. Because the RGV Clinic's laser is a regulated surgical device that may only be acquired by a licensed medical practitioner for supervised use in her medical practice, the testimony of a licensed medical practitioner is required to prove or refute Guerrero's claim that use of the device departed from accepted standards of health care. *See id*.; *Tex. W. Oaks*, 371 S.W.3d at 182–83.

Guerrero responds that a physician-patient relationship is required if the suit is for claimed departures from accepted standards of medical or health care, and that—because she was treated by a nurse rather than a physician—there was no physician-patient relationship. As an initial matter, Guerrero informed the trial court at the hearing on the motion to dismiss that a physician performed the procedure. Even if, as Guerrero now claims, a nurse performed the procedure, this does not prevent the existence of a physician-patient relationship. As we observed in *Bioderm*, a physician-patient relationship can exist even in circumstances in which the physician deals indirectly with the patient. __ S.W.3d at __ n.9. Additionally, the RGV Clinic is a professional association, which the Medical Liability Act defines as a physician. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(23)(B). Thus, Guerrero's argument that no physician-patient relationship existed fails, and Guerrero's claim is a health care liability claim.

In 2009, the Legislature enacted a statute regulating laser hair removal facilities and technicians that expressly provides that laser hair removal constitutes the practice of medicine. TEX. HEALTH & SAFETY CODE § 401.521 (providing that one who violates the statutory restrictions on requirements for performing laser hair removal is "practicing medicine" in an unauthorized manner). We need not determine whether this statute applies to Guerrero's suit because her claim is a health care liability claim even without its operation.

In sum, we conclude the rebuttable presumption that Guerrero's claim is a health care liability claim applies because she is suing a health care provider and physician over facts implicating her care or treatment. Further, expert health care testimony is needed to prove or refute her claim that the RGV Clinic breached the appropriate standard of care, and therefore Guerrero has

not rebutted the presumption. Accordingly, pursuant to Texas Rule of Appellate Procedure 59.1, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand to the trial court to consider the RGV Clinic's request for attorney's fees and costs.

OPINION DELIVERED: April 25, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0867

BOB GREENE, AS NEXT FRIEND OF LEWAYNE GREENE, PETITIONER,

v.

FARMERS INSURANCE EXCHANGE, RESPONDENT

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

Argued January 7, 2014

JUSTICE JOHNSON delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BROWN joined.

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

In this case a house that had been vacant for several months was damaged when fire spread to it from a neighboring property. The house was insured under a Texas homeowner's policy containing a clause suspending dwelling coverage if the house was vacant for over sixty days. The homeowner had not purchased an available endorsement providing coverage for extended vacancies, and the insurer denied the homeowner's claim, even though the vacancy was not related to the loss. On cross-motions for summary judgment, the trial court granted judgment for the homeowner. The court of appeals held that the vacancy provision must be applied according to its terms and reversed.

We affirm.

I. Background

LaWayne Greene owned and lived in a house in Irving that she insured with Farmers Insurance Exchange. The policy Farmers issued to Greene was a Texas Homeowners-A Policy (HO-A) form prescribed by the Texas Department of Insurance (TDI).[1] The policy was effective from February 10, 2007 to February 10, 2008. On June 30, 2007, Greene moved into a retirement community. On July 5, 2007, she notified Farmers that she was going to sell her house and provided Farmers with change of address information. On November 14, 2007, fire from a neighboring house spread to Greene's house and damaged it. Farmers denied Greene's fire damage claim on the basis that the house had been vacant for more than sixty days. The denial prompted a lawsuit on Greene's behalf by Bob Greene as her next friend (collectively, Greene). Greene sued Farmers for breaching its contractual obligation to pay under the policy, as well as for extra-contractual damages.[2]

Section I.A. of Farmers' policy contains the relevant property coverage[3] language:

> SECTION I - PROPERTY COVERAGE
> COVERAGE A (DWELLING)
> We cover:
> 1. The dwelling on the **residence premises** shown on the declarations page including structures attached to the dwelling.

The policy defines "residence premises":

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[1] TEX. DEP'T OF INS., TEX. HOMEOWNERS POLICY–FORM A (2002), http://ic.iiat.org/docs/Texas_forms/HO/HOA.pdf.

[2] Greene claimed extra-contractual damages for negligence, negligent misrepresentations, fraudulent non-disclosure, breach of constructive trust, breach of the duty of good faith and fair dealing, and misrepresentations and violations of the Insurance Code and Deceptive Trade Practices Act.

[3] Section I.B. provides personal property coverage and Section II provides liability coverage.

> 9. "Residence Premises" means the **residence premises** shown on the declarations page. This includes the one or two family dwelling, including other structures, and grounds where an **insured** resides or intends to reside within 60 days after the effective date of this policy.

"Section I - Conditions" contains the policy language at issue:

> 13. Vacancy. If the insured moves from the dwelling and a substantial part of the personal property is removed from that dwelling, the dwelling will be considered vacant. Coverage that applies under Coverage A (Dwelling) will be suspended effective 60 days after the dwelling becomes vacant. This coverage will remain suspended during such vacancy.

Dwelling coverage for periods of vacancy lasting more than sixty days was available through a TDI-approved endorsement to the policy. Greene's policy had several endorsements, but it did not have Endorsement TDP-011 that provided dwelling coverage during an extended vacancy.[4] *See* TEX. STATE BD. OF INS., ENDORSEMENT NO. TDP-011 (July 8, 1992). The parties stipulated that the vacancy of Greene's house for more than sixty days was not causally related to the fire damage the house suffered.

Both parties moved for summary judgment as to the breach of contract claim. In her motion, Greene asserted, in part, that Texas Insurance Code § 862.054 (commonly referred to as the anti-technicality statute) precluded Farmers from raising the vacancy clause as a defense. She further asserted that if the anti-technicality statute did not apply, both this Court's precedent and Texas

[4] Greene contends that Farmers should be precluded from raising any arguments about premium charges, form policies, and endorsements because they were not mentioned in the trial court or the court of appeals. We disagree. We do not consider *issues* that were not raised in the courts below, but parties are free to construct new *arguments* in support of issues properly before the Court. *See Nall v. Plunkett*, 404 S.W.3d 552, 555-56 (Tex. 2013) (holding that we do not decide issues not presented in the trial court).

public policy precluded Farmers from denying the claim because the vacancy did not prejudice Farmers nor was it causally related to Greene's loss.

The trial court denied Farmers' motion, granted Greene's, severed "all claims, causes, actions or defenses which are not disposed of by judgment on Plaintiff's breach-of-contract cause of action,"[5] and rendered final judgment for Greene on the contract claim. Farmers appealed the ruling on the breach of contract claim; Greene did not appeal the dismissal of her other claims.

The court of appeals reversed and rendered judgment for Farmers. It held that because the vacancy clause unambiguously suspended dwelling coverage after sixty days of vacancy, "describing the vacancy exclusion in terms of a breach or violation is a nonsequitur." *Farmers Ins. Exch. v. Greene*, 376 S.W.3d 278, 283 (Tex. App.—Dallas 2012, pet. granted). The appeals court concluded that Farmers was not required to establish that the vacancy contributed to cause the loss in order to assert the vacancy clause as a defense because (1) the anti-technicality statute did not apply, (2) this Court's decisions did not require such a showing, and (3) public policy did not require it. *Id.* at 285.

Greene argues that the court of appeals erred in reaching each of the foregoing conclusions. She also urges that in the event we do not reverse the court of appeals' judgment, we should remand the case to the court of appeals and direct it to clarify its judgment. We examine her arguments in turn.

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[5] The trial court's judgment provided that:

> The parties having agreed to severance of all remaining claims and defenses, so that a final appealable Judgment can and is HEREBY entered in this original cause. All claims, causes, actions or defenses which are not disposed of by judgment on Plaintiff's breach-of-contract cause of action or the severance as described herein are otherwise disposed of and are dismissed.

II. Discussion

A. Texas Insurance Code § 862.054

Section 862.054 provides:

> **Fire Insurance: Breach by Insured; Personal Property Coverage.**
>
> Unless the breach or violation contributed to cause the destruction of the property, a breach or violation by the insured of a warranty, condition, or provision of a fire insurance policy or contract of insurance on personal property, or of an application for the policy or contract:
>
> (1) does not render the policy or contract void; and
>
> (2) is not a defense to a suit for loss.

TEX. INS. CODE § 862.054.

Greene does not argue that the statute applies because she breached or violated her insurance policy in the usual sense of having violated a duty or obligation she assumed in the policy. Rather, she reasons that the statute applies because the Legislature's use of "breach" in the statute encompasses the situation where a policy condition is "triggered"; when she vacated the house she triggered operation of the vacancy clause; so she breached the vacancy clause within the meaning of the statute. *See id.* She further argues that defining "breach" to exclude "trigger" will lead to absurd results. We disagree with both arguments.

In examining the statutory language to see if Greene is correct, we follow familiar principles. We review issues of statutory construction de novo, *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003), with our primary objective being to give effect to the Legislature's intent. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). We rely on the plain meaning of the text as expressing legislative intent unless a different meaning

is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results. *Id.* We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind. *Id.*

"Breach" of a contract occurs when a party fails to perform an act that it has contractually promised to perform. *See* BLACK'S LAW DICTIONARY 225 (10th ed. 2014) (defining "breach of contract" as a "[v]iolation of a contractual obligation by failing to perform one's own promise"); *see also U.S. v. Winstar Corp.*, 518 U.S. 839, 909-10 (1996) (finding a party unable to perform its promise liable for breach); *Orix Cap. Mkts., L.L.C. v. Wash. Mut. Bank*, 260 S.W.3d 620, 623 (Tex. App.—Dallas 2008, no pet.); RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981). Similarly, a "violation" is "the contravention of a right or duty." BLACK'S LAW DICTIONARY 1800 (10th ed. 2014). A "triggering" condition or event is one that brings something else into effect. *See id.* at 356 (defining "triggering condition" as "[a] circumstance that must exist before a legal doctrine applies").

Greene's first argument fails because, as the court of appeals noted, the vacancy clause does not contain a promise by or obligation on behalf of Greene to occupy her house, thus her vacating the house was neither a breach nor a violation of the clause. *See Greene*, 376 S.W.3d at 283. The vacancy clause is substantively an agreement between the insured and Farmers that Farmers will continue insuring the house for sixty days after it no longer is her residence, when its being used as her residence is the underlying premise of the policy's dwelling coverage.[6] And re-defining "breach"

[6] Inserting appropriate definition language, Coverage I.A. (Dwelling) as related to the facts before us says that the policy covers a dwelling where an insured *resides*.

Greene stipulated that she had moved from the house and removed a substantial part of her personal property, thereby no longer residing in it under the policy terms. She does not contend that she intended to ever reside there again.

by labeling her actions as "triggering" operation of the vacancy clause as a breach, when her actions in vacating the house were specifically contemplated by and addressed in the policy, finds no basis in the common meaning of the word "breach," in a statutory definition, or in the context of section 862.054.

Her second argument likewise fails. She argues that refusing to include "trigger" in the definition of "breach" yields absurd results because that will allow insureds who breach policy provisions to recover their losses pursuant to section 862.054 while she will be precluded from recovering her loss even though she did not breach any policy provisions. While her argument has appeal, it does so only when the vacancy clause is considered apart from other parts of the policy, and that is not how policies are interpreted.

When interpreting an insurance contract we consider all its parts, read all of them together, and give effect to all of them. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). Ordinarily we seek to ascertain the intent of the parties as expressed in the language of the contract. *Id.* But here the Policy is a standard policy form prescribed by TDI. The Legislature has charged TDI with regulating the business of insurance, a task that expressly requires it to approve forms used by insurance companies in writing residential property insurance. TEX. INS. CODE §§ 31.002(1), 2301.003(b)(2), 2301.006(a). Pursuant to the Legislature's mandate, TDI prescribed the form Farmers used for Greene's policy. TDI has also approved a form endorsement that homeowners can purchase to provide coverage during extended vacancies. When we interpret such form policies, the intent of the parties is not what counts because they did not write the contract. *Fiess v. State Farm*

Lloyds, 202 S.W.3d 744, 746 (Tex. 2006). Rather, the policy language is interpreted according to the ordinary, everyday meaning of its words to the general public. *Id.*

The policy issued to Greene provides that the insurance covers "[t]he dwelling on the **residence premises**" shown on the declarations page, and defines "residence premises" to be the dwelling and structures attached to the dwelling "where an **insured** *resides or intends to reside* within 60 days after the effective date of this policy." (Emphasis added). The vacancy clause is in the Section I-Conditions part of the policy, but when the clause is read together with the provisions of Section I.A.-Property Coverage (Dwelling), the clause is substantively an agreement about what happens given a particular instance in which the insured no longer "resides" in the insured dwelling because it is vacant: it is an agreement that when the insured vacates the dwelling and no longer resides there—thus removing the premise underlying the HO-A policy that the dwelling is the insured's residence—then full coverage remains in place for sixty days beyond the vacancy date, after which there is no coverage for the dwelling but the remainder of the insurance remains in force. The court of appeals determined that the vacancy clause functions as an exclusion because it "excepts a specific condition (vacancy) from coverage." *Greene*, 376 S.W.3d at 282 (citing BLACK'S LAW DICTIONARY 563 (9th ed. 2009) and 17 WILLISTON ON CONTRACTS § 49.11 (4th ed. 1992) (explaining that an exception or exclusion limits liability or carves out certain types of loss to which coverage does not apply)); *see PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 635 (Tex. 2008) ("Exclusions and conditions are in effect two sides of the same coin; exclusions avoid coverage if the insured does something, and conditions avoid coverage unless an insured does something."). But the clause in actuality addresses the scope of coverage instead of being an exclusion. That is because

the clause does not limit Farmers' liability as to, or carve out, a particular type of loss. Rather, it effectively expands coverage to encompass a sixty-day period beyond the time the homeowner no longer resides in the dwelling, and the premise of the HO-A policy is that it covers property in which the insured resides or intends to reside.

We recognize that extending dwelling coverage for only sixty days after vacancy occurs might seem to be setting an arbitrary bright line, but it is no less arbitrary than the lines established by specified dates on which coverage begins and ends. And the sixty day provision cuts both ways: there would have been coverage for the loss if the fire had occurred fifty-nine days after vacancy occurred, regardless of the fact that Greene no longer resided there. We fail to see how the vacancy clause's specifying the times for which Farmers did not insure the risk of loss for the dwelling yields any more of an absurd result than does the policy's specifying the beginning and ending dates for the policy as a whole. If we were to re-formulate the definition of "breach" as Greene asks us to do, we would be usurping the legislative prerogative or re-making the contract to which the parties agreed. We decline to do either.

We conclude that the term "breach" as used in section 862.054 does not include a homeowner's actions in vacating her premises and "triggering" the vacancy clause. Nor does excluding such actions from being a breach within the meaning of section 862.054 yield absurd results. The court of appeals correctly determined that section 862.054 does not apply to Greene's claim.

In addition to maintaining that Greene's actions were not a breach of the policy provisions as contemplated by section 862.054 and that failing to consider her vacating her house as a breach

does not work an absurd result, Farmers argues that section 862.054 applies only to personal property insurance. The court of appeals considered the latter argument and concluded that Farmers was correct. *Greene*, 376 S.W.3d at 283. But the appeals court expressly noted that its decision "does not depend upon whether the statutory language pertains only to fire insurance on personal property or to all types of property covered by fire insurance." *Id.* Because of our conclusion, we do not address the question of whether section 862.054 applies to real property. *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.").

B. Prejudice

Citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994), and *PAJ*, Greene next argues that Farmers cannot rely on the vacancy clause to deny her claim when the property's being vacant did not prejudice Farmers. Ultimately, her argument fails.

This Court has applied the prejudice requirement several times in the recent past. *See Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750 (Tex. 2013); *Fin. Indus. Corp. v. XL Specialty Ins. Co.*, 285 S.W.3d 877 (Tex. 2009); *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374 (Tex. 2009); *PAJ*, 243 S.W.3d at 636; *Hernandez*, 875 S.W.2d at 693. We rooted those decisions in contract law, focusing on the principle that one party is excused from performing under a contract only if the other party commits a material breach. *See Lennar Corp.*, 413 S.W.3d at 756; *Fin. Indus. Corp.*, 285 S.W.3d at 879; *Prodigy*, 288 S.W.3d at 382; *PAJ*, 243 S.W.3d at 636; *Hernandez*, 875 S.W.2d at 693. We noted that the materiality of an insured's breach is determined by several factors, including the extent to which the breach deprived the insurer of the benefit that

it reasonably could have anticipated from full performance by the insured. *Hernandez*, 875 S.W.2d at 693 n.2; *see also Lennar Corp.*, 413 S.W.3d at 753; *Fin. Indus. Corp.*, 285 S.W.3d at 879; *Prodigy*, 288 S.W.3d at 375; *PAJ*, 243 S.W.3d at 632. If the insurer receives its reasonably anticipated benefit despite the insured's breach, the breach is immaterial, the insurer is not prejudiced, and the insurer is not excused from performance. *See, e.g.*, *Hernandez*, 875 S.W.2d at 693-94 (determining insured's breach of a settlement-without-consent clause was immaterial because insurer remained in the same position it would have occupied had the insured complied with the provision); *Lennar Corp.*, 413 S.W.3d at 756 (same).

Analyzing the extent to which Farmers was deprived of the benefit it reasonably could have anticipated from Greene's full performance—the materiality of her failure to fully perform her obligations under the policy—begins with analyzing her failure to perform; in other words, analyzing her breach. But Greene did not breach her obligations under the policy by moving out of her home. As discussed above, considering all the policy's parts and reading them together, it is clear that the parties simply agreed on the effect of Greene's vacating her house. Because she did not breach her obligations under the policy, including its vacancy clause, the question of materiality of a breach and its subsidiary issue of prejudice are not raised.

At bottom this case is not about breach, it is about what coverage Greene purchased and Farmers agreed to provide. Greene seeks to have us re-write the insurance policy under the guise of "construing" it so Farmers provides coverage it did not agree to provide, and Greene receives coverage she did not contract for. The concurrence asserts that this case cannot be meaningfully distinguished from the analyses and results in *Lennar*, *Prodigy*, *PAJ*, and *Hernandez*, and that those

cases should be limited to the policy provisions at issue in them. ___ S.W.3d ___ (Boyd, J., concurring). We disagree.

In *Hernandez* we applied the contract principle that only when one party commits a material breach is the other party's performance excused. 875 S.W.2d at 692. That principle was the basis for our decisions in *PAJ, Prodigy*, and *Lennar*. To determine materiality in the contexts presented by those cases we considered the extent to which the parties we referred to as nonbreaching parties—the insurers—would have been deprived of the benefit that they could have reasonably anticipated from full performance, or whether the obligations the insureds did not comply with were material parts of the bargained-for exchange. In all four cases we concluded either that the insurers received the benefits they expected from the contracts, or that the policy terms at issue were not a part of the bargained-for exchanges between the insurers and insureds.

In *Hernandez,* for example, we recognized that in the context of a policy containing a settlement-without-consent clause, an insured's breach—settlement without the insurer's consent—can extinguish a valuable subrogation right depriving the insurer of an anticipated benefit under the policy. 875 S.W.2d at 693. But in that case, the insurer had not incurred any financial loss with regard to its subrogation rights even though the insured settled without consent of the insurer. *Id.* at 694. For that reason the insurer was not excused from its obligation to perform. *Id.* Similarly, in *PAJ* an insurer was not prejudiced by the insured's failure to notify the insurer of a claim "as soon as practicable" as required by the policy. 243 S.W.3d at 631. We held that "an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation." And in *Prodigy* we concluded that "Prodigy's obligation to

provide [the insurer] with notice of a claim 'as soon as practicable' was not a material part of the bargained-for exchange" so coverage was not defeated. 288 S.W.3d at 382. Finally, in *Lennar* we held that the policy requirements at issue—prohibiting an insured from voluntarily making any payment or assuming an obligation without the insurers' consent—were not "essential to coverage." 413 S.W.3d at 756.

All of these cases involved an insured's failing to do something it agreed to do or doing something it agreed not to do. We looked to the facts to determine whether the insured deprived the insurer of benefits the insurer reasonably could have anticipated if the insured performed its obligation or whether the obligation in question was part of the bargained-for exchange. But there is not an obligation here that Greene failed to perform. As previously discussed, Greene was not required to live in her house under the policy, nor did she agree that she would not vacate the house. Rather, the insuring agreement specified the risk Farmers accepted and Greene purchased: the dwelling would be covered until sixty days after she vacated it unless she paid additional premiums for an endorsement. Accordingly, this case is different from the prejudice analysis that formed the basis of our decisions in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar* and the principle underlying our decisions in those cases is not determinative here.

C. Public Policy

Last, Greene maintains that both the public policy underlying the anti-technicality statute and our decision in *Puckett v. U.S. Fire Insurance Co.*, 678 S.W.2d 936 (Tex. 1984) preclude Farmers' denying her claim based on the vacancy condition. Again, we disagree.

In *Puckett*, the insurer denied a claim for damages to an insured airplane that crashed. 678 S.W.2d at 937. The insurer relied on policy provisions requiring the airplane to have a current airworthiness certificate and suspending coverage during the time it did not. *Id.* When the accident occurred the aircraft's certificate had lapsed because the plane's annual inspection was overdue. *Id.* But the crash was caused by pilot error and was not causally related to whatever caused the airworthiness certificate to have lapsed. *Id.* Although the policy did not require a causal connection between a breach by the insured and a loss in order for the loss to not be covered, the Court concluded it was "against public policy to allow the insurance company in [a] situation [where the accident was caused by something unquestionably covered by the policy] to avoid liability by way of a breach that amounts to nothing more than a technicality." *Id.* at 938. The decision was based, in large part, on the public policy underlying the anti-technicality statute directed to fire insurance policies. *See id.* The Court reasoned that by enacting the statute the Legislature expressed the public policy of the state that insurance coverage could not be lost based on a technical breach of policy terms. *Id.* Moreover, the Court determined that allowing the insurer to deny the claim because the airworthiness certificate was out of date would result in a windfall for the insurer: the insurer would have collected a premium even though it had no risk exposure because of the lapsed certificate. *Id.*

The court of appeals in this case distinguished *Puckett* on the basis that the vacancy clause in Greene's policy is not properly characterized as a "technicality." *Greene*, 376 S.W.3d at 285. Because of the vacancy clause's relationship to the scope of coverage, we agree with the court of appeals that the clause is a material provision of Greene's policy and the coverage it provides. This

conclusion is reinforced by the fact that, as discussed above, a TDI-approved endorsement providing dwelling coverage during an extended vacancy is available for an additional premium.

But Farmers is not precluded from relying on the vacancy clause for two other reasons. First, Greene did not breach the clause or the policy, as we have discussed above. Second, regardless of the breach and materiality questions, the general public policy underlying the anti-technicality statute is outweighed here by the specific public policy expressed in TDI's prescribing the HO-A form for insurers to use in Texas.

The Legislature establishes public policy through its enactments. *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 665 (Tex. 2004) ("The legislature determines public policy through statutes it passes."); *see also* TEX. INS. CODE §§ 31.002(1), 2301.006(a), 2301.008. In *Puckett*, the Court referenced only the anti-technicality statute as its guide, but there is more to consider in this case. *See Puckett*, 678 S.W.2d at 938. First, the Legislature has tasked TDI with prescribing and approving forms to be used by insurance companies in writing residential property insurance—which TDI did for the HO-A form Farmers used in writing Greene's policy. TEX. INS. CODE §§ 2301.003(b)(2), 2301.006(a). Greene points to no such legislation regarding the aviation policy under consideration in *Puckett*. Nor does Greene argue that TDI exceeded its authority by adopting the HO-A form or the associated TDP-011 endorsement providing dwelling coverage during an extended vacancy. Second, after *Puckett*, the Legislature expressly delegated authority to TDI to make initial decisions about whether provisions in an insurance policy violate public policy. TEX. INS. CODE § 2301.007(a)(2). In our view, TDI's prescribing the HO-A form and its associated endorsement TDP-011 reflects a specific public policy choice balancing the interests of insureds and

insurers. The more specific expression of public policy reflected in TDI's adoption of the HO-A form and the associated endorsement providing separate coverage terms pursuant to legislative directive should be given deference over the more general expression of public policy reflected in section 862.054.

Accordingly, neither the public policy underlying the anti-technicality statute nor our decision in *Puckett* preclude Farmers from relying on language in the vacancy clause in response to Greene's claim.

III. Disposition

Greene requests that in the event we do not reverse the judgment of the court of appeals, then we remand the matter to that court for it to "clarify and specifically state that its Opinion and Judgment do not address, much less rule upon, Greene's claims of lack of prejudice, waiver, and/or estoppel." We do not consider it necessary to do so. The trial court judgment severed "all claims, causes, actions or defenses which are not disposed of by judgment on Plaintiff's breach-of-contract cause of action." Greene did not appeal the severance or the order of dismissal. Further, the court of appeals' opinion is detailed as to its holding and specifically indicates that the court did not intend to address more than it expressly did when it noted that it did not consider one claim Greene made on appeal because "this claim is among the claims severed from the instant case." *Greene,* 376 S.W.3d at 286 n.3.

The judgment of the court of appeals is affirmed.

Phil Johnson
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0867

BOB GREENE, AS NEXT FRIEND OF LEWAYNE GREENE, PETITIONER,

v.

FARMERS INSURANCE EXCHANGE, RESPONDENT

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

JUSTICE BOYD, joined by JUSTICE WILLETT, concurring.

"[T]he tendency of the law must always be to narrow the field of uncertainty." Oliver Wendell Holmes, Jr., THE COMMON LAW 127 (1909). Today, unfortunately, uncertainty prevails.

For over a hundred years, this Court enforced insurance policies as written. Then, thirty years ago, the Court judicially wrote a prejudice requirement into an aviation insurance policy, concluding that public policy reasons required that result. Ten years later, the Court issued the first in a series of four decisions in which it continued to impose the prejudice requirement, but in those cases it relied on a prior-material-breach theory rather than public policy. Today, the Court holds that the material-breach theory does not apply because the provision at issue does not impose a breachable obligation on the insured but instead defines the scope of the policy's coverage, and thus there has been no breach. The Court's reasoning is sound and its result is right. But it is not consistent with our four prior decisions, because they also involved provisions that defined the scope of coverage rather than imposed a breachable obligation.

By failing to follow those cases, disapprove of them, overrule them, or adequately distinguish them, the Court leaves consumers, insurers, the Texas Department of Insurance (TDI),

and Texas courts with no logical basis for predicting when this Court will impose a prejudice requirement and when it will not. "Those who depend upon the law require continuity and predictability." *Davis v. Davis*, 521 S.W.2d 603, 608 (Tex. 1975). When it comes to insurance policies and the judicially imposed prejudice requirement, they will find neither.

I.
Introduction

LaWayne Greene's homeowners' insurance policy provides that the coverage for damage to her house "will be suspended effective 60 days after the dwelling becomes vacant" and will "remain suspended during such vacancy." It is undisputed that Greene's home had been vacant for more than sixty days when it was damaged by a fire. Greene contends that the vacancy provision should not apply and the policy should cover her loss because:

(1) it is unenforceable under an anti-technicality statute, *see* TEX. INS. CODE § 862.054;

(2) it is unenforceable under our material-breach coverage cases because the vacancy did not contribute to the fire or otherwise prejudice the insurer, *see Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750, 755 (Tex. 2013); *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 375 (Tex. 2009); *PAJ, Inc. v. Hanover Insurance Co.*, 243 S.W.3d 630, 631 (Tex. 2008); *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 694 (Tex. 1994); and

(3) it is unenforceable on public policy grounds under *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 937 (Tex. 1984).

The Court rejects Greene's arguments and enforces the vacancy provision, concluding that section 862.054, our material-breach coverage cases, and *Puckett* do not apply. I agree that section 862.054 does not apply, and I agree that we should not impose a prejudice requirement in this case, either under our material-breach cases or under *Puckett*'s public policy approach. But I do not agree that our four material-breach coverage cases are distinguishable from this case. In those cases, we held that insurers could not deny coverage based on policy provisions that defined the scope of coverage in terms of certain conduct by the insured (specifically, in those cases, the

insured's untimely notice of a claim or settlement of a claim without the insurer's consent) *unless* the insurer showed that the conduct prejudiced its interests. *See Lennar*, 413 S.W.3d at 755; *Prodigy*, 288 S.W.3d at 375; *PAJ*, 243 S.W.3d at 632; *Hernandez*, 875 S.W.2d at 694. Here, we hold that the insurer *can* deny coverage based on a policy provision that defines the scope of coverage in terms of certain conduct by the insured (specifically, the insured's vacating the home for more than sixty days) *regardless* of whether the conduct prejudiced the insurer's interests.

As I[1] and others before me[2] have observed, the Court incorrectly based its holdings in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar* on a faulty application of the material-breach rule. Today, the entire Court agrees that the material-breach rule does not apply, but it cannot meaningfully distinguish this case from those. For the very reasons the Court finds the material-breach rule does not apply in this case, it did not apply in *Lennar*, *Prodigy*, *PAJ*, and *Hernandez*. I would therefore disapprove of the reasoning in those cases. To promote stability and consistency in our jurisprudence, I would leave our holdings in those cases in place, but I would expressly decline to extend those holdings beyond the specific kinds of notice-of-claim and consent-to-settlement provisions at issue in them. I acknowledge that this is not a perfect solution because, for purposes of imposing the prejudice requirement, those kinds of provisions are not logically distinguishable from the vacancy clause at issue in this case. But it is the Court's best option at this point because it will fulfill the public expectations that those decisions have created while providing predictability and certainty for the future. While illogical certainty is admittedly undesirable, it is at least better than the illogical uncertainty that will result from the Court's decision in this case.

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[1] *See Lennar*, 413 S.W.3d at 765–66 (Boyd, J., concurring).

[2] *See Prodigy*, 288 S.W.3d at 383–89 (Johnson, J., joined by Hecht and Willett, JJ., dissenting); *Id.* at 383 (Wainwright, J., concurring); *PAJ*, 243 S.W.3d at 637–45 (Willett, J., joined by Hecht, Wainwright, and Johnson, JJ., dissenting); *Hernandez*, 875 S.W.2d at 694–95 (Enoch, J., dissenting).

II.
Early Decisions and Legislative Actions

For well over a century, this Court consistently enforced insurance contracts as written. If the contract limited coverage to, or conditioned it upon, circumstances that did not exist or occur, we repeatedly denied claims for coverage, even if the absence of the circumstances did not harm or prejudice the insurance company. We did this in several cases involving fire insurance policies,[3] including disputes involving vacancy provisions like the one at issue in this case.[4] We did it in cases involving consent-to-settlement provisions like the ones at issue in *Hernandez* and *Lennar*.[5] And we did it in cases involving prompt-notice-of-claim provisions like the ones at issue in *PAJ* and *Prodigy*.[6]

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[3] *See, e.g.*, *Hibernia Ins. Co. v. Bills*, 87 Tex. 547, 551, 29 S.W. 1063, 1064 (1895); *E. Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229, 237, 27 S.W. 122, 123 (1894); *Fire Ass'n of Philadelphia v. Flournoy*, 84 Tex. 632, 636, 19 S.W. 793, 795 (1892); *Assur. Co. of London v. Flournoy*, 19 S.W. 795 (Tex. 1892); *E. Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23, 25, 15 S.W. 166, 167 (1890); *Lion Fire Ins. Co. v. Starr*, 71 Tex. 733, 12 S.W. 45 (1888); *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366, 370 (1882); *E. Tex. Fire Ins. Co. v. Dyches*, 56 Tex. 565 (1881); *Tex. Banking & Ins. Co. v. Stone*, 49 Tex. 4, 11 (1878); *Galveston Ins. Co. v. Long*, 51 Tex. 89, 92 (1879).

[4] *Long*, which this Court decided 135 years ago, involved contentions similar to those before the Court today. 51 Tex. at 91. The fire insurance policy provided that it would be void "if the [insured] premises shall . . . become vacant or unoccupied, and so remain for more than thirty days, without notice to and consent of this company, in writing . . . ." *Id.* We held that the trial court erred by instructing the jury to render a verdict in favor of the insurer only if it found that the vacancy had increased the risk. *Id.* at 91–92. Relying on the language of the parties' agreement, we concluded that "[w]hether the risk would be increased by the premises becoming vacant, was not material." *Id.* at 92. We reached a similar holding in *Kempner*, 27 S.W. at 123 ("[T]he policy is exceptionally explicit and apt in the statement of the terms of liability. It is first stated that the company will not insure vacant houses, and, to enforce the rule with certainty, it is provided that, if the house should become vacant or unoccupied without the consent of the company, the policy shall at once become null and void.").

[5] *See, e.g.*, *Guar. Cnty. Mut. Ins. Co. v. Kline*, 845 S.W.2d 810, 811 (Tex. 1992) (citing *Ford v. State Farm Mut. Auto. Ins. Co.*, 550 S.W.2d 663, 665 (Tex. 1977)).

[6] *See, e.g.*, *Members Mut. Ins. Co. v. Cutaia*, 476 S.W.2d 278, 279 (Tex. 1972); *Allen v. W. Alliance Ins. Co.*, 162 Tex. 572, 577–78, 349 S.W.2d 590, 594–95 (1961); *Am. Fid. & Cas. Co. v. Traders & Gen. Ins. Co.*, 160 Tex. 554, 561, 334 S.W.2d 772, 776 (1959); *Klein v. Century Lloyds*, 154 Tex. 160, 162–63, 275 S.W.2d 95, 96–97 (1955); *New Amsterdam Cas. Co. v. Hamblen*, 144 Tex. 306, 309–10, 190 S.W.2d 56, 58 (1945); *Sun Mut. Ins. Co. v. Mattingly*, 77 Tex. 162, 163, 13 S.W. 1016 (1890); *Dyches*, 56 Tex. at 570; *Fire Ins. Ass'n v. Miller Bros.*, 2 Wilson 288, 290, 1884 WL 8125 (Tex. App. 1884, no writ).

Repeatedly and resolutely, we insisted that the Court could not, or at least should not, judicially inject a prejudice requirement into the parties' written agreements.[7] Instead, we acknowledged that the Legislature and TDI (or its predecessors) were better suited to make and enforce policy judgments about whether and when to mandate or alter insurance policy terms. *See e.g.*, *Kemp*, 512 S.W.2d at 690 (deferring to "statutes and Board-approved policy provisions"); *Cutaia*, 476 S.W.2d at 279 ("[I]t is better policy for the contracts of insurance to be changed by the public body charged with their supervision, . . . or by the Legislature, rather than for this Court to insert a provision that violations of conditions precedent will be excused if no harm results from their violation.").[8]

Our deference to the Legislature was not futile. In 1874, the Legislature began regulating the business of insurance and created the Department of Insurance, Statistics and History, a predecessor to TDI.[9] In 1891, the Legislature enacted a statute that invalidated any policy provision "requiring notice to be given of any claim for damages as a condition precedent to the right to sue

[7] *See, e.g.*, *Kemp v. Fid. & Cas. Co. of New York*, 512 S.W.2d 688, 690 (Tex. 1974) ("We are bound to interpret the statutes and Board-approved policy provisions as written."); *Cutaia*, 476 S.W.2d at 279 ("[W]hen [a] condition precedent to liability [i]s breached, liability on the claim [i]s discharged, and harm (or lack of it) resulting from the breach [i]s immaterial."); *Hamblen*, 190 S.W.2d at 58 ("[W]e are not authorized to add the further [provision] that a showing that no loss or damages resulted from the delay would relieve the insurer of the consequences of his failure to give immediate notice."); *see also Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007) ("Given this insurance policy's plain language, we are loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards that neither the Legislature nor the Texas Department of Insurance has thus far decided to promulgate.").

[8] *See also Fortis Benefits*, 234 S.W.3d at 649 ("As we have said before, balancing dueling policy concerns is generally for non-judicial bodies, and it remains the 'better policy for the contracts of insurance to be changed by the public body charged with their supervision, the State Board of Insurance, or by the Legislature, rather than for this Court' to contravene the express language of insurance contracts with equitable arguments.").

[9] For a discussion of the history of TDI, *see* TDI's webpage at www.tdi.texas.gov.

thereon," unless the provision was "reasonable" and allowed at least ninety days for notice.[10] In 1903, the Legislature enacted two "anti-technicality" statutes that imposed a prejudice requirement on policy provisions that voided the policy if the insured made a false statement in the insurance contract or application[11] or if the insured made a false statement in a proof of loss or proof of death.[12] In 1913, the Legislature enacted two more anti-technicality statutes. The first invalidated any provision purporting to render the policy void if the covered property was encumbered by a lien at the time of contracting or became encumbered during the policy term.[13] The second, which is the predecessor to the statute on which Greene relies in this case, provided that a "breach or violation" of a fire insurance policy covering personal property could not render the policy void or constitute a defense to coverage "unless such breach or violation contributed to bringing about the destruction of the property."[14]

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[10] Act of March 4, 1891, 22nd Leg., R.S., ch. 17, § 2, 1891 Tex. Gen. Laws 20, 20 (repealed). The current version of this statute is codified in section 16.071 of the Civil Practices and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 16.071.

[11] Unlike *Hernandez* and its progeny, the statutory prejudice requirement was not purely backward-looking. Instead, the statute made the voiding provision enforceable only if the insured's misrepresentation "actually contributed to the contingency or event on which said policy became due and payable" *or* was "material to the risk." Act of March 27, 1903, 28th Leg., R.S., ch. 69, § 1, art. 3096aa, 1903 Tex. Gen. Law 94, 94 (repealed). The current version of this statute is codified in section 705.004 of the Texas Insurance Code. *See* TEX. INS. CODE § 705.004.

Another article enacted at the same time prevented the insurer from relying on this type of misrepresentation provision unless the insurer gave the insured notice of the voidance of the policy within a reasonable time after discovering the misrepresentation. *See* Act of March 27, 1903, 28th Leg., R.S., ch. 69, § 1, art. 3096bb, 1903 Tex. Gen. Law 94, 94 (repealed).

[12] Under this statute, the voiding provision was enforceable only if the misrepresentation was fraudulent, material, and either misled the insurer or caused the insurer to lose a valid defense to the policy. *Id.* art. 3096cc. The current version of this statute is codified in section 705.003 of the Texas Insurance Code. *See* TEX. INS. CODE § 705.003.

[13] Act of March 31, 1913, 33th Leg., R.S., ch. 106, § 18, 1913 Tex. Gen. Law 195, 202. The current version of this statute is codified in section 2002.002 of the Texas Insurance Code. *See* TEX. INS. CODE § 2002.002.

[14] Act of March 29, 1913, 33rd Leg., R.S., ch. 105, § 1, 1913 Tex. Gen. Laws 194, 194. The current version of this statute is codified in section 862.054 of the Texas Insurance Code.

By the time we decided *Cutaia* in 1972, the Legislature had shifted much of the authority to monitor and regulate the business of insurance to TDI.[15] The Insurance Code of 1951 charged TDI with the duty of prescribing the forms used for a variety of common insurance policies.[16] The year after we deferred to the Legislature and TDI in *Cutaia*, TDI issued a new amendatory endorsement, applicable to all Texas commercial general liability (CGL) policies, which prohibited insurers from denying coverage based on the insured's failure to give timely notice, unless the lack of notice prejudiced the insurer.[17]

Since then, TDI's oversight of insurance policy forms has continued to expand. Today, the vast majority of Texas insurance policies are composed of forms that TDI has drafted or approved, and the Insurance Code prohibits an insurer from using a form that TDI has not approved for most types of policies. *See* TEX. INS. CODE §§ 2301.006(a) ("an insurer may not deliver or issue for delivery in this state a form for use in writing insurance described by Section 2301.003 unless the form has been filed with and approved by the commissioner"), 2301.003(b) (listing types of insurance covered).

In short, for over a century, the system worked. This Court's adherence to the contract language and reluctance to rewrite contracts with the benefit of hindsight are hallmarks of our

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[15] As noted above, the Legislature created the original predecessor to TDI in the late 1800s. The Legislature has tasked TDI with, among other things, "regulat[ing] the business of insurance in this state," "protect[ing] and ensur[ing] fair treatment of consumers," and "ensur[ing] fair competition in the insurance industry in order to foster a competitive market." TEX. INS. CODE § 31.002.

[16] *See* Acts of June 7, 1951, 52nd Leg., R.S., ch. 491, arts. 5.06, 1951 Tex. Gen. Laws 868, 925–26; *see also* TEX. INS. CODE § 5.06 (automobile insurance).

[17] *See* State Bd. of Ins., *Revisions of Texas Standard Provisions for General Liability Policies-–Amendatory Endorsement—Notice*, Order No. 23080 (March 13, 1973). The endorsement stated: "As respects bodily injury liability coverage and property damage liability coverage, unless the company is prejudiced by the insured's failure to comply with the requirement, any provision of this policy requiring the insured to give notice of action, occurrence or loss, or requiring the insured to forward demands, notices, summons, or other legal process shall not bar liability under the policy." *Id.*

contract jurisprudence, but these principles are inviolable in the context of insurance contracts, where the policy language and forms are adopted or approved by an executive body created for that purpose. That is why, for over 100 years, our mantra was that "[w]e are bound to interpret the statutes and Board-approved policy provisions as written." *Kemp*, 512 S.W.2d at 690.

III.
Decisions Imposing a Prejudice Requirement

Thirty years ago, the Court altered course in *Puckett*, in which it decided to judicially impose a prejudice requirement on public policy grounds. 678 S.W.2d at 938. After an airplane crash caused by pilot error, the plane's owner sought insurance coverage under a policy that excluded coverage if the plane did not have a current airworthiness certificate. *Id.* at 937. The Court acknowledged that the plane did not have a current airworthiness certificate and was not covered under the express terms of the policy. *Id.* Nevertheless, the Court held that the policy covered the loss, concluding that "allowing an insurance company to avoid liability when the breach of contract in no way contributes to the loss is unconscionable and ought not be permitted. . . . It would be against public policy to allow the insurance company in that situation to avoid liability by way of a breach that amounts to nothing more than a technicality." *Id.* at 938.

Chief Justice Pope, joined by Justice McGee, dissented in *Puckett*. 678 S.W.2d at 939–40 (Pope, C.J., dissenting). He observed that the Court had "written a new clause into the policy," by "add[ing] to the contract the requirement that the insurance company must prove that the breach was the cause of the accident." *Id.* at 940. He stated that the Court's holding was, by its own acknowledgement, "contrary to the reasoning of most courts" and had "been uniformly rejected by our prior Texas decisions as it has been by the majority of jurisdictions." *Id.* (citing *Bowie*, 574

S.W.2d at 543).[18] And he warned that "[t]oday's decision means that insurance policies—life, casualty, fire—though agreed upon by insured and insurer, though authorized by the Board of Insurance, though clear and unambiguous, are burdened with uncertain terms that this court may from time to time determine should have been included in the parties' contract." *Id*.

As it turned out, the Court never expanded *Puckett*'s policy-based ruling beyond the context of aviation insurance cases. Instead, in 1994, it adopted a new basis for imposing a prejudice requirement: the material-breach rule. *Hernandez*, 875 S.W.2d at 694. Since then, a divided Court has applied the material-breach rule in three additional coverage cases. *See Lennar*, 413 S.W.3d at 755; *Prodigy*, 288 S.W.3d at 375–78; *PAJ*, 243 S.W.3d at 631.

A. *Hernandez*

In 1994, only a year after the Court enforced a settlement-without-consent clause in *Kline*, 845 S.W.2d at 811, the Court reached the opposite result under very similar facts in *Hernandez*, 875 S.W.2d at 694. As in *Kline*, the claimant in *Hernandez* was injured in a car accident, entered into a settlement with the driver who caused the accident without the insurer's consent, and then sought to recover losses in excess of the settlement under his underinsured motorist coverage. *Hernandez*, 875 S.W.2d at 692. As in *Kline*, the policy excluded coverage if the insured settled a claim without obtaining the insurer's consent. *See id.* But unlike *Kline*, in which the Court applied the settlement-without-consent provision as written, the *Hernandez* Court superimposed a

[18] *Puckett* represented a significant shift in the law, at least with respect to aviation insurance policies. As one Justice of the Court has observed, "*Puckett's* judicial rewriting of the parties' contract clashes head-on with our 'modest, text-based approach' to interpreting contract language" and "is starkly at odds with our insurance decisions generally, and with most American jurisdictions' aviation-insurance decisions specifically." *AIG Aviation (Tex.), Inc. v. Holt Helicopters, Inc.*, 248 S.W.3d 169, 170 (Tex. 2008) (Willett, J., dissenting). "In short, *Puckett* granted an unbargained-for expansion of coverage in the face of a bargained-for exclusion from coverage." *Id*.

prejudice requirement onto the provision. The Court reasoned that the insureds' failure to obtain consent for the settlement was a breach of the insurance policy, and a breach would excuse the insurer's obligation to perform only if the breach was material. Because the breach did not prejudice the insurer, it was not material and therefore did not excuse the insurer's performance under the policy. *Id.* at 692–93.

Justice Enoch dissented in *Hernandez*. In his view, the material-breach rule was inapplicable because the issue was not whether the settlement without consent excused the insurer from its coverage obligation but whether the insurer had a coverage obligation in the first place. *See id.* at 694 (Enoch, J., dissenting) ("[T]his case is not about a breach of contract. This case is about coverage.") Because the insurance policy expressly "d[id] not apply" if the insured settled a claim without the insurer's consent, the insurer had no coverage duty regardless of whether the Hernandezes breached the contract, materially or otherwise. *See id.*; *see also Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010) (discussing the difference between breach of contract and failure to fulfill a condition). Justice Enoch observed that the Court's disposition was inconsistent with its disposition in *Kline*, which involved essentially identical facts, and its reasoning was inconsistent with its reasoning in *Cutaia*, in which the Court declined to judicially impose a prejudice requirement on a notice-of-claim provision. *Hernandez*, 875 S.W.2d at 694. He also noted that the jurisdictions that had adopted a prejudice requirement for settlement-without-consent provisions had done so based primarily on public policy grounds, not on a faulty application of the material-breach rule. *Id.*

B. *PAJ*

Fourteen years after *Hernandez*, the conflict between *Hernandez* and our prior precedent (*Cutaia*, in particular) was squarely before us in *PAJ, Inc. v. Hanover Insurance Co.*, which

involved an insured's non-prejudicial failure to give its insurer prompt notice of a claim. 243 S.W.3d 630, 631 (Tex. 2008). In a five-four split, the Court's majority chose to follow *Hernandez*, rather than *Cutaia*, and judicially imposed a prejudice requirement. *Id.* at 635–36. *PAJ* involved a CGL policy, and thus included the TDI-mandated endorsement providing that a lack of timely notice would not defeat coverage of bodily injury or property damage claims unless the insurer was prejudiced by the delay. *Id.* at 632. But the claim at issue in the case was for an advertising injury, rather than for bodily injury or property damage, and thus the endorsement did not apply. *See id.* The policy required the insured to give the insurer notice of a claim "as soon as practicable," and the insured's right to coverage was conditioned on compliance with all of the policy's terms. *See id.* at 638 (quoting policy language). Nevertheless, the Court held that the insured's "immaterial breach" of the notice provision "does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation." *Id.* at 631.

The *PAJ* majority did not overrule *Cutaia*, distinguish it, or even explain why it did not govern. *Id.* at 632–33. Instead, the Court relied primarily on the fact that TDI had mandated the prejudice-requirement endorsement for bodily injury and property damages under CGL policies in the wake of *Cutaia. Id.* at 632. Noting that CGL policies did not cover advertising injuries when TDI passed the endorsement and the endorsement had since been expanded to cover advertising injuries, the Court implied that TDI's failure to extend the prejudice requirement to advertising injuries sooner was merely an oversight that the Court was free to judicially correct. *Id.* at 632–33.

The four dissenting justices would have followed *Cutaia* and the Court's extensive precedent in notice-of-claim disputes before *Hernandez*. *PAJ*, 243 S.W.3d at 637–39 (Willett, J., joined by Hecht, Wainwright, and Johnson, JJ., dissenting). Rather than proposing to overrule *Hernandez*, they offered a logical basis for reconciling and distinguishing *Cutaia* and *Hernandez*:

the notice-of-claim requirement we enforced without regard to prejudice in *Cutaia* was expressly a "condition precedent" that had to be satisfied to trigger the insurer's coverage obligation,[19] while the *Hernandez* Court had "viewed"[20] the consent-to-settle requirement in *Hernandez* as a "covenant" that the insured had breached, which would relieve the insurer of its coverage obligation only if the breach was material. *PAJ*, 243 S.W.3d at 639 (Willett, J., joined by Hecht, Wainwright, and Johnson, JJ., dissenting). The *PAJ* majority, however, rejected this distinction between "conditions precedent" and "covenants," noting that the Court had made no such distinction in *Hernandez*. *Id.* at 635. But *Hernandez* had no reason to address this distinction because it involved an exclusion, not a condition precedent.[21] *See Hernandez*, 875 S.W.2d at 692.

The dissenting justices also pointed out that *Cutaia*'s argument for deference to state regulators was even stronger in *PAJ* than it had been in *Cutaia* because, after *Cutaia*, TDI had elected to "surgically" insert a prejudice requirement into some notice-of-claim provisions but not others. *PAJ* , 243 S.W.3d at 641. In post-submission briefing, the insurer pointed out that, since 2000, TDI had approved a designated endorsement that included a prejudice requirement for personal and advertising injury claims similar to that for bodily injury and property damage claims.

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[19] The policy in *Cutaia*, like the policy in *PAJ*, made the insured's compliance with "all the terms of this policy" a condition precedent to coverage. *Cutaia*, 476 S.W.2d at 278.

[20] The dissent stated: "Rather than treat the [consent-to-settle] exclusion as a condition precedent, the [*Hernandez*] Court viewed it as a covenant, an ordinary contractual obligation, the performance of which was excused only if the breach were material." *PAJ*, 243 S.W.3d at 638 (citing *Hernandez*, 875 S.W.2d at 692–93). While this is an accurate description of the reasoning in *Hernandez*, it glosses over whether the reasoning in *Hernandez* was correct. I would argue that it was not, for the same reasons the Court holds that there was no "breach" or "violation" in the present case: the policy did not obligate the insured to obtain the insurer's consent before settling a claim, it simply did not "did not apply" if the insurer settled without consent.

[21] Additionally, the *Hernandez* Court made no effort to distinguish *Cutaia*, failing to even mention it. *See Hernandez*, 875 S.W.2d at 691–93.

Id. at 642. In the dissent's view, TDI's adoption of the endorsement in 2000 underscored the absence of any such prejudice requirement in the pre-2000 policy at issue in *PAJ*. *See id.*

C. *Prodigy*

A year after we decided *PAJ*, the Court extended *PAJ*'s prejudice requirement to notice-of-claim provisions in claims-made policies. *Prodigy*, 288 S.W.3d at 375. The policy at issue in *Prodigy* covered "claims first made" against an insured during the policy term. *Id.* at 376. As "a condition precedent to [the insureds'] rights under this Policy," the policy required the insured to give the insurer written notice of a claim "as soon as practicable . . . but in no event later than ninety (90) days after the expiration" of the policy term. *Id.* A week after the policy expired, the insured notified the insurer of a claim that the insured had known about for over a year. *Id.* The insurer conceded that it was not prejudiced by the delay. *Id.* at 375. Following *PAJ*, the *Prodigy* Court held that, although the insured did not give the insurer notice of the claim "as soon as practicable," the insurer was obligated to cover the claim because it was not prejudiced by the delay. *Id.* at 382–83. Even though the policy's notice-of-claim requirement was a "condition precedent" to coverage, the Court again rejected the distinction between a condition precedent to coverage and a contractual covenant to perform. *Id.* at 378.

The insurer argued that *Prodigy* was distinguishable from *PAJ* because *Prodigy* involved a claims-made policy rather than an occurrence-based policy. *Id.* The *PAJ* Court had recognized a "critical distinction" between occurrence-based and claims-made policies in adopting the "benefit of the bargain" approach to determining materiality of a breach, indicating that notice requirements were "subsidiary to the event that triggers coverage" in occurrence-based policies but not in claims-made policies. *PAJ*, 243 S.W.3d at 631, 636 (quoting *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 658 (5th Cir. 1999)) (citations omitted). In *Prodigy*, the

Court reasoned that the policy's 90-day notice deadline was essential to the benefit of the bargain for a claims-made policy (often more accurately called a claims-made-and-reported policy) but the "as soon as practicable" limit was common in both claims-made and occurrence-based policies and was not essential to the benefit of the bargain for either. *Id.* at 378–81. The Court observed that these different limitations on notice served different purposes—the "as soon as practicable" notice requirement "serves to 'maximiz[e] the insurer's opportunity to investigate, set reserves, and control or participate in negotiations with the third party asserting the claim against the insured,'" while the requirement for notice within the policy period or within a certain number of days thereafter "is directed to the temporal boundaries of the policy's basic coverage terms" and "defines the limits of the insurer's obligation." *Id.* at 380 (quoting 13 COUCH ON INSURANCE 3D § 186:13).

Three of the four justices who dissented in *PAJ* also dissented in *Prodigy*, and the fourth concurred because, although he disagreed with the result in *Prodigy*, he agreed that the majority holding in *PAJ* dictated that result. *Prodigy*, 288 S.W.3d at 384–85 (Johnson, J., joined by Hecht and Willett, JJ., dissenting); *id.* at 383 (Wainwright, J., concurring). The dissent observed that, "when courts rewrite existing policy provisions as the Court does in this case, insurers' actuarial predictions of losses and expenses, and the process of setting premium rates to cover projected losses and expenses are disrupted." *Id.* at 387. In their view, "[p]olicy language and its effects on the insurer's business are matters better addressed through the legislative and regulatory processes than through the judicial process," because the legislative and regulatory processes allow prospective, rather than retrospective, implementation of changes to policy terms, such that premiums can be accurately assessed based on the risk actually assumed in the policy at the time the policy is issued. *Id.* at 387–88 (citing *Cutaia* in support of deference to legislative and

regulatory governance of insurance policy terms). Additionally, the dissent explained that the Legislature and TDI have "the time, staff, resources and expertise to investigate and bring all relevant information to bear on such issues." *Id.* at 389.

D. *Lennar*

Finally, the Court relied on the material-breach rule to impose the prejudice requirement again last year. In *Lennar*, a homebuilder determined that homes it had built using an exterior insulation and finish system (EIFS) were subject to serious water damage that worsened over time. 413 S.W.3d at 751. The builder decided to remove the EIFS from its homes and replace it with conventional stucco, regardless of whether the home had yet suffered from water damage, and it sought reimbursement of its costs from its insurers. *Id.* at 752. Condition E of the insurance policy provided that "no insured, except at their own cost, may voluntarily make any payment, assume any obligation, or incur any expense . . . without [the insurer's] consent." *Id.* at 753. The insurer had refused to consent to the insured's removal and replacement program because it removed and replaced all EIFS in all homes, without regard to the existence or extent of water damage to each home. *Id.* The court of appeals had held in an earlier appeal that the insurer could not deny coverage on the basis of the insured's failure to comply with Condition E unless the insurer was prejudiced by the breach, and neither of the parties asked this Court to review that holding. *See id.* ("Neither Lennar nor Markel sought review of the court of appeals' decision. Both have accepted that court's holdings as governing the case."). Because the insurer had not proven prejudice, the insurer could not deny coverage based on Condition E. *Id.* at 756.

But Condition E was not the only consent-to-settlement provision in the policy. The insured sought coverage for its "ultimate net loss," which the policy defined as "the total amount of [property] damages for which [the insured] is legally liable" as determined "by adjudication,

arbitration, or a compromise settlement to which [the insurer] previously agreed in writing." *Id.* The insurer argued, and the Court assumed, that these were the three exclusive means of establishing the insured's liability for an "ultimate net lost." *Id.* On this basis, the insurer argued that it did not have to prove that the insured's failure to get consent prejudiced it because the consent requirement was "essential to coverage" under the policy. *Id.*

The Court disagreed, reasoning that the consent requirement in the policy's coverage provisions served "exactly the same" purpose as the consent requirement in Condition E, and thus was "no more central to the policy that Condition E." *Id.* The Court held that the prejudice requirement "operate[d] identically" with respect to the language in both provisions, and the insurer was therefore obligated to cover the insured's costs, regardless of whether the insured was legally liable for them, unless the insurer could show prejudice. *Id.* at 756–57.

Concurring in the Court's judgment, I explained that I would have reached a different result if we were "writing on a blank slate," but I acknowledged that *Hernandez*, *PAJ*, and *Prodigy* compelled the Court's result. *Id.* at 759–66 (Boyd, J., concurring). I recognized that "our precedents may be difficult to understand and reconcile," but concluded that they were now the basis on which insurers, insureds, TDI, and the Legislature reasonably relied in drafting and entering into insurance policies. *Id.* at 765–66. However, I urged the Court, "for the sake of clarity, consistency, and predictability," to abandon its flawed material-breach approach and instead recognize that the prejudice requirement was the product of the Court's policy preferences rather than the principles of contract construction. *Id.*

IV.
Distinguishing the Material-Breach Coverage Cases

Today, the Court declines to apply the material-breach analysis on which it relied in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*. The Court asserts that this case is distinguishable from

those cases for two reasons: first, those cases involved "breaches" while this case does not, and second, the "breached" provision in those cases were immaterial while the vacancy provision in this case is material.[22] The Court is correct that there is no breach here and the provision at issue is material, and these are legally sound bases for the Court's holding, which is also correct. But these are not legally sound bases for distinguishing *Hernandez*, *PAJ*, *Prodigy*, or *Lennar*. The reasoning that leads the Court to hold that there was no breach here would lead to the same holding in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*; and the analysis that the Court used to hold the provisions in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar* were not material would lead to the same holding today. In short, either the Court is right today or it was right in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*. Both cannot be true.

A. The "No Breach" Argument

The Court observes that Farmers is not relying on a breach to excuse itself from a coverage obligation, but instead is relying on a provision that defines the scope of the policy's coverage. The Court explains that Greene "did not breach her obligations under the policy by moving out of her home"; instead "the parties simply agreed on the effect of Green's vacating her house." *Ante* at ___. Because there was no breach, "the question of materiality of a breach and its subsidiary issue of prejudice are not raised." *Id*. at ___. Thus, the Court rejects Greene's reliance on *Hernandez* and *PAJ* because our holdings in those cases are "rooted . . . in contract law, focusing on the principle that a party is excused from its obligations to perform under a contract only if the other party commits a material breach." *Id.* at __.

[22] The Court sometimes uses the phrase "failure to comply" instead of "breach." If there is a difference between failing to comply with a contractual obligation and breaching a contractual obligation, this Court has never recognized it. To the contrary, the Texas Pattern Jury Charge and countless Texas breach of contract cases have treated a finding that a party has failed to comply with the contract as the equivalent of a breach of the contract.

I agree. Greene's policy does not obligate her to reside in the residence, and Farmers does not contend that she breached the policy by moving out of it. Instead, the policy limits the coverage to the period of time when the home is occupied and for sixty days thereafter, and Greene's act of moving out for sixty days simply placed the home outside the scope of the coverage she had purchased. The Court correctly concludes that the material-breach analysis does not apply here because the question is not whether Farmers is excused from paying on a covered claim due to a prior material breach of the policy, but rather, whether the policy covers Greene's home in light of the vacancy. The Court correctly concludes that it does not. *See id.* at __. But the same thing was true in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*.

The Court asserts that "[a]ll of these cases involved an insured's failing to do something it agreed to do or doing something it agreed not to do." *Id.* at __. This is simply incorrect. In *Hernandez*, the policy excluded underinsured motorist coverage if the insured settled with the underinsured motorist "without written consent of the company." *Hernandez*, 875 S.W. at 694 (Enoch, J., dissenting) (noting that the policy stated it "does not apply" under such circumstances). As in this case, Hernandez did not agree to obtain the insurer's consent to any settlement and thus "did not breach [his] obligations under the policy" by settling a claim without first getting his insurer's consent. Instead, "the parties simply agreed on the effect of" those actions: no coverage. *Compare id.*, *with ante* at ___.

Nor was there a breach in *Lennar*. That policy expressly defined the scope of coverage to include only those settlements to which the insurer had consented.[23] *See Lennar*, 413 S.W.3d at 755–56; *see also id.* at 764 (Boyd, J., concurring) (noting that the Court's opinion imposed a

[23] Again, this is according to Lennar's construction of the coverage definitions, which we assumed to be correct for purposes of the opinion.

prejudice requirement based on the prior-material-breach rule, even though "no one (not even the Court) asserts that Lennar 'breached' the policy . . . "). As in *Hernandez* and in the case here, Lennar did not agree to obtain the insurer's consent to any settlement, and its settlement without the insurer's consent "did not breach [its] obligations under the policy"; instead, "the parties simply agreed on the effect of" those actions: no coverage.[24] *Compare id.* ("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."), *with ante* at ___.

And even if the insureds agreed to give prompt notice of a claim in the policies at issue in *PAJ* and *Prodigy*, those policies expressly conditioned the insurance coverage on the giving of such notice. Thus, like Farmers in this case, the insurers in those cases did not argue that they were "excused from performing" under the policies because "the other party commit[ted] a material breach." *See ante* at ___. Instead, the insurers argued that their policies only covered claims of which they received timely notice. *Prodigy*, 288 S.W.3d at 376 (conditioning coverage on notice "as soon as practicable" and "in no event later than ninety (90) days"); *PAJ*, 243 S.W.3d at 631 (conditioning coverage on compliance with certain terms, including notice "as soon as practicable").[25] In other words, in those cases, as in this one, "the parties simply agreed on the

[24] The settlement-related language in Lennar's policy appeared in two places: Condition E and the definition of the "legal liability" that the policy covered. Lennar did not agree in either section to obtain the insurer's consent before settling a claim. Instead, both provisions merely indicated that the policy would not cover settlements to which the insurer had not consented—Condition E provided that unapproved settlements would be at Lennar's own expense, and the definition of "legal liability" required that the loss be established by adjudication or arbitration or in a settlement approved in writing. *See* 413 S.W.3d at 755.

[25] *Prodigy* and *PAJ* both involved notice requirements that were conditions precedent to coverage. This Court has explained the difference between a breach of contract and the failure to fulfill a condition precedent on numerous occasions, and the *Prodigy* and *PAJ* dissents did so as well. *See, e.g.*, *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010) (citing *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992)) (citations

effect of" the insureds' actions: no coverage. *Compare ante* at __, *with Lennar*, 413 S.W.3d at 755–56; *Prodigy*, 288 S.W.3d at 376; *PAJ*, 243 S.W.3d at 631. "[T]he question of materiality of a breach and its subsidiary issue of prejudice," thus, "[we]re not raised." *See ante* at ___.

B. The "Materiality" Argument

The Court also attempts to distinguish *Hernandez*, *PAJ*, *Prodigy*, and *Lennar* on the ground that the "breaches" in those cases were immaterial while the breach in this case is material. This effort fails for two reasons. First, the "materiality" of the breach is only relevant if (1) there is, in fact, a breach and (2) the non-breaching party relies on the breach to avoid performance under the contract. But neither is true here, and nor were they true in *Hernandez*, *PAJ*, *Prodigy*, or *Lennar*. In all of these cases, the issue was not whether the insured's conduct excused the insurer from fulfilling its coverage obligations under the contract; it was whether the insurer had a coverage obligation under the contract at all. In most of these cases, including this one, the insurer did not even allege that the insured had breached the contract. Instead, in each of these cases, the insurer argued that the policy simply did not cover the loss.

Second, even if there were a breach here, the "materiality" of the breach (or lack thereof) is indistinguishable from the materiality of the "breaches" in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*. As the Court points out, in all four cases, we determined whether the insured's "breach" was "material" by examining whether the "breach" deprived the insurer of the benefit that it could have reasonably anticipated from full performance—i.e., the benefit of the bargain. *See Lennar*,

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omitted); *see also Prodigy*, 288 S.W.3d at 384–88 (Johnson, J., joined by Hecht and Willett, JJ., dissenting); *PAJ*, 243 S.W.3d at 637–39 (Willett, J., joined by Hecht, Wainwright, and Johnson, JJ., dissenting). In short, when a party fails to fulfill a condition precedent to another party's obligation, the other party has no duty under the contract to perform that obligation, regardless of whether the contract has been breached. *See Solar Applications*, 327 S.W.3d at 108; RESTATEMENT (SECOND) OF CONTRACTS § 225(1), (2). The majorities' use of the material-breach analysis in *PAJ* and *Prodigy* confused failure to fulfill a contractual condition precedent with a mere breach of a contractual covenant.

413 S.W.3d at 755 ("Generally, one party's breach does not excuse the other's performance unless the breach is material. 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.'"); *Prodigy*, 288 S.W.3d at 377 ("an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation.") (quoting *PAJ,* 243 S.W.3d at 631, citing *Hernandez*, 875 S.W.2d at 692); *PAJ*, 243 S.W.3d at 631 (same); *Hernandez*, 875 S.W.2d 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.").

In each of those cases, we held that the "breach" was not "material" because it did not deprive the insurer of the benefit of the bargain, since the insurer was not prejudiced by the insured's conduct. *See Lennar*, 413 S.W.3d at 755 (holding that insurer was not deprived of the benefit of full performance because the insurer was not harmed by the insured's unapproved settlement); *Prodigy*, 288 S.W.3d at 382 (holding that insurer was not deprived of the benefit of full performance because the insurer was not harmed by the untimely notice); *PAJ*, 243 S.W.3d at 636–37 (holding that insurer was not deprived of the benefit of full performance because the insurer was not harmed by the untimely notice); *Hernandez*, 875 S.W.2d at 692 (holding that insurer was not deprived of the benefit of full performance because the insurer was not harmed by the insured's unapproved settlement). In short, we equated materiality with prejudice. *See Lennar*, 413 S.W.3d at 755; *Prodigy*, 288 S.W.3d at 382; *PAJ*, 243 S.W.3d at 633–34, 636–37; *Hernandez*, 875 S.W.2d at 692.

Under that test, the vacancy clause at issue in this case is equally immaterial because the insured's failure to reside in the house did not prejudice the insurer. Farmers, in fact, has expressly

conceded this point. Because the vacancy of the house did not contribute to cause the fire damage, the interest that the vacancy clause was designed to protect (minimizing the fire risks for a vacant dwelling) was not injured here. But for the same reasons, the interest that the prompt-notice provisions in *PAJ* and *Prodigy* were designed to protect (ensuring adequate time to gather information and prepare a defense) was not injured, and the interest that the consent provision in *Hernandez* and *Lennar* were designed to protect (the insurer's subrogation rights) was not injured. In sum, if the "materiality" test the Court announced in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar* is correct, the Court's holding today cannot be. If the Court's holding today is correct, and I agree that it is, the "materiality" test articulated in those four cases cannot be.

As the court states, "[a]t bottom this case is not about breach, it is about what coverage Greene purchased and Farmers agreed to provide. Greene seeks to have us re-write the insurance policy under the guise of 'construing' it so Farmers provides coverage it did not agree to provide, and Greene receives coverage she did not contract for." *Ante* at __. I agree, but this was equally true in *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*.[26]

C. Conclusion on the Material-Breach Analysis

The Court correctly identifies the heart of this matter: "At bottom this case is not about breach, it is about . . . coverage[.]" *Ante* at __. Justice Enoch correctly made the same observation his *Hernandez* dissent: "[T]his case is not about a breach of contract. This case is about coverage." 875 S.W.2d at 694. They are both right, and the same statement would be accurate about *PAJ*,

[26] In *Hernandez*, we "constru[ed]" the policy to cover a loss to which the policy expressly "d[id] not apply." *See Hernandez*, 875 S.W.2d at 694. In *PAJ* and *Prodigy*, we "constru[ed]" the policies to cover losses of which the insured did not provide timely notice even though the policies expressly conditioned coverage on timely notice. *See Prodigy*, 288 S.W.3d at 382; *PAJ*, 243 S.W.3d at 636. In *Lennar*, the policy expressly covered "ultimate net loss[es]," but we "constru[ed]" it to cover a loss that fell outside the definition of an "ultimate net loss." *See Lennar*, 413 S.W.3d at 756.

Prodigy, and *Lennar*. Despite the Court's efforts, there is no valid basis for distinguishing this case from *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*. Because those decisions rest on an inapplicable legal principle, they cannot logically be distinguished: How can a court distinguish the breach (or absence of a breach) in one case from the breach in an earlier case when there was no breach in the earlier case? If an insurer must show prejudice to enforce an "immaterial" provision, and provisions are "immaterial" if the insurer has suffered no prejudice, when is an insurer ever not required to show prejudice? If Texans are to have any certainty about how the courts will construe and apply their insurance contracts in future cases, we must disapprove of the reasoning on which we based our decisions in those cases.

V.
The Struggle for Certainty

Ultimately, I cannot join the Court's opinion in this case because it provides no clear basis on which courts or parties can decide whether the material-breach rule applies in future cases. Because we cannot distinguish this case from *Hernandez*, *PAJ*, *Prodigy*, and *Lennar*, we must follow those cases, overrule them, or expressly limit their application on some basis.[27] If we followed *Hernandez* and its progeny in this case, the rule of law would be flawed but consistent: policy provisions conditioning coverage on some conduct by the insured (like providing timely notice, obtaining consent to settle, or occupying the premises) could not be enforced absent a

[27] *See Lennar*, 413 S.W.3d at 759 (Boyd, J., concurring) ("[I]f 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.").

showing of prejudice. And parties would have *some* certainty about when an insurer must show prejudice to enforce conditions of coverage: almost always.[28]

On the other hand, if we overruled those cases and returned to our 100-plus years of precedent before *Hernandez*, continuity would suffer but Texas's insurance case law would be back on the right track: policy provisions conditioning coverage on the existence or occurrence of some fact or event would be enforced as written and as approved by TDI, absent a statute that requires a different result. And parties would have certainty about when an insurer must show prejudice to enforce conditions of coverage: when the contract or a statute so requires.

But if we expressly limited our prior decisions to the kinds of notice and consent provisions at issue in those cases, as I recommend here, we would retain the greatest degree of continuity and certainty available under our existing precedent. An insurer would have to show prejudice to deny coverage based on an insured's failure to give prompt notice or to obtain consent to settle under provisions like those in *Hernandez* and its progeny,[29] but would not have to show prejudice to enforce other terms of coverage unless the contract so provided. To achieve this, we would have to abandon the material-breach analysis we adopted in *Hernandez* and propagated in *PAJ*, *Prodigy*, and *Lennar*. As today's decision confirms, that analysis is legally incorrect and, more importantly, practically unworkable. The principle of *stare decisis* can justify turning a blind eye to the first

[28] I say "some certainty" and "almost always" because the line would have to be drawn somewhere. Presumably, an insured who failed to pay her premiums could not, after a fire or flood, simply pay-up before reporting the claim and be entitled to coverage because the insured was not prejudiced by the lack of timely payments. Otherwise, no insurer would pay premiums unless or until a claim arose.

[29] I say "like those in *Hernandez* and its progeny" because the holding in those cases do not apply to all notice and consent provisions. Specifically, the *Prodigy* Court indicated that while the "as soon as practicable" notice requirement was not enforceable absent prejudice, the 90-day notice requirement in the same provision would have been enforceable absent prejudice. 288 S.W.3d at 382.

shortcoming but not the second. Because the outcome in *Hernandez* depended on the "materiality" of a breach when there was, in fact, no breach, it cannot be logically distinguished or cabined.

Because *Hernandez* and its progeny have been our precedent for the last twenty years, I conclude that we should leave their holdings in place. But because their material-breach rationale lacks the sound logical basis that is the foundation of judicial predictability, we should abandon it in favor of a public policy rationale. *See Lennar*, 413 S.W.3d at 759 (Boyd, J., concurring) ("[I]f 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."). Having recognized that it is public policy, and not the operation of general contract law, that makes notice-of-claim and consent-to-settlement requirements like those in *Hernandez et alia* unenforceable absent prejudice, we should decline to extend that policy beyond those cases and *Puckett*, deferring instead to the TDI and the Legislature to dictate insurance policy terms, as the Court correctly does in this case.

VI.
Conclusion

I concur in the Court's judgment in this case, but do not agree with all of its reasoning, particularly its effort to distinguish this case from *Hernandez* and its progeny. I would acknowledge the flawed logic in that line of cases and expressly decline to extend it to any other insurance policy provisions that place the insured outside the circumstances for which there is coverage under the policy. This would permit consumers, TDI, the Legislature, insurers, and courts to reliably predict when such provisions operate according to general contract law and when the special prejudice requirement of *Hernandez* applies instead. Having restricted the judicially-imposed prejudice requirement to policy provisions that require prompt notice of claims and

consent to any settlements, I would defer to the Legislature and to the Texas Department of Insurance to decide whether to impose the prejudice requirement on any other policy provisions.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0937

MEHRDAD MOAYEDI, PETITIONER,

v.

INTERSTATE 35/CHISAM ROAD, L.P. AND
MALACHI DEVELOPMENT CORPORATION, RESPONDENTS

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

Argued January 8, 2014

JUSTICE WILLETT delivered the opinion of the Court.

This dispute asks whether a party waives the statutory right of offset under section 51.003(c) of the Property Code by agreeing to a general waiver of defenses in a guaranty agreement. The court of appeals answered yes, holding that section 51.003 creates an affirmative defense and that the guaranty agreement waives all possible defenses against liability, including the offset provision at issue here. We affirm.

I. Factual and Procedural Background

Villages of Sanger, Ltd. borrowed $696,000 from lenders I-35/Chisam Road, L.P. and Malachi Development Corporation. The three-year note was secured by a deed of trust covering real property in Denton County. Merhdad Moayedi, as president of Villages' general partner, Pars Investment, Inc., guaranteed the loan. The guaranty agreement provides that Moayedi's liability is

limited to $196,000 plus accrued interest and collection costs. The agreement also includes the general waiver of defenses at issue here:

> 7. Guarantor further agrees that this Guaranty shall not be discharged, impaired or affected by (a) the transfer by the Borrower of all or any portion of the real estate or improvements thereon, or of any security or collateral described in the Deed of Trust or in any other security document, or (b) any defense (other than the full payment of the indebtedness hereby guaranteed in accordance with the terms hereof) that the Guarantor may or might have as to Guarantor's respective undertakings, liabilities and obligations hereunder, each and every such defense being hereby waived by the undersigned Guarantor.

After Villages defaulted on the loan, I-35 purchased the secured property in a nonjudicial foreclosure sale at which I-35 was the sole bidder. The parties agree that the fair market value of the property at the time of the foreclosure sale was $840,000. The purchase price at foreclosure, however, was $487,200. After applying all credits and the proceeds from the sale, I-35 sued Moayedi to recover the $266,748.84 balance remaining on the note.

Moayedi included in his answer that under Property Code section 51.003, any deficiency owed should be offset by the difference between the fair market value and the foreclosure price. Later he moved for summary judgment based on that same section, asking the trial court to apply the offset. Moayedi argued that because the difference between the fair market value and the foreclosure price exceeded the amount owed, his liability should be extinguished. I-35 did not contest the fair market value of the property, and argued instead that paragraphs 7 and 13 of the guaranty agreement waived section 51.003. Moayedi eventually filed two motions for summary judgment, and I-35 also moved for summary judgment. The trial court granted summary judgment for Moayedi.

The court of appeals reversed, holding that in paragraph 7, Moayedi waived his right to apply section 51.003.[1] The court of appeals held that the offset is an affirmative defense. It concluded that the use of "any," "each," and "every" in the agreement encompassed all possible defenses and conveyed an intent that the guaranty would not be subject to any defense other than payment. It further concluded that at least three other provisions in the agreement indicated the same intent, including Moayedi's agreement that I-35 could enforce the guaranty without first resorting to or exhausting any security or collateral. According to the court, then, because Moayedi waived all defenses, he waived the right to avail himself of section 51.003's offset provision. The court also held that it could not address I-35's argument that Moayedi waived section 51.003 in paragraph 13 of the agreement.

Before this Court, Moayedi argues that section 51.003 should not be characterized as a defense and that the waiver in paragraph 7 is so lacking in specificity that Moayedi could not be said to have knowingly and intentionally waived his right to apply section 51.003. We disagree.

II. Discussion

We review a trial court's grant of summary judgment de novo.[2] When both parties move for summary judgment, each party bears the burden of establishing its entitlement to judgment as a matter of law.[3]

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[1] 377 S.W.3d 791.

[2] *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

[3] *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

A. Deficiency Judgments

Deficiency judgments based on foreclosure proceeds have been statutorily provided for since 1846.[4] The Court has always interpreted those provisions consistent with the understanding that a deficiency is premised on the concept of a foreclosure. For example, in the 1930s, the Legislature enacted a statute that allowed the debtor an offset for the actual value of the property.[5] This Court held that because the statute acted retroactively to impair existing contract obligations, it was unconstitutional under article I, section 16 of the Texas Constitution.[6] The Court stated, "It seems to us that the act before us does in fact operate upon and impair the 'obligation' of the contract, in that it nullifies that portion of the contract, read in the light of the then existing statute, which entitled the [creditor] to a deficiency judgment."[7] Concluding that even if the statute were interpreted as merely operating on the remedy for the enforcement of the contract, the provision was nevertheless unconstitutional because it abridged the rights of the mortgagee so as to make the contract less valuable.[8]

In 1965, the Court again addressed, albeit indirectly, whether a deficiency judgment is based on the foreclosure proceeds.[9] In that case, the debtor challenged the validity of the foreclosure sale,

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[4] *See Langever v. Miller*, 76 S.W.2d 1025, 1027 (Tex. 1934).

[5] Act of April 21, 1933, 43rd Leg., R.S., ch. 92, § 1, 1933 Tex. Gen. Laws 198, 199.

[6] *Langever*, 76 S.W.2d at 1029.

[7] *Id.*

[8] *Id.*

[9] *See Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965).

arguing that the property had been inaccurately described. The Court relied on the rule that a deficiency judgment is based on "the amount of the note, interest and attorney's fees, less the amount received at the trustee sale and other legitimate credits."[10]

Moreover, this Court's understanding is not unique; indeed, one of the very definitions of "deficiency" is the amount remaining on a debt after applying the proceeds realized at a foreclosure sale.[11] In keeping with this understanding, the Court has concluded that mere inadequacy of consideration does not invalidate a foreclosure sale and open the door to a fair market value determination.[12] Nor does a creditor need to "liquidate its security promptly . . . to minimize the guarantor's liability for any deficiency."[13]

B. Property Code Section 51.003

It was against that legal backdrop that section 51.003 was enacted. Section 51.003 was added to the Property Code in 1991. No doubt it is intended to protect borrowers and guarantors. When lenders are the sole bidders at a foreclosure sale, they can control the foreclosure sale price and by implication the deficiency judgment. There is little incentive for them to bid high when a low bid preserves the amount they might get in a judgment against the borrower. Thus, the nonjudicial foreclosure sale often does not directly represent what a buyer might pay in the market.

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[10] *Id.* (citing *Maupin v. Cheney*, 163 S.W.2d 380 (Tex. 1942)).

[11] BLACK'S LAW DICTIONARY 514 (10th ed. 2014).

[12] *See Am. Sav. & Loan Ass'n v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975); *Tarrant Sav. Ass'n*, 390 S.W.2d at 475.

[13] *FDIC v. Coleman*, 795 S.W.2d 706, 708 (Tex. 1990).

Under the new law, a deficiency judgment is still the amount by which the debt and foreclosure costs exceed the foreclosure sale price. But, that amount may be reduced if the borrower or guarantor files a motion under section 51.003. Section 51.003 provides that if the fact-finder determines that the fair market value is greater than the foreclosure sale price, the party obligated on the debt may ask the court to offset the deficiency owed by the difference between the fair market value and the foreclosure sale price:

> (a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.
>
> (b) Any person against whom such a recovery is sought by motion may request that the court in which the action is pending determine the fair market value of the real property as of the date of the foreclosure sale. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence . . . .
>
> (c) If the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation . . . exceeds the sale price. If no party requests the determination of fair market value or if such a request is made and no competent evidence of fair market value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency.
>
> (d) Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower prior to the lender bringing an action at law for any deficiency owed by the borrower. Notwithstanding the foregoing, the credit required by this subsection shall not apply to the exercise by a private mortgage guaranty insurer of its subrogation rights against a borrower or other person liable for any deficiency.[14]

[14] TEX. PROP. CODE § 51.003.

As an example, imagine a debtor owes $100,000 secured by a piece of property. At the foreclosure sale the property is sold for $60,000. The resulting debt is the amount owed minus the proceeds from the foreclosure sale. That amount is affected by the costs associated with foreclosure, but for simplicity's sake, we will ignore those variables. Here, the resulting deficiency would be $100,000 minus $60,000, or $40,000.

If section 51.003 applies, the court can hear evidence regarding what the fair market value of the property was at the time of the foreclosure sale. If the fair market value exceeded the foreclosure sale price, the court shall offset the deficiency by that difference. Using our example, let us assume that the fair market value of the property at the time of foreclosure is $75,000. Because the fair market value, $75,000, exceeds the foreclosure sale price, $60,000, the deficiency judgment can be reduced by the difference between those amounts, that is, by $15,000. The resulting amount owed is $40,000 (the deficiency) minus $15,000, or $25,000.

We disagree with Moayedi that the statute creates a system of two different methods of calculating a deficiency. Rather, the language of the statute presupposes the traditional definition of deficiency, one based on the foreclosure proceeds. But the statute provides an offset that otherwise would not be available. In other words, it provides a defense.

Section 51.003 is designed to ensure that debtors receive credit when their foreclosed property is sold at an unreasonably low price. But, like many statutory provisions designed to protect one contracting party or another, the benefit offered may be refused.

C. Whether Moayedi Waived Section 51.003

Texans have long embraced the principle of freedom of contract.[15] And this Court's decisions respect the strong public policy of respecting parties' freedom to design agreements according to their wishes.[16]

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[15] *See* Tex. Const. art. I, § 16.

[16] *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007).

Whether Moayedi can waive section 51.003 is not disputed by the parties. And although this Court has not addressed whether section 51.003 may be waived, other courts have consistently held so.[17]

We agree. In general, parties may waive statutory and even constitutional rights.[18] Occasionally, the Legislature decides that some benefits are too important—and thus may not allow them—to be waived. But, when it does decide to prohibit waiver, we ask that the Legislature speak clearly. And indeed, other provisions in the Property Code do include anti-waiver language.[19] This anti-deficiency law, however, nowhere prohibits waiver.

So, Moayedi could waive section 51.003. The question is whether he did. We agree with the court of appeals that the general waiver in paragraph 7 of the guaranty agreement waives the application of section 51.003.

To be effective, a waiver must be clear and specific. The United States Supreme Court has defined waiver as an "intentional relinquishment or abandonment of a known right or privilege."[20] This Court has defined waiver as the "intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right."[21] Determining whether there has been an "intelligent waiver" depends on the circumstances of the case.[22] Waiver is a matter of intent as "[t]here can be no waiver unless so intended by one party and so understood by the other."[23]

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[17] *See, e.g., LaSalle Bank Nat'l Ass'n v. Sleutel*, 289 F.3d 837, 842 (5th Cir. 2002); *Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 278 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

[18] *See In re Prudential Ins. Co.*, 148 S.W.3d 124 (Tex. 2004).

[19] *See, e.g.*, TEX. PROP. CODE §§ 28.006(a), 54.043(b), 59.004, 91.006.

[20] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[21] *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987).

[22] *See Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401–02 (Tex. 1967).

[23] *Lesikar v. Rappeport*, 33 S.W.3d 282, 300 (Tex. App.—Texarkana 2000, pet. denied).

Courts construe unambiguous guaranty agreements as any other contract.[24] If the meaning of a guaranty agreement is uncertain, "its terms should be given a construction which is most favorable to the guarantor."[25] The interpretation of an unambiguous contract, however, is a question of law for the court.[26] "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument."[27] Courts 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. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument."[28] When parties disagree over the meaning of an unambiguous contract, we determine the parties' intent by examining the entire agreement.[29] Moreover, unless the agreement shows the parties used a term in a technical or different sense, the terms are given their plain, ordinary, and generally accepted meaning.[30]

Until now, this Court has not addressed the level of specificity required to waive section 51.003. Most cases in which courts have concluded section 51.003 was waived involved language with more specificity than the language at issue here.[31]

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[24] *Coker v. Coker*, 650 S.W.2d 391, 393–94 (Tex. 1983).

[25] *Id.* at 394 n.1.

[26] *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650 (Tex. 1999).

[27] *J.M. Davidson v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

[28] *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006) (emphasis in original).

[29] *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

[30] *Id.*

[31] *See, e.g., LaSalle*, 289 F.3d at 840 (guaranty waived "right of offset"); *Segal*, 155 S.W.3d at 278 (guaranty waived "all rights, remedies, claims and defenses based upon or related to Sections 51.003, 51.004 and 51.005 of the Texas Property Code").

Moayedi argues that our decision in *Shumway v. Horizon Credit Corp.*[32] should apply here. *Shumway* addresses the necessary specificity of a debtor's waiver of rights to presentment, notice of the note holder's intent to accelerate, and notice of acceleration of the balance due upon default. In *Shumway*, we noted that a lender can neither create nor exercise its right to accelerate a debt unless the provisions creating that right are clear and unequivocal. Having held that a lender has no right to accelerate a debt without saying so in clear and unequivocal language, it necessarily followed that a debtor could waive notice of acceleration only by meeting the same exacting standard of clarity and precision.

Thus, the specificity required to waive notice of acceleration in *Shumway* was premised on the rule that the right itself was not created unless the lender initially met the high standard of specificity and precision. "To meet this standard," we held, "a waiver provision must state specifically and separately the rights surrendered."[33]

Moayedi relies on *Shumway* to argue that just as "all notice" or "any notice whatsoever" is ineffective to waive notice of acceleration and notice of intent to accelerate, here, the general waiver language in his guaranty contract is similarly ineffective.

Moayedi argues that he cannot be said to have knowingly and intentionally waived section 51.003, but we must ask, if that's the case, then what did Moayedi think he was waiving when he waived "any," "each," and "every" defense? We have no doubt that the waiver would include the UCC defenses under the Business and Commerce Code, and Moayedi conceded in oral argument that it does operate to waive ordinary, common-law defenses. Thus, the waiver is not meaningless. Nor is there any indication that Moayedi was not a sophisticated businessman. After all, he was the president of Villages' general partner. But, we can see no principled way to distinguish common-

[32] 801 S.W.2d 890 (Tex. 1991).

[33] *Id.* at 893.

law defenses from that created by section 51.003. It is true that unlike the ordinary common-law defenses, section 51.003 is a legislative creature. But that distinction gets us nowhere.

As the court of appeals concluded, the plain meaning of "any," "each," and "every" used in paragraph 7 results in a broad waiver of all possible defenses.

Just because the waiver is all encompassing does not mean that it is unclear or vague. To waive all possible defenses seems to very clearly indicate what defenses are included: all of them. Indeed, a waiver provision such as this one may be more descriptive to a layperson than a waiver referencing Property Code section numbers.

The parties disagree about the effect of other waivers and statements of liability in the agreement. We agree with Moayedi that the meaning of the waiver in paragraph 7 depends on the rest of the agreement, but we agree with the court of appeals that these provisions indicate an intent that the guaranty would not be subject to any defense other than full payment. In particular, Moayedi agreed that I-35 could enforce the guaranty without first resorting to or exhausting any security or collateral and waived diligence on I-35's part in the collection of payment from Villages. Read as a whole, then, we think the waiver in paragraph 7, though broad, is not without meaning and is intended to include all defenses.

D. Guaranty Agreement Paragraph 13

The parties also argue in this Court whether Moayedi waived section 51.003 when he waived "all rights and remedies of surety" in paragraph 13 of the guaranty agreement. Because we dispose of this case according to the waiver in paragraph 7 of the guaranty agreement, we need not reach the parties' arguments regarding paragraph 13.

III. Conclusion

The guaranty agreement yields but one conclusion: Moayedi waived his statutory right to an offset. We affirm the court of appeals' judgment.

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Don R. Willett
Justice

OPINION DELIVERED: June 13, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0957

IN RE FORD MOTOR COMPANY, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued December 3, 2013

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

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE DEVINE and JUSTICE BROWN joined, and in part III of which JUSTICE BOYD joined.

JUSTICE BOYD filed a dissenting opinion.

This case requires us to interpret the definition of "plaintiff" in the Texas-resident exception to the forum non conveniens statute. A defendant estate was sued in Texas regarding a Mexican decedent's alleged responsibility for a car accident in Mexico. The estate filed a third-party claim against Ford. Wrongful-death beneficiaries—some of whom are legal residents of Texas—intervened and also filed claims against Ford. Ford moved to dismiss under forum non conveniens, and the trial court denied the motion. Ford moved for mandamus relief, which the court of appeals denied, concluding that the decedent's beneficiaries could lay hold of the Texas-resident exception to forum non conveniens. The exception allows plaintiffs who are legal residents of Texas

to anchor a case in a Texas forum even if forum non conveniens would otherwise favor dismissal. We must determine whether the intervening wrongful-death beneficiaries are "plaintiffs" within the meaning of the exception. We agree with the court of appeals that the wrongful-death beneficiaries are distinct plaintiffs that can rely on the Texas-resident exception. Accordingly, we deny mandamus relief.

I. Background

This case arises from a fatal single-car accident. Juan Tueme Mendez, his brother Cesar Tueme Mendez, and two other passengers were traveling in a Ford Explorer in the Mexican state of Nuevo Leon when the left rear tire burst and the vehicle careened off the road. Juan (the driver) was injured, and Cesar (the passenger) was killed.

Juan, who is not a legal resident of Texas, sued his deceased brother's estate in Hidalgo County, where Cesar's estate was being administered.[1] Juan alleged in his petition that Cesar had failed to properly maintain the vehicle and the tires. Cesar's estate in turn filed a third-party claim against Ford and Michelin,[2] alleging defective design and negligence. The estate's petition sought survival damages for Cesar's pre-death pain and suffering, plus the costs of his funeral and burial.

On the same day, Yuri Tueme, the estate's administrator and Cesar's daughter, and two others filed their own claims against Ford and Michelin as wrongful-death beneficiaries. Soon after, Cesar's minor daughter J.T., with her mother Melva Uranga acting as next friend and guardian, also intervened in the lawsuit as a wrongful-death beneficiary of Cesar, asserting claims against Ford and

[1] The district court had granted a letter of administration in January 2011.

[2] Michelin later settled.

Michelin. The intervening claims mirrored the theories of liability in the estate's claims, but the intervenors alleged different damages from the estate. The intervening wrongful-death beneficiaries sought damages allowed for wrongful death, such as emotional pain and suffering, loss of consortium, loss of society, loss of support, and so on. Ford does not seem to dispute that Yuri, J.T., and Uranga are legal residents of Texas.[3] Several months later, Juan amended his petition to add Ford as a defendant in his personal-injury claim. Ford moved to dismiss under forum non conveniens. Following a hearing, the trial court denied the motion without explanation.

Ford filed a petition for writ of mandamus in the Thirteenth Court of Appeals. Ford argued that the trial court had abused its discretion in denying the motion to dismiss and that Ford had no adequate remedy by appeal. Specifically, Ford contended that the intervening beneficiaries are not "plaintiffs" within the meaning of the Texas-resident exception. Thus, the forum non conveniens factors would apply, and our decision in *In re Pirelli Tire, L.L.C.*[4] would favor dismissal.

The court of appeals denied relief.[5] The court agreed that a refusal to dismiss on forum non conveniens grounds could not be adequately remedied by appeal. However, the court held that the wrongful-death beneficiaries are plaintiffs that can take advantage of the Texas-resident exception. Since at least one of the beneficiaries is a legal resident of Texas, the court of appeals concluded that the trial court did not abuse its discretion in denying Ford's motion to dismiss. We agree.

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[3] We do not decide today whether a next friend can be a "plaintiff" for purposes of the Texas-resident exception. We do not need to address that question to resolve this case because J.T. and Yuri are legal residents of Texas.

[4] 247 S.W.3d 670 (Tex. 2007).

[5] ___ S.W.3d ___.

II. Discussion

Mandamus relief is only proper when the trial court abused its discretion and the relator lacks an adequate remedy by appeal.[6] We note at the outset that Ford does not have an adequate remedy by appeal. We have held that no adequate remedy by appeal can rectify an erroneous denial of a forum non conveniens motion.[7] Neither party questions the propriety of this holding.

The sole issue before us is whether the trial court abused its discretion by denying Ford's motion. "[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ."[8] We conclude, however, that the trial court did not misinterpret the statute at issue.

A. The Texas-resident exception allows plaintiffs who are legal residents of Texas to keep their cases in the state.

The Legislature has codified the common-law doctrine of forum non conveniens as follows:

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action.[9]

The statute then lists six factors that courts must consider in determining whether to stay or dismiss under forum non conveniens.[10]

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[6] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004).

[7] *Pirelli Tire*, 247 S.W.3d at 679.

[8] *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

[9] TEX. CIV. PRAC. & REM. CODE § 71.051(b).

[10] *Id.*

In order to ensure access to Texas courts for Texas plaintiffs, the Legislature created an exception to the forum non conveniens rule. The Texas-resident exception reads:

> The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state. If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court may not stay or dismiss the action under Subsection (b) if the plaintiffs who are legal residents of this state are properly joined in the action and the action arose out of a single occurrence.[11]

The formula is simple: plaintiff + legal residence = right to a Texas forum. But the terms "plaintiff" and "legal resident" require clarification. Both are defined in the statute, but only the former is directly at issue here. "Plaintiff" is defined as follows:

> "Plaintiff" means a party seeking recovery of damages for personal injury or wrongful death. In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, "plaintiff" includes both that other person and the party seeking such recovery. The term does not include a counterclaimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful death action, in bad faith for purposes of affecting in any way the application of this section.[12]

Ford argues that none of the wrongful-death beneficiaries qualifies as a plaintiff under the statutory definition for two reasons. First, the beneficiaries are third-party plaintiffs expressly excluded by the definition. Second, the wrongful-death beneficiaries are combined with the decedent into one single plaintiff, just like a pitcher and a catcher are both members of a single team. In this scenario, says Ford, the decedent's legal residency controls, and Cesar was not a legal resident of

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[11] *Id.* § 71.051(e).

[12] *Id.* § 71.051(h)(2).

Texas. We disagree with both arguments and hold that the intervening wrongful-death beneficiaries are distinct plaintiffs within the meaning of the Texas-resident exception.

B. The intervening wrongful-death beneficiaries are not third-party plaintiffs excluded from the statute's definition of "plaintiff."

Ford contends the intervening beneficiaries are third-party plaintiffs because:

1. Their claims mirror the estate's claim; and

2. Wrongful-death beneficiaries stand in the same legal shoes as the estate.

We disagree. As we read the statute, the definition's exclusion of third-party plaintiffs only excludes defendants who file third-party claims. Thus, intervenors can only constitute third-party plaintiffs under the statute if they can be properly characterized as defendants.[13] We conclude that the intervenors here, however, should not be considered defendants because they are not directly pitted against the plaintiff. Thus, the intervenors are not third-party plaintiffs under the statutory definition. Moreover, while beneficiaries' claims are in a sense derivative of a decedent's claim, this observation does not deprive the intervenors of the status of plaintiffs under the statute.

1. *The intervening beneficiaries are not third-party plaintiffs just because their claims mirror the estate's claims.*

The intervening beneficiaries are not third-party plaintiffs. The statutory definition of "plaintiff" indicates that a plaintiff does not stop being a plaintiff just because he files a cross-claim, counterclaim, or third-party claim. Rather, the statutory definition only excludes *defendants* who

[13] While intervenors are not traditional defendants in the sense that they are involuntarily drawn into litigation to defend against a claim, intervenors can still be characterized as defendants under particular circumstances. *See, e.g.*, *Perkins v. Freeman*, 518 S.W.2d 532 (Tex. 1974). We explore this concept in greater depth below.

file counterclaims, cross-claims, or third-party claims. Because intervenors here cannot be properly characterized as defendants, they are not excluded from the statutory definition of plaintiff.

i. The statutory definition of "plaintiff" excludes only defendants who file third-party claims, cross-claims, or counterclaims.

The ordinary meaning of the statutory text is the first dip of the oar as courts embark on interpretation of a statute. As part of that inquiry, we must consider words in light of the lexical environment in which we find them. "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."[14] Under the statutory definition here, the term plaintiff "does not include a counterclaimant, cross-claimant, or third-party plaintiff."[15] Third-party plaintiff is undefined. However, the context of the statute here indicates that this clause excludes *only defendants* who assert their own claims within the same lawsuit.

A third-party plaintiff is a party defending a claim who files a pleading to bring a third party into the lawsuit in an effort to pass on or share any liability.[16] Cesar's estate is a third-party plaintiff in this traditional sense; Juan sued the estate, and the estate in turn sued Ford as a third-party defendant. The wrongful-death beneficiaries of the estate then intervened and asserted claims against Ford.

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[14] *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

[15] TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2).

[16] *See* TEX. R. CIV. P. 38; BLACK'S LAW DICTIONARY 1708 (10th ed. 2014).

However, as a general matter, both defendants *and* plaintiffs can file counterclaims, cross-claims, and third-party claims. A plaintiff becomes a cross-claimant by asserting a claim against a fellow plaintiff.[17] If the plaintiff defending against the cross-claim then files a claim against the cross-claimant, the plaintiff-defendant would be a counterclaimant. Rule 38 of the Texas Rules of Civil Procedure allows a plaintiff facing a counterclaim to file a claim against a third party.[18] Thus, plaintiffs can file all three of the kinds of claims mentioned in the definition of "plaintiff." But while plaintiffs can wear all of these hats, they do not thereby cease to be plaintiffs as that word is commonly understood.

Statutory definitions must be interpreted in light of the ordinary meaning of the word being defined. A legislature can define terms however it wants.[19] However, when seeking to understand statutory definitions, "the word being defined is the most significant element of the definition's context."[20] Courts should not consider the meaning of the term to be defined in total isolation from its common usage. We presume that a definition of a common word accords with and does not conflict with the ordinary meaning unless the language clearly indicates otherwise.[21]

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[17] TEX. R. CIV. P. 97(e).

[18] *Id.* at 38(b).

[19] *TGS-NOPEC*, 340 S.W.3d at 439 ("If a statute uses a term with a particular meaning or assigns a particular meaning to a term, we are bound by the statutory usage.").

[20] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 232 (2012).

[21] *See id.* ("[W]hile it is true that drafters have the power to innovate upon the general meaning of words at large free from all legal restrictions, they do not have the power to do so free from the presumption that they have not done so." (footnote omitted) (internal quotation marks omitted)).

A definition of "plaintiff" that excludes parties to the original petition who proceed to file a cross-claim, third-party action, or counterclaim is contrary to the ordinary meaning of the word. If two parties file suit against a defendant, we would call them both plaintiffs. If one of the plaintiffs files a cross-claim against the other, common usage would still refer to both parties as plaintiffs. If a defendant filed a counterclaim against a plaintiff, and the plaintiff files a third-party action, we would still call that party a plaintiff. We look for a high level of linguistic clarity from the Legislature that it intends its statutory definition to depart markedly from the ordinary meaning of "plaintiff."

The language of the statutory definition, however, does not clearly signal a departure from ordinary usage because it can be reasonably read as a limitation on the kinds of *claimants* who fit into the definition. The Legislature has elsewhere defined "claimant" as "a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of damages."[22] The definition of "plaintiff" selects a subset of the broader term "claimant" by excluding the last three party types elsewhere listed as claimants in statutory definitions. It simply clarifies that the Texas-resident exception does not apply to all four categories of claimants. It does not, however, narrow the scope of the first category—plaintiff—or modify its ordinary meaning. The clause simply limits the definition of "plaintiff" to its traditional scope. It does not cause parties who would in common parlance constitute plaintiffs to drop out of the definition.

[22] TEX. CIV. PRAC. & REM. CODE § 41.001(1); *see also id.* § 147.001(2).

The structure of the definition affirms this reading. The first two sentences of the definition are inclusive and define the scope of "plaintiff." The third sentence carves out particular kinds of claimants from the definition. In full, it states:

> The term [plaintiff] does not include a counterclaimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful death action, in bad faith for purposes of affecting in any way the application of this section.[23]

The second half of the sentence, separated by the second "or," refers to parties who would typically be plaintiffs *but for* a bad-faith attempt to game the system. The first half of the sentence refers to the only set of circumstances in which *defendants* assert affirmative claims. The first clause addresses a narrowing of the broad term "claimant." The second clause, on the other hand, narrows the ordinary sense of the word plaintiff by excluding certain bad-faith plaintiffs. Thus, the logical structure of the sentence first addresses defendants who assert claims and then addresses plaintiffs who assert claims but fail to meet the definition for other reasons.

This text-driven analysis also accords with common sense. As we read it, the statute does not exclude a plaintiff from the Texas-resident exception just because he decides to turn on one of his fellow plaintiffs or bring in a third party. Our reading of the statute limits the scope of cross-claimants, counterclaimants, and third-party plaintiffs to defendants that assert claims. Cross-claims, counterclaims, and third-party claims present the only three kinds of claims that defendants can file in the same suit in which they present their defense. The clause is directed toward clarifying that a

[23] *Id.* § 71.051(h)(2).

defendant cannot become a party that triggers the Texas-resident exception just by asserting its own affirmative claims.

There are at least two compelling reasons for excluding defendants who file claims from the Texas-resident exception. First, if a defendant from Texas files a third-party claim, he could be forced to litigate in Texas even if he wants to remove the case to a foreign jurisdiction. His Texas residency status becomes a curse that anchors the case in Texas even if the plaintiff is a non-resident. Second, in a case where a non-resident of Texas sues multiple defendants in a Texas forum, a defendant who is a legal resident of Texas could single-handedly prevent the other defendants from removing the case from a Texas forum by asserting an affirmative claim. Thus, without this limiting clause, claims brought by non-resident plaintiffs on matters otherwise unrelated to Texas could become cemented in Texas fora. The rule prevents this and clarifies that the Texas-resident exception is designed for non-defendants seeking relief. By contrast, transfiguring plaintiffs into non-plaintiffs just because they file a counterclaim, cross-claim, or third-party claim seems counter-intuitive and contrary to the manner in which we use the word "plaintiff" in ordinary parlance.

JUSTICE JOHNSON's dissent argues that the statute does not limit "third-party plaintiff" to defendants. We believe the extensive context discussed above indicates otherwise. JUSTICE JOHNSON's reading would contort the ordinary meaning of the word "plaintiff" by reading the statutory definition of plaintiff as excluding parties to the original petition who file cross-claims, counterclaims, or third-party claims. The statute does not close the door on original plaintiffs just because they file a cross-claim, counterclaim, or third-party claim.

JUSTICE JOHNSON also faults our reliance on context in interpreting the statute. But context is essential to textual analysis, something this Court has held repeatedly, emphatically, and unanimously. "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."[24] Indeed, "[l]anguage cannot be interpreted apart from context."[25] Thus, we have tried exhaustively to interpret the statute in light of the surrounding context.

Ironically, JUSTICE JOHNSON's dissent, while faulting our textual analysis, offers no textual analysis of its own for the conclusion that "third-party plaintiff" here refers to both defendants and plaintiffs. But that conclusion, even from an isolated examination of the term by itself, is not obvious. Black's Law Dictionary defines a third-party plaintiff as "[a] *defendant* who files a pleading in an effort to bring a third party into the lawsuit."[26] While it is clear that a plaintiff can file a third-party claim under Rule 38 of our Rules of Civil Procedure, the rule never refers to plaintiffs who file such claims as "third-party plaintiffs," while the rule explicitly calls defendants who file third-party claims by that term. Thus, an isolated examination of "third-party plaintiff" does not yield an obvious answer, yet JUSTICE JOHNSON's dissent seems to assume that mere criticism of our contextual approach suffices to establish that the conclusion contrary to ours is correct.

JUSTICE JOHNSON also argues that we have wrongly relied on our own judgment as a guide to statutory interpretation and have thus risked "crossing the dividing line between judicial and

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[24] *TGS-NOPEC*, 340 S.W.3d at 439.

[25] *Id.* at 441.

[26] BLACK'S LAW DICTIONARY 1708 (10th ed. 2014) (emphasis added).

legislative prerogatives." But we only weigh the equities of various outcomes in our discussion regarding the intervenors' status in the litigation, not in our discussion regarding statutory interpretation. Intervenor status is not governed by statute, and our caselaw explicitly considers equitable factors when determining intervenor status, as discussed below. Of course, when interpreting a statute, we look to the language passed by the Legislature and signed by the Governor—not to our own lights.

ii. The intervenors are not third-party plaintiffs under the statute because they cannot be properly characterized as defendants.

Based on our reading of the statutory definition, third-party plaintiffs in this context only refer to defendants. However, defendants are not just parties sued by a plaintiff. Intervenors can also be characterized as defendants, depending on the nature of their interests and claims. Thus, intervenors here can be excluded as "third-party plaintiffs" if they are properly characterized as defendants. While intervenors need not necessarily be defending a claim to intervene in a defendant's capacity, we conclude that these intervenors are not defendants. Therefore, they cannot be third-party plaintiffs under the statutory definition, because the definition only excludes defendants who file third-party claims.

Intervenors can be characterized as plaintiffs or defendants[27] depending on the claims asserted and relief requested by the intervenor.[28] For example, in *Noble v. Meyers*, we treated the

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[27] *Compare Perkins,* 518 S.W.2d at 534 (characterizing intervenor as defendant) *with Noble v. Meyers*, 13 S.W. 229, 230 (Tex. 1890) (characterizing intervenor as plaintiff). *See also Jenkins v. Entergy Corp.*, 187 S.W.3d 785, 797 (Tex. App.—Corpus Christi-Edinburg 2006, pet. denied) (characterizing intervenor as defendant); *Welch v. Hrabar*, 110 S.W.3d 601, 608 (Tex.App.—Houston [14th Dist.] 2003, pet. denied) (characterizing intervenor as plaintiff).

[28] *See, e.g.*, *Perkins*, 518 S.W.2d at 534 (evaluating status based on the claims and request for relief in the intervenors' petition); *see also Sec. State Bank v. Merritt*, 237 S.W. 990, 992 (Tex.App.—Amarillo 1922, no writ). The Texas Civil Practice & Remedies Code allows for intervenors to enter suits as additional plaintiffs. *See* TEX. CIV. PRAC.

intervenor as a plaintiff. There, the plaintiffs sued a defendant to partition a piece of land.[29] The intervenor filed a petition claiming ownership of an undivided interest in the disputed land.[30] The plaintiffs responded to the intervention and raised various defenses but sought no relief from the intervenor.[31] The intervenor did not show up at trial, and a take-nothing judgment was rendered against him.[32] The intervenor appealed the judgment, arguing that his claim should have been dismissed without prejudice. We concluded: "An intervenor against whom no affirmative relief is asked by the pleadings of the other parties to the cause occupies so much the position of a plaintiff that the only proper action to take with regard to him, when he fails to appear, is to dismiss his suit for want of prosecution."[33] Since the intervenor acted like a plaintiff, we treated him like a plaintiff.

By contrast, in *Perkins v. Freeman*, we treated the intervenors as defendants even though no affirmative claims were leveled against them. In *Perkins*, paternal grandparents intervened in a child custody suit.[34] The father had obtained custody of the child following divorce, and the mother sued to gain custody.[35] The trial court allowed the grandparents and the father to each have six peremptory challenges despite a rule that only six peremptory challenges total should be given to all

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& REM. CODE § 15.003.

[29] *Noble*, 13 S.W. at 229.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 230.

[34] *Perkins*, 518 S.W.2d at 534.

[35] *Id.* at 533.

defendants.[36] The issue was whether the intervenors should be treated as defendants, thus limiting the total quantity of challenges between the grandparents and the defendant to six.[37] The intervenors' petition alleged that the plaintiff-mother was unfit and asked that custody be granted to the intervenor-grandparents or, alternatively, the father.[38] The intervenors made no allegation of the defendant-father's unfitness.[39] We treated intervenors as defendants because "there was no antagonism between the intervenors and defendant" and "[t]he defendant and intervenors were united in a common cause of action against the plaintiff."[40] Thus, we have held that intervenors can occupy the position of a defendant where their claims and prayer align them with the defendant and pit them directly against the plaintiff, even if no parties assert claims against them.

Perkins and *Noble* indicate that the status of the intervenor also hinges on the legal consequence of the designation. Equitable considerations played a role in both decisions. For example, in *Perkins*, we were concerned that allowing the intervenors and the defendant to each have a set of six peremptory challenges would give them an "unequal advantage" that "was so materially unfair that the judgment cannot be upheld."[41] Likewise, *Noble* appears to have been animated in part by the arbitrary unfairness of shutting out the intervenor's claim simply because of voluntary

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 534.

[39] *Id.*

[40] *Id.*

[41] *Id.*

insertion into the dispute while non-parties' title claims would remain unprejudiced by the judgment.[42] Thus, the designation of the intervenor's status is determined in part by the purposes and consequences behind the designation.

Our review of the caselaw indicates that courts rarely designate intervenors as defendants. At the stage of intervention, most intervenors inherently resemble a plaintiff: the intervenor files an affirmative claim, and, at least at the point of intervention, no parties are directly suing the intervenor. Where the intervenor is seeking affirmative relief and is not defending a claim, we should operate under a presumption that the intervenor is a plaintiff. Such an intervenor is only a defendant where the intervenor is closely aligned with the defendant, direct antagonism exists between intervenor and plaintiff, and equitable factors weigh in favor of treating the intervenor as a defendant.

The caselaw regarding how to classify intervenors does not persuade us that intervenors in today's case should be designated as defendants or third-party plaintiffs. The intervenors here resemble the intervenor in *Noble*, and *Perkins* is readily distinguishable. Moreover, equitable considerations strongly favor holding that intervenors are not third-party plaintiffs.

Like the plaintiff in *Noble*, the intervenors acted like plaintiffs, not defendants filing a third-party claim. They inserted themselves with affirmative claims for relief. The intervenors' interests are not in direct opposition to the plaintiff's. In fact, intervenors here are more like plaintiffs than the intervenor in *Noble*, because the plaintiffs in *Noble* actively opposed the intervenor's claims.

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[42] *See Noble*, 13 S.W. at 230.

Here, the plaintiff has not opposed the intervenors—in fact, he has joined with them in the action against Ford.

While the plaintiff's and intervenors' interests may be indirectly adverse, they are not in sufficiently direct opposition to justify treating intervenors as defendants. While the intervenors allege that Ford is fully liable, they have not intervened to defend or protect the estate. Rather, they seek their own affirmative and independent relief. However, the intervenors' interests may be indirectly harmed if Juan's claim against the estate is successful. The intervenors have an interest in Ford assuming the lion's share of liability, because they will not recover for any liability allotted to Cesar's estate.[43] Since the original plaintiff is suing both the estate and Ford, he has a lesser stake in the relative apportionment of liability between the two.

Nonetheless, the parties are not at loggerheads in the manner typical of a plaintiff-defendant relationship. The plaintiff's interests here are not threatened by the intervenors. The plaintiff, Juan, will be just as vindicated regardless of which of the two defendants ends up with the hot potato of liability. If anything, Juan might be better off if Ford is fully liable, since Ford's pockets doubtless run deeper than the estate's. Thus, the plaintiff has no beef with intervenors. The damages he will receive are just as valuable regardless of whose pocket they come from. Again, this is akin to *Noble*. There, the intervenor was treated as a plaintiff even though the plaintiffs actively opposed

[43] We decline to speculate as to whether any recovery against the estate would diminish the wrongful-death beneficiaries' future inheritance from the estate, as nothing in the record provides insight into this possibility. Plus, the question of intervenor status focuses on parties' interests internal to the litigation and does not extrapolate to considerations of what parties might prefer in general.

the intervenor's claim.[44] The intervenor, however, did not directly oppose the plaintiff's partition, nor did his claim depend on the outcome of partitioning. Similarly here, only one party has an interest adverse to the other's. The plaintiff has no real antagonism towards the intervenors' claim against Ford.

The intervenors here are in much less tension with the plaintiff than the intervenors in *Perkins*. There, the intervenors took a position directly contrary to the plaintiff's prayer for relief and thus took on features of a defendant. One could prevail only at the expense of the other. Here, the intervenors have simply taken a different route in the course for recovery than the plaintiff's original petition. While they have an indirectly adverse interest in the plaintiff's claim against the estate, the parties are not in direct opposition. Although the defendant estate has also filed claims against Ford, that does not mean that the intervenors occupy the same adversarial stance to the plaintiff. The intervenors should not suffer guilt by association.

Ford argues that we should ignore the fact that the plaintiff here has amended his petition to sue Ford and base intervenors' status on the litigation landscape at the time they intervened, when the original plaintiff had not yet added Ford as a defendant. We decline to do so. Parties' relative positions and interests change. The caselaw indicates that intervenors' status should revolve around the practical and ongoing realities of the litigation, not on a brief snapshot of the litigation landscape at the moment intervenors entered the suit. If Juan non-suited the estate, leaving only three non-defendant parties suing Ford, we would surely not designate intervenors as defendants, much less

[44] *See Noble*, 13 S.W. at 229–30.

third-party plaintiffs. Labels like third-party plaintiff describe how the parties in litigation relate to each other. The dynamics of these relationships can change as litigation proceeds, and so the labels change accordingly.

The interests of the defendant and the intervenors are also not as closely aligned as in *Perkins*. There, both intervenors and defendant shared the same goal of keeping custody from the mother. The intervenor grandparents sought that custody be bestowed upon them, or, alternatively, the father. In this case, unlike in *Perkins*, the estate and the beneficiaries seek distinct kinds of relief that do not overlap. The intervenors seek relief typical of wrongful-death claims, such as emotional pain and suffering, loss of consortium, society, and support, etc. The estate, on the other hand, seeks survival damages for Cesar's pre-death suffering and funeral expenses. The evidence needed to weigh the merits of these relative claims will vary, and thus they will not be treading the same path to recovery. Moreover, the intervenors' pleadings have not sought to defend or protect the estate. Intervenors thus do not share as close an alignment with the defendant as the intervenors in *Perkins*.

Equitable factors like those considered in *Perkins* and *Noble* also play a role in determining intervenor status, and they weigh against treating intervenors as defendants who have filed third-party claims. The third-party plaintiff designation would lead to arbitrary and illogical results. For example, here, the label of third-party plaintiff and right to access the Texas-resident exception hinge on whether the beneficiaries intervened before or after the original plaintiff (Juan) amended his pleadings to add Ford as a defendant. If Juan had added Ford prior to the intervenors' plea, then they would indisputably be plaintiffs, not defendants/third-party plaintiffs, because their claims would have been aligned with the original plaintiff at the point of intervention. Likewise, the third-party

plaintiff designation would not apply if the beneficiaries had filed an independent suit against Ford asserting the same claims. Then they would be able to lay hold on the Texas-resident exception even though Ford would likely move to consolidate the cases. Even after consolidation, they would not be third-party plaintiffs, since they would have come into the case as independent plaintiffs rather than intervenors. And if Juan had never sued the estate, or the estate had never sued Ford, the beneficiaries would be regular plaintiffs capable of taking advantage of the exception. Nothing in the statutory definition of plaintiff indicates that the independent actions of other litigants should control a party's access to the statutory right.

Moreover, under Ford's third-party plaintiff theory, if we dismissed for forum non conveniens, the estate would have to litigate in Mexico, but the intervenors/beneficiaries could still file an independent suit in Texas, since they would no longer be third-party plaintiffs. We decline to treat a fleeting and changeable procedural characteristic as a condition precedent to the Texas-resident exception.

JUSTICE JOHNSON and JUSTICE BOYD argue that the intervenors are fully aligned with the estate and antagonistic to Juan. We disagree. Juan's interests are wholly vindicated if the intervenors succeed. In the archetypal plaintiff-defendant relationship, each can only succeed at the expense of the other. Here, both intervenors and plaintiff come away victorious if Ford is held fully liable. Moreover, we believe the dissents overstate the degree of alignment between the estate and the intervenors. Their interests are only indirectly harmed if the estate is found liable, as this may reduce Ford's ultimate apportionment of liability. Where intervenors enter litigation asserting

independent claims for relief, we believe they must be more akin to the archetypal defendant than the scenario presented here before we will treat them as such.

JUSTICE BOYD also argues that the intervenors should be considered third-party plaintiffs because they filed a claim against a third-party defendant. But Ford is formally a third-party defendant only as against the estate. Juan certainly did not become a third-party plaintiff by adding a claim against Ford just because a third-party claim had already been filed against Ford by the estate. Ford is not a third–party defendant as against all parties in the litigation. Here, the intervenors face no counter-claim, so they cannot file a third-party claim. And, contrary to the dissents' assertion, they have never affirmatively sought to defeat Juan's recovery against the estate, so they do not become constructive third-party plaintiffs because of an attempt to defend the estate, assuming this is even possible.

JUSTICE BOYD asserts that Juan's later amended petition adding Ford as a defendant does not affect the calculus because this only turns the estate into a cross-claimant, which is also a category of claimant excluded from the definition of "plaintiff." But this point misapprehends the significance of Juan's amended petition for the relative alignment of interests of Juan and the intervenors. Because Juan added a claim against Ford, his interests are no longer adverse as to the intervenors, while his interests remain adverse to the estate's. Because the relationship between Juan and the intervenors diverges from the archetypal plaintiff-defendant relationship in this critical respect, we cannot conclude that the intervenors should be treated as defendants, and thus they cannot be third-party plaintiffs.

Finally, we note that neither dissent addresses the arbitrariness that results from their analyses, despite our caselaw's clear consideration for the results of a designation in determining an intervenor's appropriate status. While such considerations obviously do not factor into our statutory analysis, they constitute an important part of the designation of an intervenor's status.

* * *

The intervenors are not fully aligned with the estate. Their interests are not directly contrary to the plaintiff's interests. We thus decline to treat intervenors as defendants, which is a precondition to being a third-party plaintiff under the statutory definition. Moreover, the designation of third-party plaintiff would lead to arbitrary and illogical results. Thus, we conclude that intervenors are not third-party plaintiffs.

2. The intervening beneficiaries are not third-party plaintiffs merely because they stand in the decedent's legal shoes or assert the same claims as his estate (an actual third-party plaintiff).

Ford also argues that the derivative-beneficiary rule requires us to treat the wrongful-death beneficiaries as third-party plaintiffs. We disagree.

Wrongful-death beneficiaries are derivative parties. We have said:

> [T]he right of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death, and is subject to the same defenses to which the decedent's action would have been subject. In short, wrongful death action plaintiffs stand in the legal shoes of the decedent.[45]

[45] *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 347 (Tex. 1992).

This derivative-beneficiary rule springs from the language of the wrongful-death subchapter, which says: "This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived. . . ."[46]

This principle applies to both substantive and procedural limitations on the decedent's imaginary claim. For instance, in *Russell v. Ingersoll-Rand Co.*, wrongful-death beneficiaries sought to sue defendants even though the decedent could not have sued them before his death because the statute of limitations had run.[47] We held that if a decedent's action would have been barred by limitations if it had been asserted just before he died, a wrongful-death action is also barred.[48]

Our interpretation of the term "third-party plaintiff" in the statutory definition of "plaintiff" does not conflict with the derivative-beneficiary rule in the wrongful-death statute because that rule's domain does not extend to these circumstances. The derivative-beneficiary rule applies to characteristics of the decedent and his situation prevailing "immediately prior to his death."[49] This ensures that beneficiaries have no greater rights or stronger claims than the decedent would have had as a consequence of the circumstances obtaining at the time of death. Derivative status therefore relates back only to the decedent's circumstances immediately preceding his demise and is unrelated to the ongoing procedural status of the estate in the course of litigation.

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[46] TEX. CIV. PRAC. & REM. CODE § 71.003(a).

[47] *Russell*, 841 S.W.2d at 344. In Texas, statutes of limitations are considered procedural rather than substantive bars to bringing an action. *Id.* at 356 & n.11.

[48] *Id.* at 352.

[49] *Id.* at 347.

The third-party plaintiff moniker is not a feature of or limitation on the decedent's claim, had he brought one before death. Rather, it is a part of the procedural posture of the posthumous litigation. The status of third-party plaintiff is a characteristic arising out of and internal to the litigation. Indeed, while beneficiaries' claims are in a sense derivative, beneficiaries are entitled to their own independent recovery that does not benefit the estate.[50] They are entitled to their own counsel separate from the estate. They cannot simply piggyback on the estate; they must pay their own filing fees and file their own motions, pleadings, and briefs. Their damages must be established and are distinct from those of the estate. Thus, they are entitled to treatment as a party distinct from the estate in the course of litigation and are not chained to its litigation strategy. In other words, while the beneficiaries in some sense wear the decedent's shoes, they need not follow in the estate's footsteps.

As with Ford's intervenor argument, extension of the derivative-beneficiary rule to the procedural status of the estate invites arbitrary results. If the estate had decided not to sue Ford, the beneficiaries would fit into the exception, because they would not be tied to a label that excludes them. The derivative-beneficiary rule tethers the fate of the beneficiaries to the fixed history of the decedent's rights immediately prior to death, not to the capricious future of the estate's litigation choices.

* * *

The wrongful-death beneficiaries are not third-party plaintiffs. As we read it, the statutory definition of "plaintiff" limits the word to its traditional scope by preventing defendants from

[50] *See Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998) ("An action to recover damages for wrongful death is for the exclusive benefit of the deceased's surviving spouse, children, and parents.").

accessing the Texas-resident exception. The intervenors' claims do not align them with the estate in such a fashion that they should be treated as defendants, so they cannot be third-party plaintiffs under the statutory definition. And the derivative-beneficiary rule does not apply here, since the estate's status as a third-party plaintiff is unrelated to the ability of the decedent to file a claim immediately prior to his death.

C. Wrongful-death beneficiaries are distinct plaintiffs whose own residency can satisfy the Texas-resident exception.

The statutory definition of "plaintiff" "includes both" the decedent and other parties suing to recover damages for the decedent's wrongful death. We must address the issue of whether this means that the wrongful-death beneficiaries and the decedent are combined into one plaintiff for the purposes of the exception, or whether both wrongful-death beneficiaries and decedents are distinct and separate plaintiffs, each of whom can rely on his own legal residency for purposes of the exception. While beneficiaries are derivative plaintiffs, the statutory definition allows them to rely on their Texas residency. We hold that wrongful-death beneficiaries and decedents are both distinct plaintiffs under the statute.

We apply a statute's plain meaning "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results."[51] In determining a statute's meaning, we "consider statutes as a whole rather than their isolated provisions."[52] Here, context within the

[51] *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011).

[52] *TGS-NOPEC*, 340 S.W.3d at 439.

statutory definition and related provisions demonstrates that wrongful-death beneficiaries are distinct plaintiffs under the statutory definition.

The last clause of the statutory definition is a clear indicator that "includes both" means that wrongful-death beneficiaries and decedents are distinct plaintiffs. That clause says that the term "plaintiff" "does not include . . . a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful-death action, in bad faith for purposes of affecting in any way the application of this section."[53] In other words, parties who are appointed or assigned to an injured or deceased party's claim are not "plaintiffs" if they became such in order to game the system.

The Legislature's express exclusion of *bad*-faith assignees and personal representatives implies that *good*-faith assignees and personal representatives are included in the definition. Yet an assignee or a personal representative is a derivative party like a beneficiary.[54] This casts severe doubt on Ford's reading of the statute. Ford says a wrongful-death beneficiary is lumped together with the decedent as a single plaintiff because the beneficiary's claim is derivative of the decedent's claim. However, the bad-faith exception clearly implies that at least some derivative parties can be distinct and separate plaintiffs. Unless there is some textual basis for distinguishing between types of derivative parties, if any derivative party is a distinct plaintiff under the definition, then they all are.

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[53] TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2).

[54] *See Russell*, 841 S.W.2d at 347 (affirming that no wrongful-death action is allowed unless "the decedent could have maintained suit for his injuries immediately prior to his death"); *John H. Carney & Assocs. v. Texas Prop. and Cas. Ins. Guar. Ass'n*, 354 S.W.3d 843, 850 (Tex.App.—Austin 2011, pet. denied) ("An assignee 'stands in the shoes' of the assignor but acquires no greater right than the assignor possessed.").

In that case, the bad-faith exception leads inexorably to the conclusion that beneficiaries are indeed distinct plaintiffs and can make use of the Texas-resident exception. We must determine, then, whether the text provides a basis for including certain derivative parties as distinct plaintiffs while excluding wrongful-death beneficiaries.

We can find no textual basis for making this distinction. A wrongful-death beneficiary, like an assignee or a personal representative, is "a party [that] seeks recovery of damages for personal injury to or the wrongful death of another person."[55] Thus, when a decedent's estate and a wrongful-death beneficiary seek recovery, the term "plaintiff" "includes both" the estate and the beneficiary. Because of the bad-faith exception, we interpret "includes both" as creating distinct plaintiffs rather than one singular plaintiff. Therefore, wrongful-death beneficiaries, like assignees or personal representatives, are distinct plaintiffs under the statute.

Our distinct-plaintiff theory also fits with the broader context of the statute. The language of the Texas-resident exception reads in part: "The court may not stay or dismiss a plaintiff's claim under Subsection (b) *if the plaintiff is a legal resident of this state.*"[56] Multiple people cannot be "*a* legal resident of the state." Indeed, the subsection defining "legal resident" states that a legal resident is "an individual."[57] The language envisions that a single plaintiff must be capable of being a single legal resident. A single legal resident is a single individual. A single plaintiff, therefore, cannot include multiple individuals.

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[55] TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2).

[56] *Id.* § 71.051(e) (emphasis added).

[57] *Id.* § 71.051(h)(1).

If we decided that multiple individuals could be a plaintiff, we would create a gap in the statute that would then require judicial lawmaking to resolve. If a "plaintiff" may include multiple parties, then the Court must decide whose residency should control. It is axiomatic that "[t]o supply omissions transcends the judicial function."[58] If courts should not supply gap-filling laws, then they certainly should not create a demand for them by interpreting statutes so as to create holes that otherwise would not exist. When we interpret wrongful-death beneficiaries and decedents as distinct plaintiffs, we can simply apply the Legislature's resolution for actions involving multiple plaintiffs properly joined in an action arising from the same occurrence: "If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court may not stay or dismiss the action under Subsection (b) . . . ."[59] If we decide that multiple individuals can be a single plaintiff, then we must engage in a measure of judicial lawmaking to resolve the case.

Ford's arguments for the singular-plaintiff theory cannot carry the day. Ford points out that we have interpreted very similar language in the manner proposed by Ford in *Drilex Systems, Inc. v. Flores*.[60] There, we interpreted a provision defining "claimant" in the statute governing proportionate responsibility.[61] The definition at that time read: "In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, 'claimant' includes both that other person and

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[58] *Iselin v. United States*, 270 U.S. 245, 250 (1926).

[59] TEX. CIV. PRAC. & REM. CODE § 71.051(e).

[60] 1 S.W.3d 112 (Tex. 1999).

[61] *Id.* at 122.

the party seeking recovery of damages . . . ."[62] We concluded that the plain language of the statute combined the derivative and the injured parties into one single claimant.[63]

Ford's reliance on *Drilex* is misplaced, as the Texas-resident exception is readily distinguishable. First, the proportionate responsibility provision in *Drilex* did not have a bad-faith exception that clearly implies that derivative parties are distinct plaintiffs. Second, unlike the definition in *Drilex*, other crucial context here indicates that a single plaintiff is a party capable of being a single legal resident.

We are not concerned that disparate interpretations of almost identical language undermines principles of statutory construction. These statutes relate to different matters, so the text of the definition itself and other context in the exception carry much more interpretive weight than a statutory provision in a far-flung part of the *corpus juris*.

Moreover, Ford's reading of the statute can only be reached by contorting the ordinary meaning of "plaintiff" without any indication that the Legislature intended to depart from the term's common usage. As discussed above, "the word being defined is the most significant element of the definition's context."[64] When someone says that a baseball team "includes both" a first baseman and a shortstop, it plainly means that each of them is a part of the same team. Unlike a word like "team," however, "plaintiff," in common usage, does not apply to a collection of individuals, which renders

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[62] Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.07, 1987 Tex. Gen. Laws 40, 41 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 33.011(1)).

[63] *See Drilex*, 1 S.W.3d at 122.

[64] SCALIA & GARNER at 232.

the meaning of "includes both" far less obvious. "Plaintiff" in ordinary use is a term applied party-by-party. Neither common parlance nor formal dictionaries use the term as referring to a collective group. Black's Law Dictionary defines "plaintiff" as "[t]he party who brings a civil suit in a court of law."[65] Likewise, Webster's Third New International Dictionary defines plaintiff as "one who commences a personal action or lawsuit" or "the complaining party in any litigation."[66] Because the ordinary sense of the word should guide our understanding of ambiguous words or phrases in the Legislature's definition,[67] the ordinary meaning of "plaintiff" points to an interpretation that reads "includes both" as creating distinct plaintiffs rather than a collective plaintiff. At the very least, the nature of the word being defined clouds the meaning of "includes both" and makes it ambiguous. The bad-faith exception provides crucial context that resolves the ambiguity by treating derivative parties, like beneficiaries, as distinct plaintiffs.

Again, Ford argues that its reading of the statute accords with the traditional rule that a beneficiary is a derivative plaintiff who stands in the shoes of the decedent and that the beneficiary's claims are wholly derivative of the decedent's rights. Thus, given this principle, says Ford, we should favor a reading of the statute that does not give a beneficiary a right that the decedent would not have had if he had brought an action immediately prior to his death.

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[65] BLACK'S LAW DICTIONARY 1336 (10th ed. 2014).

[66] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1729 (3rd ed. 1961).

[67] SCALIA & GARNER at 232 ("The normal sense of [the word being defined] and its associations bear significantly on the meaning of ambiguous words or phrases in the definition.").

We acknowledge that the definition of "plaintiff" does not sit in isolation but must live in company with its neighbors in the broader body of law. "If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both."[68] No fair reading, however, can harmonize the wrongful-death statute's broader derivative-beneficiary rule with the Texas-resident exception. If we held that beneficiaries are not "plaintiffs" in deference to the derivative-beneficiary rule, we would render the bad-faith exception meaningless. If a good-faith assignee or personal representative can be a plaintiff, then a wrongful-death beneficiary must also be a distinct plaintiff. To hold otherwise would delete the bad-faith exception and violate our duty to "giv[e] effect to all words so that none of the statute's language is treated as surplusage."[69]

When the Legislature enacts two conflicting provisions that cannot be reconciled, "the special or local provision prevails as an exception to the general provision."[70] The narrow Texas-resident exception operates as a small carve-out to the broad rule that a wrongful-death beneficiary stands in the shoes of the decedent.

Ford also expresses the concern that the beneficiaries' reading of the statute renders the second sentence redundant. The first sentence of the definition reads: "'Plaintiff' means a party seeking recovery of damages for personal injury or wrongful death."[71] This broad language would

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[68] TEX. GOV'T CODE § 311.026(a).

[69] *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010).

[70] TEX. GOV'T CODE § 311.026(b).

[71] TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2).

include a wrongful-death beneficiary. The second sentence says: "In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, 'plaintiff' includes both that other person and the party seeking such recovery."[72] Ford says the second sentence becomes meaningless if it only means that a wrongful-death beneficiary is a plaintiff. The theory that decedent and beneficiaries are one plaintiff gives meaning to the second sentence by reading it as a limitation or exception to the first broader sentence.

We believe the two sentences are not redundant. The second sentence still has meaning as an added layer of clarity. Since the exception was written with the broad derivative-beneficiary rule as a backdrop, the second sentence serves as the kind of clear language courts seek when trying to determine whether a specific rule can be harmonized with a more general rule. The second sentence is not redundant when viewed as a specific clarification that the definition is stepping away from the traditional rule regarding derivative plaintiffs that might otherwise apply if the Legislature had only spoken with the level of generality in the first sentence.

* * *

Ford's interpretation directly contradicts the necessary implication of the bad-faith exception, conflicts with contextual provisions and asks us to engage in judicial lawmaking. We decline Ford's reading of the statute and hold instead that beneficiaries and decedents are distinct plaintiffs for purposes of the Texas-resident exception to the forum non conveniens doctrine.

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[72] *Id.*

III. Conclusion

A fair reading of the Legislature's Texas-resident exception requires that Ford defend itself in a Texas forum against claims brought by Texas residents. We cannot rewrite the statute under the guise of interpreting it. We deny the petition for writ of mandamus.

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Don R. Willett
Justice

OPINION DELIVERED: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0957

IN RE FORD MOTOR COMPANY, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued December 3, 2013

JUSTICE JOHNSON, joined by JUSTICE DEVINE and JUSTICE BROWN, and by JUSTICE BOYD as to Part III, dissenting.

The Court holds that the wrongful death beneficiaries who intervened in Juan Mendez's personal injury suit against the estate of his deceased brother Cesar are plaintiffs within the meaning of the Texas-resident exception to the forum non conveniens statute because *only* defendants can be third-party plaintiffs, and thus excluded from the definition of plaintiff under the exception. In my view the Court errs in two ways. First, it errs by reading language into the statute, and next it errs by misapprehending the interests of the intervenors.

Clearly the intervenors are not defendants; they were not sued by Juan and they run no risk of a judgment against them for his damages. But, just as clearly, their interests are so closely aligned with those of Cesar's estate that they should be characterized as defendants and third-party plaintiffs, just as the estate is a defendant and third-party plaintiff. As such, the Texas-resident exception should not apply to them in this lawsuit and a proper balancing of the statutory factors requires this suit to be dismissed. Because the Court fails to so hold, I respectfully dissent.

I. Background

On August 29, 2009, Juan was driving a 2001 Ford Explorer in Mexico when its left rear tire failed, resulting in an accident. Juan and Cesar, who was a passenger in the Explorer, were injured and Cesar eventually died from his injuries. In June 2011, Juan sued Cesar's estate through its administrator Yuri Tueme (the estate), in Hidalgo County, seeking personal injury damages. On July 27, 2011, at 12:24 p.m. Yuri, Cesar's adult daughter, filed a pleading on behalf of the estate denominated as "Defendant's/Third-Party Plaintiff's Original Third-Party Petition." In it she alleged that Ford Motor Company, Goodrich Corporation, Michelin North America, Inc., and Michelin Americas Research and Development Corporation were completely responsible for the accident, the injuries to Juan, and Cesar's death. She also alleged that, contrary to Juan's allegations, Cesar was not responsible to any degree and she claimed survival damages for Cesar's injuries. Then at 12:28 p.m. that same day, Yuri, along with Yadira N. Tueme Tijerina, another of Cesar's adult daughters, and Cesar's mother, Maria De Refugio Mendez Castillo, all in their capacities as individuals and wrongful death beneficiaries of Cesar (Yuri intervenors), filed a pleading entitled "Plaintiffs-Intervenors Yuri Tueme, Yadira N. Tueme Tijerina and Maria De Refugio Mendez Castillo's Original Petition in Intervention." They were represented by the same law firm that filed the third-party petition on behalf of the estate and their pleadings tracked those of the estate as to factual allegations, damage allegations, and theories of liability, except for differences to account for the estate's claiming survival damages while the Yuri intervenors claimed wrongful death

damages.[1] In August, represented by a different attorney from the Yuri intervenors, Melva Uranga filed an "Intervenors/Plaintiffs' Original Petition" in her alleged capacity as Cesar's wife and as mother, next friend, and natural guardian of J.T., Cesar's minor daughter (Uranga intervenors). The Uranga intervenors named Ford Motor Company, Goodrich Corporation, Michelin North America, Inc., and Michelin Americas Research and Development Corporation as defendants,[2] and like the estate and the Yuri intervenors, claimed those defendants were solely responsible for the accident, Juan's injuries, and Cesar's death. The Uranga intervenors made the same claims as the Yuri intervenors as to facts, wrongful death damages, and theories of liability.[3]

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[1] For example, in the "Facts" part of their petition, the Yuri intervenors repeated the factual allegations set out in the estate's third-party petition, deleting language in the final paragraph specifying that Yuri, as administrator of the estate, "asserts only those survival claims belonging to the Estate of Cesar Mendez Tueme" and adding language referring to "the intervenors." The mirror-image language of the pleadings asserted that third-party defendants Ford, *et.al.* were completely responsible for the accident and injuries to both Juan and Cesar. With the differences in language emphasized, the paragraphs are set out below. Paragraph A is from the defendant/third-party estate's third-party petition while paragraph B is from the intervenors' original pleading:

> A. For all of the reasons set forth herein Defendant/Third-Party Plaintiff would show that Third-Party Defendants are completely responsible and legally liable for the injuries suffered by Plaintiff Juan Tueme Mendez and that Third-Party Defendants are completely responsible and legally liable for all claims arising out of the death of Cesar Mendez Tueme ***(for which Yuri Tueme asserts only those survival claims belonging to the Estate of Cesar Mendez Tueme)***. As such, Defendant/Third-Party Plaintiff is not and should not be held responsible and legally liable for Plaintiff Juan Tueme Mendez' injuries, but rather such responsibility and legal liability is upon Third-Party Defendants herein.
>
> B. For all of the reasons set forth herein, Defendant/Third-Party Plaintiff ***and Intervenors*** would show that Third-Party Defendants are completely responsible and legally liable for the injuries suffered by Plaintiff Juan Tueme Mendez, and that Third-Party Defendants are completely responsible and legally liable for all claims arising out of the death of Cesar Mendez Tueme. As such, Defendant/Third-Party Plaintiff is not and should not be held responsible and legally liable for Plaintiff Juan Tueme Mendez' injuries, but rather such responsibility and legal liability is upon Third-Party Defendants herein.

[2] Ford Motor Company is the only one of the original third-party defendants remaining in the lawsuit.

[3] The pleadings of the Uranga intervenors paralleled those of the Yuri intervenors set out in footnote 1:

> For all of the reasons set forth herein, Intervenors/Plaintiffs would show that Defendant Ford and the Defendants Michelin are completely responsible and legally liable for the injuries suffered by

The trial court denied Ford's motion to dismiss based on forum non conveniens, the court of appeals denied mandamus relief, and Ford now asks this Court to issue a writ of mandamus directing the trial court to grant its motion. For the reasons set out below, I would do so.

II. Discussion

A. Definition of "Plaintiff"

Texas has codified the doctrine of forum non conveniens. TEX. CIV. PRAC. & REM. CODE § 71.051. The general rule is stated in section 71.051(b):

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether [certain enumerated factors apply].

Id. § 71.051(b). An exception to the general rule precludes dismissal of claims by plaintiffs who are legal residents of Texas:

> The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state. If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court may not stay or dismiss the action under Subsection (b) if the plaintiffs who are legal residents of this state are properly joined in the action and the action arose out of a single occurrence. The court shall dismiss a claim under Subsection (b) if the court finds by a preponderance of the evidence that a party was joined solely for the purpose of obtaining or maintaining jurisdiction in this state and the party's claim would be more properly heard in a forum outside this state.

Id. § 71.051(e). The statute defines "plaintiff" as:

> Intervenors/Plaintiffs, and that Defendant Ford and Defendants Michelin are completely responsible and legally liable for all claims arising out of the death of Cesar Mendez.

> a party seeking recovery of damages for personal injury or wrongful death. In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, "plaintiff" includes both that other person and the party seeking such recovery. *The term does not include a counterclaimant, cross-claimant, or third-party plaintiff* or a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful death action, in bad faith for purposes of affecting in any way the application of this section.

Id. § 71.051(h)(2) (emphasis added). The statute expressly excludes third-party plaintiffs from the definition of "plaintiff," but does not define "third-party plaintiff." Nor does the statute define or address intervenors.

B. The Intervenors are not "Plaintiffs"

The Court says that, in context, section 71.051(h)(2)'s language providing "[plaintiff] 'does not include a counterclaimant, cross-claimant, or third-party plaintiff'" excludes "*only defendants* who assert their own claims within the same lawsuit." ___ S.W.3d at ___. The Court then says that although the statute excludes only defendants from the definition of plaintiff, parties "need not necessarily be defending a claim to intervene in a defendant's capacity." *Id.* at ___. It proceeds to analyze whether these intervenors, who clearly are not defendants at risk of a judgment being rendered against them, should be "characterized" as defendants even though the Court has already concluded that the statute excludes *only* defendants from the definition of plaintiff. After analyzing the interests of the intervenors, Juan, and Ford, the Court concludes that the intervenors are not defendants and therefore cannot be third-party plaintiffs under the statutory definition. *Id.* at ___.

I agree that the intervenors are not defendants and that the definition of "plaintiff" in section 71.051(h)(2) excludes defendants who assert claims in the same lawsuit. But, I do not agree that the

definition of "plaintiff" excludes *only* defendants; the statute simply does not say so. I further agree that interests of non-defendant intervenors such as these must be analyzed to determine if they should be characterized as defendants, and whether the claims they make should be characterized as counterclaims, cross claims, or third party claims. But, unlike the Court, I conclude that a proper analysis of the intervenors' interests vis-à-vis Juan, the estate, and Ford yields the conclusion that they should be characterized as third-party plaintiffs.

The Court says that, in context, section 71.051(h)(2)'s language "limits the scope of cross-claimants, counterclaimants, and third-party plaintiffs to defendants that assert claims." *Id.* at ___. But, it is well established that courts must take statutes as we find them and presume the Legislature included words in statutes that it intended to include and omitted words it intended to omit. *See, e.g.*, *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010); *Entergy Gulf States Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (noting that we must enforce statutes as written and refrain from rewriting text that lawmakers chose). If it had been the Legislature's intent to limit the application of section 71.051(h)(2) to actual defendants, it could have inserted the words "a defendant who is," so that the limitation read "[t]he term [plaintiff] does not include *a defendant who is* a counterclaimant, cross-claimant, or third-party plaintiff." Or, the Legislature could have simply said that "[t]he term [plaintiff] does not include a defendant." We must presume that the Legislature intentionally omitted any reference to "defendant." Moreover, courts do not read language into a statute unless doing so is necessary to avoid an absurd result. *See, e.g.*, *Presidio Indep. Sch. Dist.*, 309 S.W.3d at 930. The Court does not propose or demonstrate that the language of section 71.051(h)(2) yields an absurd result as it is written. Nor does it contend that grafting the "only

defendant" language into section 71.051(h)(2) avoids an absurd result. The Court lays out reasons why defendants are excluded from the definition of plaintiff in section 71.051(h)(2), but no one is arguing that the defendant estate is a plaintiff under the statute.

Ironically, the Court's reasons for excluding defendants from being plaintiffs under the statute apply to these intervenors. For example, the Court first says that categorizing a resident defendant who files a third-party claim as a plaintiff could force the defendant to litigate in Texas even if he wants to remove the case to a foreign jurisdiction. But under the Court's construction of the statute, a resident defendant who does not file a third-party claim can nevertheless be unwillingly locked into litigating in Texas by a Texas resident who intervenes, as the intervenors did here. Next, the Court says excluding defendants from the definition of plaintiff keeps one Texas resident defendant who files an affirmative claim from single-handedly preventing other defendants from removing the case from Texas. But again, under the Court's construction of "plaintiff," none of the defendants have to file affirmative claims in order for them to lose the option of removal: Texas-resident intervenors can lock multiple defendants into litigating in Texas despite the defendants' unified desire to remove the case from Texas.

In sum, the Court simply does not convincingly demonstrate that it is an absurd, nonsensical result for "plaintiff" in section 71.051(h)(2) to mean both actual defendants and intervenors who are not defendants but who are aligned with defendants. Nor does it adequately explain how defining "plaintiff" to mean only actual defendants avoids an absurd result. Under the Court's construction of the statute, the Legislature has precluded a Texas resident from section 71.051(e)'s protection when the resident is involuntarily haled into court as a defendant and files a counterclaim or third-

party claim. Yet, the Court concludes the Legislature afforded a Texas-resident intervenor section 71.051(e)'s protection—and ability to lock all the other parties into a Texas forum—even though the intervenor aligns with a resident defendant and files the same claim against the original plaintiff or third-party defendant as did the named resident defendant. *That* is a nonsensical result. Rather than construing the statute according to the words the Legislature used, or here, did not use, the Court veers off course and uses "context" to re-make the statutory exception. In the Court's final analysis it seemingly does so because it is unwilling to accept the procedural construct the Legislature's words created. The Court notes that if Juan's claim against the estate is dismissed, the estate will have to litigate in Mexico while the intervenors could file an independent suit in Texas and the Court "decline[s] to treat a fleeting and changeable procedural characteristic as a condition precedent to the Texas-resident exception." ___ S.W.3d at ___. But that position turns the protection of section 71.051(h)(2) on its head under the circumstances before us. The Texas-resident exception serves to keep Texas plaintiffs' claims in Texas, not to insulate claims of non-resident plaintiffs such as Juan from application of section 71.051(b).

Despite its construction of section 71.051(h)(2) as applying only to defendants and the fact that no one contends the intervenors here are actually defendants, the Court proceeds to analyze whether the intervenors should be characterized as defendants. I agree that such an analysis should be made; the intervenors are not actual defendants, and yet under long standing precedent their interests must be analyzed to determine if they should be characterized as such.

Typically, although not always, an intervenor is characterized as either a plaintiff or a defendant. The Court notes that when it is necessary to characterize the nature of an intervenor as

a plaintiff or a defendant, the determination generally turns on the claims asserted and relief requested by the intervenor as well as the purposes and consequences underlying the necessity for the designation. ___ S.W.3d at ___; *see Perkins v. Freeman*, 518 S.W.2d 532, 534 (Tex. 1974). This Court has referred to parties who intervened in a lawsuit as third-party plaintiffs, as have others. *See, e.g.*, *Prudential Secs., Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (per curiam); *Humble Oil & Refining Co. v. Westside Inv. Corp.*, 428 S.W.2d 92 (Tex. 1968). Although the two foregoing cases did not focus on the classification of the intervenors, they demonstrate that intervenors can have a status other than that of either plaintiff or defendant. *See Marshall*, 909 S.W.2d at 898. And while it may be true, as the Court says, that a third-party plaintiff is typically a defendant in the original action who files a pleading to bring a third party into the lawsuit in an effort to pass on or share any liability, ___ S.W.3d at ___, that is not the case when a party who has not been sued as a defendant intervenes in support of and in alignment with a defendant/third-party plaintiff, as has happened here.

The intervenors could have filed a separate suit against Ford, but they chose not to do so. Intervenors such as the Yuri and Uranga intervenors (sometimes referenced collectively as "intervenors") are basically interlopers in a lawsuit. As such, they must take the case as it exists when they join it; they do not get to remake it to fit their interests. *See Buzzini Drilling Co. v. Fuselier*, 562 S.W.2d 878, 879 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Rogers v. Searle*, 533 S.W.2d 440, 443 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Corzelius v. Cosby Prod. & Royalty Co.*, 52 S.W.2d 270, 272 (Tex. Civ. App.—Fort Worth 1932, no writ). And when they showed up, these intervenors joined forces with and asserted the same claims and allocations

of fault as the defendant estate: Ford was responsible for the accident, Cesar was not responsible for it, the accident caused Juan's and Cesar's injuries, and the intervenors were entitled to damages because of Cesar's death. This alignment is to be expected because the claims of both the estate and intervenors are derivative of Cesar's claims. *See Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex. 1992); see also TEX. CIV. PRAC. & REM. CODE § 71.003(a). As the Court sets out, the intervenors' claims mirror those of the estate. The intervenors have no interest adverse to the estate's claims. Rather, their interests are indistinguishable from those of the defendant/third-party plaintiff estate's, except, as previously noted, the intervenors are not exposed to a potential judgment for Juan's damages, and the types of damages the estate and wrongful death beneficiaries claim differ.

The Court says, at different points, that "the intervenors' interests are not in direct opposition to the plaintiff's," "the intervenors have taken no position on the estate's liability," and "the plaintiff has no beef with intervenors." ___ S.W.3d ___, ___. But those statements do not ring true. The intervenors' interests *are* in direct opposition to Juan's claim against the estate; the intervenors *have* taken a position on the estate's liability; and the plaintiff *does* have beef with the intervenors. First, the intervenors' interests are in direct opposition to those of Juan, the plaintiff who is claiming that Cesar's negligence caused the accident and who is seeking recovery from the estate. After all, how could they not be? If the intervenors aligned with Juan and blamed Cesar and his estate, they would in effect be blaming themselves and seeking to defeat or diminish their own claims. Next, the intervenors' interests were and are exactly aligned with those of the estate as to the estate's liability to the only plaintiff, Juan. Their position is and always must be that Juan is wrong: Cesar did not

fail to properly maintain the vehicle and he was not otherwise negligent, because any fault by Cesar directly affects any recovery by intervenors. And the intervenors claim that the accident was all Ford's fault—contrary to Juan's original claim that it was all Cesar's fault and his continuing claim that Cesar was at fault as well as Ford. Finally, as the foregoing shows, Juan may not have a direct "beef" with the intervenors in the sense that he has not sued them, but his interests and theirs directly conflict because he claims that Cesar caused the wreck while their position is that he did not. On the other hand, Ford's interests were and are aligned with the claims made in Juan's petition to the extent that Juan claims Cesar was at fault in causing the accident. Both Juan and Ford are adverse to the estate and the intervenors insofar as Cesar's role in causing the accident is concerned, even though the intervenors are not technically defendants.

The Court notes that in *Perkins* "[w]e treated intervenors as defendants because 'there was no antagonism between the intervenors and defendant' and '[t]he defendant and intervenors were united in a common cause' against the plaintiff." ___ S.W.3d at ___ (quoting *Perkins*, 518 S.W.2d at 534). In this case it is clear that there is no antagonism between the defendant/third-party plaintiff estate and the intervenors. The estate and the Yuri intervenors are represented by the same attorneys. The estate and all the intervenors will want jurors receptive to the position that Cesar was not negligent, and unreceptive to the allegations of both Juan and Ford that Cesar was at fault in causing the wreck. The estate and the intervenors will be aligned as to the types of liability witnesses and evidence needed to show Ford was at fault and Cesar was not. The estate and the intervenors will have different damages issues and models, but their damages claims will not conflict and their jury

arguments will be complementary, not antagonistic. Melva Uranga summarized the positions of the intervenors and the estate in an affidavit in support of her intervention:

> I am aware that I have brought claims for [J.T.] against the Ford Motor Company and Michelin tire companies. I know that these claims are being pursued for the benefit of [J.T.]. I know that Yuri Tueme has been appointed as administrator of the Estate of Cesar Tueme, and that the Estate has brought the exact same kind of claims against the Ford Motor Company and Michelin tire companies. I also know that Cesar's mother, and all his adult children, have brought the exact same kind of claims against the Ford Motor Company and Michelin tire companies.

In sum, there simply is no antagonism between the estate and the intervenors whereas there is direct antagonism between Juan, who is claiming Cesar negligently caused the accident, and the estate and intervenors who claim Cesar was not negligent. I recognize that after the estate and intervenors sued Ford, Juan also did. But the alignment of Juan, the estate, and the intervenors against Ford does not remove the antagonism that exists between Juan, on the one hand, and the estate and the intervenors on the other. *See Savage v. Cowen*, 33 S.W.2d 433, 434 (Tex. Comm'n App. 1930, judgm't adopted) ("By seeking recovery against intervenor as well as defendants, intervenor became a defendant as to plaintiffs; his claim is adverse to that of plaintiffs, and, as against them, his position is the same as that of the original defendants."). Thus, the intervenors should be characterized as defendants and third-party plaintiffs and they do not fall under the plain language of the Texas-resident exception in section 71.051(b).

Not only must courts take statutes as they are written and enacted, we must take cases as they are structured by the parties and as they come to us. *See, e.g.*, *Man Engines, Inc. v. Shows*, ___ S.W.3d___, ___ (Tex. 2014) ("We take cases as they come . . .."). The Court attempts to justify its decision by addressing scenarios that are not before us, such as if the intervenors filed separate suits

instead of intervening. But those scenarios show only that different facts and different litigation choices can yield different litigation results. Whether we believe the procedural structure enacted by the Legislature is the most or least efficient way to accomplish a goal is not the proper test for whether we should read words into a statute and risk crossing the dividing line between judicial and legislative prerogatives. The proper test is the longstanding one of whether, absent our reading words into the statute, the statute yields an absurd result. *Presidio Indep. Sch. Dist.*, 309 S.W.3d at 930. And in this instance, if the statute does not reach an absurd result by precluding Texas residents who are defendants and third-party plaintiffs from meeting the statutory definition of plaintiff—and the Court does not say it does—then it is not an absurd result for the intervenors in this case to be precluded from being characterized as plaintiffs. The Court's characterizing the intervenors as plaintiffs instead of as third-party plaintiffs, when they are completely aligned with the defendant estate that is also a third-party plaintiff in the lawsuit, circumvents legislative intent manifested in the words used in section 71. I would characterize the intervenors as third-party plaintiffs, hold that they do not come within the Texas-resident exception to forum non conveniens under the statute, and hold that the only plaintiff in this suit for purposes of Ford's motion to dismiss is Juan—a resident of Mexico. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2). Those positions would bring us to the question of whether to direct the trial court to grant Ford's motion to dismiss. For the reasons set out below, I would do so.

On a last note, the Court says I would read the statute to exclude original plaintiffs in a suit from the application of section 71.051(e) if they were to file a cross-claim, counterclaim, or third-party claim. The Court is incorrect; I do not even attempt to address such a situation because it

would be completely different from the facts before us and would implicate different concerns. Unquestionably, the Legislature intended to provide that section 71.051(b) does not apply to claims of Texas-resident plaintiffs. But harmonizing the language of the statute so that such intent is fulfilled under circumstances not before us will depend on those particular facts and factors.

III. Application of the Forum Non Conveniens Factors

Typically, the plaintiff's choice of forum is given great deference when the doctrine of forum non conveniens is being considered. *In re Pirelli Tire L.L.C.*, 247 S.W.3d 670, 675 (Tex. 2007). But a nonresident's choice of Texas as a forum is generally afforded substantially less deference than that of a Texas resident. *Id.*; *see also Quixtar, Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 31 (Tex. 2010). And if a plaintiff is not a Texas resident, courts must consider the factors[4] listed in the forum non conveniens statute when determining whether to dismiss or stay an action for forum non conveniens. TEX. CIV. PRAC. & REM. CODE § 71.051(b). If the factors weigh in favor of the action more properly being heard in a forum outside Texas, the claim must be dismissed. *In re Gen. Elec. Co.*, 271 S.W.3d 681, 686 (Tex. 2008).

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[4] The factors to be considered are whether:
(1) an alternate forum exists in which the claim or action may be tried;
(2) the alternate forum provides an adequate remedy;
(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.
TEX. CIV. PRAC. & REM. CODE § 71.051(b).

Consideration of the section 71.051(b) factors begins with determining whether there is an adequate alternative forum where the lawsuit may be tried, and then balancing the public and private interests at stake. *Pirelli Tire*, 247 S.W.3d at 675-77. An adequate alternative forum exists if the defendant would be subject to the alternate forum's jurisdiction by consent or otherwise, and the substantive law in the alternate forum would not deprive the parties of a remedy. *Id.* at 677-78. The private interest factors include the location of the evidence, the location of witnesses, the availability of a compulsory process for ensuring the attendance of those witnesses, and the location of the accident scene. *Id.* at 677. The public interest factors include the administrative burden on the courts and citizens of Texas with little or no connection the lawsuit, the extent to which acts or omissions in Texas contributed to the accident or injury, and the alternative forum's interest in protecting the rights of its citizens. *Id.* at 679; *see also* TEX. CIV. PRAC. & REM. CODE § 71.051(b)(5).

The circumstances here, similar to those we addressed in *Pirelli Tire*, weigh in favor of dismissal for forum non conveniens. *Pirelli Tire*, 247 S.W.3d at 677-78. First, Mexico is an adequate alternative forum that is available for the litigation to proceed. Ford has consented to Mexico's jurisdiction and the record demonstrates that Mexican law provides a remedy.

The private factors at stake favor litigating this case in Mexico. The accident site is in Mexico, the vehicle was registered in Mexico, both the plaintiff and decedent were residents of Mexico at the time of the accident, the crash site investigators and treating physicians are all located in Mexico, the accident report and autopsy took place in Mexico, and the majority of the factual

evidence and pertinent fact witnesses are located in Mexico. A Mexican court can compel attendance of these witnesses while a Texas court cannot.

Additionally, while Texas has an interest in seeing that persons injured by negligence or other liability-creating acts allegedly taking place in Texas are compensated for injuries they suffer, the public interest factors weigh at least as strongly in Mexico's favor. The connections Texas is alleged to have with the accident are: (1) several months before the accident a nail was removed from the right front tire (the left rear tire is the one that failed) by a Texas tire shop; (2) general testimony that Cesar performed maintenance on the Explorer's tires in both Texas and Mexico by "checking the pressures, viewing the tires for any obvious problems, and so on"; and (3) Ford tested Explorer vehicles in Texas at some time in the past. Not only does Mexico have similar interests in Cesar's maintenance of the tires, but it also has interest in the driving conduct of motorists on its highways and streets, particularly conduct involved in accidents resulting in fatalities. And Mexico certainly has an interest in protecting the rights of its residents by ensuring they are compensated for injuries they sustain in Mexico.

Just as the balance of factors weighed in favor of Pirelli Tire's motion to dismiss in *Pirelli Tire*, the balance here weighs in favor of granting Ford's motion to dismiss.

IV. Conclusion

I would grant Ford's request for mandamus relief. Because Respondent does not pray that in the event mandamus relief is granted, the relief be limited to staying the suit, I would direct the trial court to (1) vacate its order denying Ford's motion to dismiss and (2) dismiss the suit.

Phil Johnson
Justice

OPINION DELIVERED: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0957

IN RE FORD MOTOR COMPANY, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued December 3, 2013

JUSTICE BOYD, dissenting.

For the most part, I agree with the Court's construction of section 71.051 of the Texas Civil Practice and Remedies Code in this case, and I generally disagree with Justice Johnson's conclusion that the Court "errs by reading language into the statute." *Ante* at ___ (Johnson, J., dissenting). But I agree with Justice Johnson's conclusion that the Court "errs by misapprehending the interests of the intervenors," *id*., and with his forum non conveniens analysis, so I too dissent, but for slightly different reasons.

The issue in this case is whether the intervenors, who are Texas residents, are "plaintiffs" and thus protected from forum non conveniens dismissal under section 71.051(e) of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(e) ("The court may not stay or dismiss a plaintiff's claim . . . if the plaintiff is a legal resident of this state."). Addressing a different section of the same Code, we hold today in another case that the common, ordinary meaning of the term "plaintiff" refers to a party who initiates a lawsuit or legal proceeding and does not include defendants or third-party defendants who file cross-claims, counterclaims, or third-party claims.

Jaster v. Comet II Constr., ___ S.W.3d ___ (Tex. 2014). Unlike section 71.051, the statute at issue in *Jaster* does not define the term "plaintiff," so we looked in that case to dictionary definitions, prior precedents, and other statutes to identify the term's common, ordinary meaning, and then concluded that the context confirmed the use of that intended meaning. *Id.* at ___. Section 71.051 is one of the statutes to which we look in *Jaster*, and we note that it first "defines [the term 'plaintiff'] broadly to mean 'a party seeking recovery of damages for personal injury or wrongful death,' but . . . then expressly provides that '[t]he term does not include a counterclaimant, cross-claimant, or third-party plaintiff.'" *Id*. at ___ (quoting TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2)). We note in *Jaster* that this section is consistent with others throughout the Civil Practice & Remedies Code, which repeatedly use and define the term "claimant" to refer to all parties who seek relief in a lawsuit, *id.* at ___, and use and define the term "plaintiff" to refer to claimants who initiate the lawsuit. *Id*. at ___.

In this case, the Court confirms that the term "plaintiff," as section 71.051(h) defines it, refers to "a subset of the broader term 'claimant.'" *Ante* at ___. The Court also concludes that "plaintiffs" who file counterclaims, cross-claims, or third-party claims do not thereby cease to be "plaintiffs," *ante* at ___, and that a "third-party plaintiff," as that term is used in section 71.051, means "a defendant who files a pleading in an effort to bring a third-party into the lawsuit." *Ante* at ___. The first of these conclusions is what we held in *Jaster*, and the other two are consistent both with it and with the language of section 71.051. I agree with all three, and thus disagree with Justice Johnson's view that the Court is reading words into section 71.051 when it concludes that a party must be a defendant to be a third-party plaintiff. *Ante* at ___.

Consistent with our holding in *Jaster*, under the common, ordinary meaning of the term, as well as the definition in section 71.051(h)(2), a "plaintiff" is a party who initiates the lawsuit (i.e., the first party to the suit). *Jaster*, ___ S.W.3d at ___. A defendant (the second party to the suit) may assert claims against a third party, and by doing so the defendant becomes a "third-party plaintiff." *See* TEX. R. CIV. P. 38(a) (providing that "a defending party, as a third-party plaintiff," may serve citation and a petition on "a person not a party to the action").[1] If the defendant asserts counterclaims against the plaintiff, the plaintiff may also bring in a third party "under circumstances which under this rule would entitle a defendant to do so." TEX. R. CIV. P. 38(b). But the rules nowhere refer to such a plaintiff as a "third-party plaintiff." TEX. R. CIV. P. 38. Instead, although the rule allows a "plaintiff" to bring in a "third party," it refers only to a "defending party" as a "third-party plaintiff." *Id*. I thus agree with the Court that a plaintiff who asserts claims against a third party does not thereby cease to be a "plaintiff," and that only a defendant can be a "third-party plaintiff."

But we are not dealing in this case just with a plaintiff, a defendant/third-party plaintiff, and a third-party defendant. Instead, we are dealing with *intervenors*, who elected to insert themselves into a lawsuit that already involved a plaintiff, a defendant/third-party plaintiff, and a third-party defendant. "[A] person or entity has the right to intervene [1] if the intervenor could have brought the same action, or any part thereof, in his own name, or, [2] if the action had been brought against

[1] The third-party defendant, in turn, may assert claims "against any person not a party to the action who is or who may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant." TEX. R. CIV. PROC. 38(a). Because this kind of claim brings a fourth party into the suit, we have referred to these parties as fourth-party plaintiffs and defendants, although Rule 38 does not. *See, e.g.*, *Liberty Mut. Ins. Co. v. First Nat'l Bank in Dall.*, 245 S.W.2d 237, 243–44 (Tex. 1951) (resolving claims by a "fourth party plaintiff" against "fourth party defendants").

him, he would be able to defeat recovery, or some part thereof." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co*., 793 S.W.2d 652, 657 (Tex. 1990). In other words, a person may intervene as a plaintiff who could have brought the same action, or as a defendant who can defeat the plaintiff's recovery. And, I would add, a person may intervene as a third-party plaintiff if the intervenor could have brought the same claims against the third-party defendant in the intervenor's own name, or as a third-party defendant if the intervenor would be able to defeat the third-party plaintiff's recovery, or some portion thereof. And, as I would hold occurred in the present case, a person may intervene as a defendant/third-party plaintiff, opposing the plaintiff's recovery against the defendant and seeking recovery against the third-party defendant.

The issue in this case is whether the intervenors have joined with the plaintiff, the third-party plaintiff, or the third-party defendant. The Court acknowledges that intervenors can be "characterized" as plaintiffs or as defendants, "depending on the nature of their interests and claims," *ante* at ___, and "need not necessarily be defending a claim to intervene in a defendant's capacity." *Ante* at ___. It then compares these intervenors to the intervenor in *Noble v. Meyers*, 76 Tex. 280, 13 S.W. 229 (1890), whom we "treated . . . like a plaintiff" because he "acted like a plaintiff," *ante* at ___, and distinguishes them from the intervenors in *Perkins v. Freeman*, 518 S.W.2d 532 (Tex. 1974), whom we treated like defendants because there was "no antagonism" between them and the defendant and because they and the defendant were instead "united in a common cause of action against the plaintiff." *Ante* at ___ (quoting *Perkins*, 518 S.W.2d at 534).

Noble and *Perkins* represent the two principal considerations for determining how to categorize an intervenor: (1) whether the intervenor seeks affirmative relief (like a plaintiff) or to

defeat another party's recovery (like a defendant); and (2) whether the intervenor's interests are aligned with or antagonistic to the interests of various other parties in the suit. Sometimes only one of these considerations is helpful, and it dictates the outcome. For example, we based our decision in *Noble* on the first consideration alone. 13 S.W. at 230. The intervenors in *Noble* claimed an ownership interest in land in a partition suit among parties who claimed full ownership of the same land. *Id.* at 229. Although the intervenors' interests were equally antagonistic to both the plaintiffs' and the defendant's, we treated the intervenors as plaintiffs because they sought affirmative relief and no affirmative relief was sought against them. *Id.* at 230. Conversely, we relied more extensively on the second consideration in *Perkins*, a child custody action in which the defendant and the intervenor-grandparents agreed that custody of the child should remain with the defendant. 518 S.W.2d at 534. Because the defendant's and intervenors' interests were aligned, we treated the intervenors as defendants. *Id.*

But both *Noble* and *Perkins* involved only first-party claims. When there are second-party claims (counterclaims and cross-claims) and third-party claims, the first consideration is less definitive because there is more than one category of parties that seek or defend against affirmative relief. This is true here, where there are three parties: the plaintiff (Juan), the defendant/third-party plaintiff (the estate), and the third-party defendant (Ford). Under our rules governing intervention, the question is: With which of these three are intervenors' interests most aligned? As Justice Johnson explains, the intervenors share the interests of the estate (the defendant/third-party plaintiff), both in avoiding the estate's liability to Juan (the plaintiff) and in imposing liability on Ford (the third-

party defendant). I agree that the intervenors' interests are most aligned with the estate's interests in this case, and thus they intervened into *this* lawsuit as defendants/third-party plaintiffs.

Holding to the contrary, the Court suggests that intervenors "acted like plaintiffs, not defendants filing a third-party claim." *Ante* at ___. But when there are no counterclaims, as is the case here, it is only a defendant who can file a third-party claim. *See* TEX. R. CIV. P. 38(a), (b). Filing a third-party claim thus may constitute acting like a defendant (the estate) and like a third-party plaintiff (also the estate), but it does not constitute acting like the plaintiff (Juan), who is not permitted under the rules of civil procedure to file a third-party claim. *See id.* The intervenors "acted like plaintiffs" *only* by filing claims against a *third-party defendant*, which is what third-party plaintiffs do. Because multiple parties are asserting or defending against affirmative relief, the question of whether the intervenors are asserting or defending against affirmative relief cannot alone dictate how the intervenors are classified. Instead, as with most cases involving second- and third-party claims, we must also consider which party's interests are most closely aligned with the intervenors' interests. The answer, as Justice Johnson explains, is the estate.

The Court points out that Juan's (the plaintiff's) interests in this case will be "wholly vindicated if the intervenors succeed" in their claims against Ford, *ante* at ___, but that is also true if the estate (the defendant/third-party plaintiff) succeeds in its claims against Ford. Similarly, the Court suggests that Juan "will be just as vindicated regardless of which of the two defendants [the estate or Ford] ends up with the hot potato of liability." *Ante* at __. This, however, only demonstrates why the intervenors' interests are *not* aligned with Juan's interests: if the estate ends up with the "hot

potato," then Juan wins but the intervenors lose. In this suit, the intervenors share the estate's fate, not Juan's.

The Court acknowledges that the intervenors, like the estate, filed claims against a third-party defendant, Ford. *Ante* at ___. But because the plaintiff, Juan, later filed his own direct claims against Ford, the Court contends that Ford is a defendant as to Juan, and is "formally a third-party defendant only as against the estate." *Id*. Even if Juan's direct claim against Ford is relevant to this analysis, it places Ford in the position of a defendant, rather than a third-party defendant, and the estate in the position of a cross-claimant, rather than a third-party plaintiff, with respect to Ford. Because the statute excludes cross-claimants from the definition of "plaintiff" as well as third-party plaintiffs, the distinction makes no difference. TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2). Whether the estate's claims against Ford constitute third-party claims or cross-claims, the estate is not a "plaintiff," and because the intervenors' interests remain aligned with the estate's interests, they are not "plaintiffs" either.

As both the Court and Justice Johnson agree, if the intervenors had filed a separate, independent lawsuit against Ford, they would have been "plaintiffs" and, as Texas residents, would have been protected from forum non conveniens dismissal under section 71.051. But they didn't. Instead, they intervened in an existing lawsuit that already involved a plaintiff, a defendant/third-party plaintiff, and a third-party defendant. Intervenors must take the case as they find it. *See, e.g.*, *Buzzini Drilling Co. v. Fuselier*, 562 S.W.2d 878, 879 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (holding that because "[a]n intervenor takes the suit as he finds it . . . , venue of the intervention is dependent upon the venue of the original cause of action"); *Corzelius v. Cosby*

Producing & Royalty Co., 52 S.W.2d 270, 272 (Tex. Civ. App.—Fort Worth 1932, no writ) (holding that an "intervener takes the case as he finds it"). In choosing to join this suit, the intervenors aligned themselves with the estate, sharing its interests in avoiding liability to the plaintiff and alleging that Ford is liable. Under such circumstances, they have intervened into this suit not as "plaintiffs" but as "third-party plaintiffs." The protection from forum non conveniens dismissal, therefore, does not apply to them in this case.

Because I agree with Justice Johnson that the intervenors in this case have intervened as defendants/third-party plaintiffs and not as plaintiffs, I would not reach Ford's alternative argument that section 71.051 treats the intervenors as a combined, single plaintiff with the decedent. Because I also agree with Justice Johnson's application of the forum non conveniens factors to this case, I respectfully dissent.

_____

Jeffrey S. Boyd
Justice

Opinion delivered: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0968

IN THE INTEREST OF S.M.R., G.J.R. AND C.N.R., CHILDREN

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

Argued September 11, 2013

JUSTICE DEVINE delivered the opinion of the Court.

In this appeal, the court of appeals reversed a judgment terminating a father's parental rights and remanded the case, concluding that the termination grounds expressed in the trial court's judgment were not supported by factually sufficient evidence. 404 S.W.3d 612 (Tex. App.–Houston [1st Dist.] 2012). The Department of Family and Protective Services appeals the reversal, complaining of legal flaws in the court of appeals' factual sufficiency review of the evidence. The Department further complains that the court's decision to remand is erroneous because the record conclusively establishes another ground for terminating the father's rights, which was raised by the Department but omitted from the trial court's judgment. Finding no error in the court of appeals' judgment, we affirm.

I

Patricia and Sergio have three daughters: S.M.R., born in December 2003, G.J.R., born in May 2005, and C.N.R., born in January 2006. The couple never married, but lived together for

about four years. During this period, the Department of Family and Protective Services investigated allegations of neglect, domestic violence, and drug and alcohol abuse. Nothing came of those investigations. Patricia and Sergio ceased living together in 2007. The children remained with Patricia.

Since the separation, Patricia has had difficulty providing the children a stable home. Department records indicate contributing factors that included a disgruntled boyfriend, displacement by Hurricane Ike, and Patricia's bipolar disorder. Department records further indicate that Patricia has often relied on her sisters for housing and support.

In September 2008, the children were living with one of Patricia's sisters when the Department received a referral alleging neglectful supervision and medical neglect. The children had been ill, and the aunt did not have sufficient resources to pay for their medical care. About this time, Sergio agreed to take the children, and they moved into a trailer he shared with his girlfriend and her child. The children stayed there about ten weeks, but, just before Christmas, Sergio returned the children to their maternal aunt.

The children were returned because Sergio decided to serve a brief jail sentence in lieu of paying a Class C misdemeanor fine. He spent two weeks in jail for the misdemeanor. Upon his release, his relationship with the girlfriend apparently soured because subsequent contact with her led to misdemeanor harassment and criminal trespass convictions. Sergio did not return to jail, but neither did he return to reclaim custody of his children.

Meanwhile, Patricia and the children continued to live with one of Patricia's sisters. Medical resources were a continuing problem for the family, however, and a caseworker attempted to assist

Patricia in obtaining Medicaid and updating the children's immunization records during this period. But on February 24, 2009, Patricia went to jail for violating probation. The children remained with their aunt because their father's whereabouts were unknown.

In March, the aunt reported to the Department that the children were ill again and that she could not afford their medical care. The children still did not have Medicaid. The aunt also had been unable to enroll the eldest daughter in school because her immunizations were not current.

In April, the Department filed its original petition seeking temporary conservatorship of the children and possibly the termination of the parents' rights. Following an adversarial hearing at which only the Department and the children's guardian ad litem appeared, the court signed temporary orders appointing the Department temporary managing conservator. The court's order recited that there was "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 children's removal impossible or unreasonable; and (3) notwithstanding reasonable efforts to eliminate the need for the children's removal and enable the children to return home, there is a substantial risk of a continuing danger if the children are returned home." The court further found that placement of the children with another relative was not in their best interests.

The mother had notice of the hearing but did not appear. Presumably, she was out of jail by this time. The father was not given notice of the hearing because, as already mentioned, his whereabouts were unknown.

In June, the Department completed a family-service plan that established tasks for the parents to regain custody of the children. The trial court incorporated the family-service plan's requirements into temporary orders. The father's order directed him to (1) enroll in domestic-violence and anger-management classes; (2) attend and complete a 12-step program such as Alcoholics Anonymous and obtain a sponsor; (3) maintain monthly contact with the caseworker; (4) participate in parenting classes; (5) participate in a psychological evaluation and follow all recommendations; (6) refrain from criminal activity, develop a support system, and obtain stable employment and housing; (7) complete a drug and alcohol assessment and submit to random urinalysis; and (8) provide documentation to his caseworker upon completion of each requirement.

The Department eventually found the father and notified him of the family-service plan's requirements. He signed a copy of the plan on October 23, 2009. Hearings on the parents' progress under the family-service plan followed.

After several months, the Department amended its pleadings to seek termination of the parents' rights, and the trial court set the case for trial. The termination case was tried to the court over several days in September and October 2010. The father participated at trial, but the mother came only for the first day. At the trial's conclusion, the court terminated both parents' rights, finding by clear and convincing evidence that both parents had "knowingly placed or knowingly allowed the child[ren] to remain in conditions or surroundings which endanger the physical or

emotional well-being of the child[ren]" and had "engaged in conduct or knowingly placed the child[ren] with persons who engaged in conduct which endangers the physical or emotional well-being of the child[ren]." *See* TEX. FAM. CODE § 161.001(1)(D), (E) (the endangerment grounds). The trial court also found termination of parental rights to be in the children's best interests. *Id.* § 161.001(2). Although raised by the Department, the trial court's judgment did not include section 161.001(1)(O) (failure to comply with court order specifically establishing actions necessary for parent to obtain return of child) as a termination ground. The father appealed the judgment; the mother did not.

In a divided decision, the court of appeals reversed the trial court's judgment and remanded the case, holding the evidence factually insufficient to support the endangerment grounds. 404 S.W.3d 612, 630-32; *id.* at 634 (Jennings, J. concurring). A dissenting justice found the evidence legally and factually sufficient to support termination on endangerment grounds and would have affirmed the trial court's judgment. *Id.* at 635 (Brown, J. dissenting).

II

When a parent has abused, neglected, abandoned or endangered a child, a court may terminate the parent's rights to the child. *See* TEX. FAM. CODE § 161.001 (the involuntary-termination statute). The involuntary-termination statute provides two prerequisites for termination: First, the proponent must establish one or more of the recognized grounds for termination, and, second, termination must be in the child's best interest. *Id.* § 161.001 (1), (2). Because involuntary termination involves fundamental constitutional rights, however, evidence justifying termination must be clear and convincing. *In the Interest of E.C.R.*, 402 S.W.3d 239, 240 (Tex. 2013).

The involuntary-termination statute sets out twenty different courses of parental conduct, any one of which may serve as a ground that satisfies the statute's first prerequisite for termination. TEX. FAM. CODE §§ 161.001 (1)(A)-(T). The Department's pleadings in this case asserted three of the statutory grounds. The Department alleged endangerment of the children under subparts (D) and (E) and the parent's failure to comply with court-ordered conditions for the children's return under subpart (O). *Id*. § 161.001(1)(D), (E), (O). Again, clear and convincing proof of any one ground will support a judgment terminating parental rights, if similar proof also exists that termination is in the child's best interest. *In the Interest of E.C.R.*, 402 S.W.3d at 240.

A

The Department first argues that the court of appeals should have affirmed the trial court's judgment under subpart (O) because the father clearly failed to comply with the family service plan. Because the trial court's judgment did not include (O) as a ground for terminating the father's parental rights, the court of appeals declined to consider it. Although omitted from the judgment, the Department submits that the ground should nevertheless be implied in support of the judgment terminating parental rights under Texas Rule of Civil Procedure 299.

Rule 299 provides that "omitted unrequested elements" of a ground of recovery or defense may be presumed to support a judgment, when evidence supports the omitted element and the trial court has found one or more elements of the ground of recovery or defense. TEX. R. CIV. P. 299. Although the rule by its terms applies to a trial court's fact findings rather than statutory grounds included in the judgment, the Department contends that our analysis in *In re J.F.C.*, 96 S.W.3d 256

(Tex. 2002), required the court of appeals to deem a finding of the omitted ground and affirm on that basis.

The termination suit in *J.F.C.* was tried to a jury rather than the court and so implicated omissions from the court's charge under Rule 279, rather than omitted fact findings under Rule 299. *Id*. at 261-62; *compare* TEX. R. CIV. P. 299 (pertaining to omitted findings in bench trial) *with* TEX. R. CIV. P. 279 (pertaining to omissions from the jury charge). Although the jury determined that the parents' rights should be terminated, a problem existed with the court's charge. The submission was in broad form but failed to instruct the jury regarding the children's best interests as to some of the submitted statutory grounds, making it possible for the jury to terminate on a ground unconnected with the children's best interest. *Id*. Although the parents did not object to the omission, the court of appeals concluded that the omission was fundamental error that could be raised for the first time on appeal. *Id.* at 259. The court therefore reversed the termination judgment and remanded the case to the trial court.

While we agreed that the omission was error, we did not agree that the error was fundamental. *Id.* at 275-76. We viewed the charge error instead as the omission of "a statutorily prescribed element for parental termination." *Id*. at 262. Although omitted from the charge, the element was included in the trial court's judgment, which dutifully recited that termination was in the children's best interests. *Id*. at 263. We further concluded that the trial court's best-interest finding was proper as a deemed finding of an omitted element under Rule 279. *See id.* at 263 (noting that "'omitted element or elements shall be deemed found by the court in such manner as to support the judgment' if there is evidence to support such a finding"). We also held that the trial

court's deemed best-interest finding was supported by clear and convincing evidence and that the court of appeals therefore erred in reversing the termination judgment. *Id*. at 268-72.

Because the termination suit here was tried to the court instead of a jury, the Department argues that Rule 299 should apply similarly in this case to imply a finding as to the omitted ground, subpart (O). In other words, the Department contends that the trial court found the best-interest element and rendered judgment terminating parental rights so any termination ground raised by the pleadings and sufficiently supported by the evidence may be implied as a substitute for the insufficient ground actually included in the trial court's judgment.

Without deciding that Rule 299 might otherwise apply under these circumstances, we note its presumption extends only to "omitted unrequested elements." TEX. R. CIV. P. 299. Although subpart (O) was clearly omitted from the judgment, it was requested. Decisions beginning with *Vasquez v. Texas Department of Protective & Regulatory Services*, 190 S.W.3d 189, 194 (Tex. App.–Houston [1st Dist.] 2005, pet. denied), have refused to extend *J.F.C.*'s analysis to supply omitted grounds expressly presented to the trial court. The court of appeals here followed these cases, which hold that "termination can only be upheld on a ground that was both pleaded by the party seeking termination and found by the trier of fact." *In re K.G.*, 350 S.W.3d 338, 345-46 (Tex. App.—Fort Worth 2011, pet. denied); *see also*, *In re C.A.B.*, 289 S.W.3d 874, 881 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Ruiz v. Tex. Dep't of Protective & Regulatory Servs.*, 212 S.W.3d 804, 813 (Tex. App.–Houston [1st Dist.] 2006, no pet.); *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 252 (Tex. App.–Houston [1st Dist.] 2006, no pet.). The Department contends that these cases conflict with *J.F.C.* We disagree.

Our rules provide that a judgment in a suit filed by a governmental entity to terminate parental rights "must state the specific grounds for termination." TEX. R. CIV. P. 306. Although the judgment here predates the rule's recent amendment expressly imposing this requirement, the judgment nevertheless complies with the current rule. More significantly, the judgment conforms to the statute's requirements by stating the specific termination grounds and determining the children's best interests. *See* TEX. FAM. CODE § 161.001 (stating the two prerequisites for termination); *see also In re J.F.C.*, 96 S.W.3d at 261. The judgment was therefore complete on its face. No element was omitted, and nothing needed to be implied in support of the judgment under Rule 279.

B

The Department next contends that the evidence supporting subpart (O), the omitted ground, is not only legally sufficient but also conclusive, an argument the *Vasquez* line of authority did not consider. This argument does not ask the appellate court to imply a fact finding; rather, it suggests that no facts were at issue. The Department's argument thus presents a question of law, that is, whether the Department conclusively established subpart (O) as a basis for terminating the father's parental rights in the trial court.

Subpart (O) provides for termination of the parent-child relationship if by clear and convincing evidence the parent has:

> (O) 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). The Department maintains that the record conclusively establishes that (1) the children were in the Department's custody for more than nine months as the result of an order under Chapter 262 for the children's abuse or neglect, (2) the trial court ordered the father to complete all services in the family service plan and the father understood what actions were required for reunification with his children, and (3) the father failed to comply with material parts of the order.

The Department points out that the trial court, without objection, took judicial notice of its order granting the Department temporary managing conservatorship of the children, which included findings concerning the physical health and safety risks to the children. The caseworker's affidavit supporting the children's removal was also admitted without objection. That affidavit recited the parent's unfortunate history with child protective services, the parents' challenges in providing a stable home, and the maternal aunt's inability to meet the children's medical and physical needs without the parents' support. The Department submits that these documents together establish subpart (O)'s predicate that the Department's custody result from "the child's removal from the parent under Chapter 262 for the abuse or neglect of the child."

Abuse and neglect are not defined in chapter 262. Nor does the chapter indicate any special or technical meaning for the terms. *See* TEX. GOV'T CODE § 311.011(b) (requiring words and phrases to be construed according to any acquired technical or particular meaning). When terms are not defined and no technical or particular meaning is apparent from the context, we apply the

statute's words according to their common usage. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). Thus, whether removal under the chapter was for abuse or neglect depends on the surrounding facts and circumstances and is generally determined on a case-by-case basis. For example, in one case a child was removed for neglect when the mother failed to return for the child after being released from police custody. *In re A.A.A.*, 265 S.W.3d 507, 513-15 (Tex. App.–Houston [1st Dist.] 2008, pet. denied). In another case, a child was removed for neglect where the mother's living conditions were unstable, and the child had been left with a person who had health problems and could not provide adequate care. *D.F. v. Tex. Dep't of Family & Protective Servs.*, 393 S.W.3d 821, 830-31 (Tex. App.–El Paso 2012, no pet.). Although not defined in chapter 262, the preceding chapter provides a nonexclusive list of acts or omissions constituting "abuse" and "neglect" when investigating reports of child abuse or neglect. TEX. FAM. CODE §§ 261.001(1), (4). Recently, we acknowledged that the acts or omissions listed in chapter 261 might be used to inform the terms' use in other chapters. *In re E.C.R.*, 402 S.W.3d at 248. Under chapter 261, "neglect" may include in part the failure "to seek, obtain, or follow through with medical care for a child." TEX. FAM. CODE § 261.001(4)(B)(ii).

The caseworker averred that the children's removal under chapter 262 was because of medical neglect and neglectful supervision. At the time of their removal, the mother was in jail on a probation violation, the father was out of jail but missing, and the caretaker was struggling to care for the children because of the parents' failure to provide meaningful financial or medical support. Previous referrals to the Department indicated that this lack of support had prevented the children from obtaining medical care for past illnesses and from obtaining their required immunizations.

When the Department obtained custody, the children had scabies, and one child had an injury to her ankle.

Because the father could not be found before the chapter 262 adversarial hearing, he had no opportunity to contest the children's removal. But he also did not contest their removal or otherwise dispute the Department's appointment as temporary managing conservator under chapter 262 at subsequent hearings, including the termination trial. We accordingly agree with the Department that no factual dispute underlies the circumstances of the children's removal or the temporary orders issued under chapter 262.

We further agree that no factual dispute exists about the family-service plan's requirements or Sergio's understanding of what the plan required. Sergio admitted he knew the tasks he needed to complete to regain possession of his children. In fact, he argued that he complied, or at least substantially complied, with the plan.

The plan required Sergio to submit to a psychological examination, which he did. The psychological report recommended referral for vocational counseling, stress management, substance abuse, parent education, and family therapy. The plan also required him to remain drug free, submit to random drug tests, refrain from criminal activity, and maintain stable housing and employment.

No proof showed that Sergio violated either the drug or criminal-activity prohibitions. Proof of Sergio's employment and housing stability was less definitive. Sergio testified about his construction-work income but provided no pay stubs because he was always paid in cash. Sergio further testified that he was about to move into his girlfriend's mother's home and that the house would have a bedroom for his girls. The stability of his housing was thus dependent on Sergio's

relationship with the girlfriend. At the hearing, Sergio also produced certificates showing completion of an outpatient substance-abuse program and a domestic-abuse program. He testified to attending several AA meetings and about his difficulty finding a sponsor. His testimony also indicated frustration with the Department's delays in responding to his inquiries about local services and generally with its assistance in helping him complete the tasks required under the family-service plan.

Department witnesses, on the other hand, blamed Sergio for not completing material parts of the family-service plan, listing the father's shortcomings as (1) failing to complete anger-management classes, (2) failing to advance beyond the first step of Alcoholics Anonymous or find a sponsor; (3) failing to provide proof that he participated in parenting classes; and (4) failing to attend vocational-counseling classes. The Department concludes that these failures, together with children's uncontested removal under chapter 262, conclusively establish subpart (O) as a proper ground for terminating the father's rights.

Parents frequently fall short of strict compliance with a family-service plan's requirements. The Department's argument, however, accepts nothing less and thus would require termination for a parent's imperfect compliance with the plan. But whether a parent has done enough under the family-service plan to defeat termination under subpart (O) is ordinarily a fact question. *See, e.g.*, *In re J.S.*, 291 S.W.3d 60, 66–67 (Tex. App.—Eastland 2009, no pet.) (affirming termination where mother complied with parts of service plan but did not obtain stable housing, employment, or basic necessities for children); *In re C.M.C.*, 273 S.W.3d 862, 874–876 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (declining to reverse termination on mother's argument of substantial compliance with

service plan); *Liu v. Dep't of Family and Protective Servs.*, 273 S.W.3d 785, 801–802 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (affirming termination of schizophrenic mother's parental rights despite partial compliance with service plan because she failed to take prescribed medications as required by plan, resulting in hallucinations and violent behavior); *In re T.T.*, 228 S.W.3d 312, 317–321 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (affirming termination where mother failed to comply with four of seven requirements and father failed to comply with three of seven requirements); *In re C.D.B.*, 218 S.W.3d 308, 311–312 (Tex. App.—Dallas 2007, no pet.) (affirming termination based on mother's partial compliance with service plan); *In re A.D.*, 203 S.W.3d 407, 411–412 (Tex. App.—El Paso 2006, pet. denied) (affirming termination because mother failed to meet family-service plan's material requirements including drug assessment, finding a job, and providing a safe home).

While parents have generally had little success arguing substantial compliance to reverse a termination judgment under subpart (O), *see, e.g., In re M.C.G.*, 329 S.W.3d 674, 675–76 (Tex. App.—Houston [14th Dist.] 2010, pet. denied), here the argument simply suggests a factual dispute. Conceivably, subpart (O) could be established as a termination ground as a matter of law. But when questions of compliance and degree are raised, and the trial court declines to terminate on this ground, the evidence is not conclusive; it is disputed. *See In re J.S.*, 291 S.W.3d 60, 67 (Tex. App.–Eastland 2009, no pet.) (analyzing substantial compliance argument as a factual sufficiency challenge). We accordingly reject the Department's contention that it conclusively established subpart (O) as a ground for terminating the father's rights in this case.

III

The Department's final complaint concerns the court of appeals' review of the evidence supporting termination of the father's rights under subparts (D) and (E), the endangerment grounds. The appellate court found the evidence to be factually insufficient. 404 S.W.3d at 630-31, 635. The statutory endangerment grounds require clear and convincing proof that the parent has "(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child [and] (2) that termination is in the best interest of the child." TEX. FAM. CODE §§ 161.001(1)(D),(E), (2).

The relevant endangerment evidence at trial can be grouped into six categories: sexually transmitted disease, sexual abuse, criminal convictions, alcohol and drug abuse, neglect, and domestic abuse. Although neglect had been the principal reason for removing the children, the Department subsequently became more concerned about sexual abuse, and this became its primary focus at trial. The sexual-abuse evidence is thoroughly discussed in the court of appeals' three opinions, and each opinion rejects the Department's theory of sexual abuse. *See, e.g.*, 404 S.W.3d at 643-44 (Brown, J., dissenting) (agreeing that evidence failed to demonstrate that the father sexually abused any of the children).

Although not its primary thrust at trial, the Department here shifts attention to domestic abuse, complaining that the court of appeals erroneously disregarded relevant evidence of such abuse when performing its factual sufficiency review. In particular, the Department complains that

the court ignored relevant evidence of abuse reported in the mother's psychological examination, which repeated the mother's claim that the children had witnessed their father being abusive to her.

The concurring justice explained that this report was not only hearsay but devoid of any specifics and presented in a way that made it unlikely the trial court even considered it:

> . . . this hearsay evidence, offered without any contextual evidence or explanation at all of when, how, or exactly what "abuse" occurred, is contradicted by S.H.R.'s direct testimony. Given how the case was presented to the trial court, it is highly doubtful whether the trial court considered or even read the mother's hearsay statement in this report. But, even if it did, a fact-finder could not have reasonably resolved the disputed evidence in favor of a finding of actual endangerment.

Id. at 635 (Jennings, J. concurring). The Department, however, objects in particular to a statement in the court's lead opinion, which observed that the court could "discount relevant, probative evidence which was admitted, but never discussed or argued to the fact-finder." *Id*. at 632. The Department submits that an appellate court cannot simply disregard relevant, probative evidence when conducting its factual sufficiency review.

We agree that relevant evidence may not be ignored, but we do not agree that the court of appeals did that in this case. Although "disregard" is one possible meaning for the word "discount," to discount can also mean "(1): to make allowance for bias or exaggeration in (2): to view with doubt." WEBSTER'S NEW COLLEGIATE DICTIONARY 323 (1981). That the court of appeals intended this latter meaning is clear from its three opinions, which do not ignore the evidence but rather discuss it, explaining its relevance, significance, and reliability.

To reverse a judgment for factual insufficiency, the court of appeals must detail all the relevant evidence and explain why it is insufficient to support the judgment. *Maritime Overseas*

Corp. v. Ellis, 971 S.W.2d 406, 407 (Tex. 1998). Although this Court itself lacks jurisdiction to determine questions of factual sufficiency, we nevertheless have the "responsibility to ensure that the intermediate appellate courts follow applicable legal standards in making their review of the evidence." *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29 (Tex. 1993). Thus, we are not powerless to correct a clearly erroneous review of the evidence. Our review, however, checks only that the intermediate court detailed all of the relevant evidence and clearly stated why that evidence was factually insufficient. *Id*. at 28. When an appellate court fails to apply this standard, we may reverse and remand for the court to reexamine the evidence under the appropriate standard.

A judgment terminating parental rights is factually sufficient when "the evidence is such that a reasonable jury could form a firm belief or conviction that grounds exist for termination." *In re C.H.*, 89 S.W.3d 17, 18-19 (Tex. 2002). The court of appeals here applied the appropriate standard, reviewed all the evidence, and explained its insufficiency. Contrary to the Department's contention, the court did not apply an erroneous standard of review.

The court of appeals' judgment is accordingly affirmed.

_____

John P. Devine
Justice

Opinion Delivered: June 6, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-0983

MCALLEN HOSPITALS, L.P. D/B/A MCALLEN MEDICAL CENTER, PETITIONER,

v.

STATE FARM COUNTY MUTUAL INSURANCE COMPANY OF TEXAS, RESPONDENT

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

Argued December 4, 2013

JUSTICE LEHRMANN delivered the opinion of the Court.

To assist hospitals with securing payment for medical services provided to accident victims, Texas Property Code chapter 55 (the Hospital Lien Statute) allows a hospital to file a lien on a patient's cause of action against a person whose negligence caused the injury that necessitated the patient's treatment. If the hospital's charges secured by a proper lien are not "paid" within the meaning of the statute, any release of the patient's cause of action is invalid. In this case, two patients treated at the petitioner's hospital settled with the negligent third party. That party's liability insurer made the settlement checks jointly payable to the patients and the hospital and delivered the checks to the patients, who deposited them without the hospital's endorsement. The issue presented is whether the hospital's charges were "paid" under the Hospital Lien Statute and

the Uniform Commercial Code even though the hospital never received notice that the settlement funds had been delivered to the patients and were never reimbursed for the treatment costs. We hold that they were not.

But this does not end the inquiry. Although failure to "pay" the hospital invalidates the releases of the patients' negligence causes of action, the question remains whether the hospital may enforce its lien by suing the negligent person or his liability insurer directly. However, this issue was neither raised in the underlying summary judgment motion nor argued on appeal. As a result, we may not decide it. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

I. Background

Jose Gil and Melinda Hernandez were involved in a car accident with Carlos Benavidez, who was insured by State Farm County Mutual Insurance Company of Texas (State Farm). McAllen Hospitals, L.P. d/b/a McAllen Medical Center (the Hospital) treated Gil and Hernandez for their injuries. The cost of treatment totaled $53,564 for Gil and $1,281 for Hernandez. To secure payment, the Hospital filed hospital liens under chapter 55 of the Texas Property Code. The validity of those liens is not in dispute.

Gil and Hernandez settled with Benavidez for $5,200 and $2,100, respectively, and released their claims against him. The Hospital was not a party to the releases, nor was it informed the parties had settled. State Farm, aware of the Hospital's liens, informed Gil that he was responsible for paying the Hospital for its services out of the settlement funds.[1] State Farm issued Gil's

[1] The record does not reflect that State Farm similarly instructed Hernandez.

settlement check payable to "Jose Antonio Gil & Rafaela Balderas, Individually and as husband and wife & McAllen Medical Center," and issued Hernandez's check payable to "Melinda De La Garza Hernandez, a Single Individual & McAllen Medical Center." State Farm sent the checks to Gil and Hernandez without notifying the Hospital. Both Gil and Hernandez deposited their settlement checks without the Hospital's endorsement. The Hospital's charges for treating Gil and Hernandez remain outstanding.

The Hospital sued State Farm to enforce its hospital liens, seeking to recover the outstanding treatment costs up to the amount of the settlements.[2] In response, State Farm contended that it met its obligation to pay the Hospital under the Hospital Lien Statute by making the checks payable to the Hospital as a copayee. After considering competing cross-motions, the trial court granted summary judgment for State Farm. The court of appeals affirmed. ___ S.W.3d ___.

II. Discussion

The Texas Legislature passed the Hospital Lien Statute "to provide hospitals an additional method of securing payment for medical services, thus encouraging the prompt and adequate treatment of accident victims" and reducing hospital costs. *Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307, 309 (Tex. 1985). Under the Hospital Lien Statute, a hospital has a lien on the cause of action of a patient "who receives hospital services for injuries caused by an accident that is attributed to the negligence of another person," provided that the patient is admitted to the hospital within seventy-two hours of the accident. TEX. PROP. CODE § 55.002(a). The lien also attaches to

[2] In the same suit, the Hospital brought claims against several other insurers to enforce hospital liens arising out of outstanding charges for the treatment of victims of unrelated accidents. Only the claims against State Farm arising out of the Hospital's treatment of Gil and Hernandez are at issue here.

the proceeds of a settlement of the patient's cause of action or to damages awarded in a judgment. *Id.* § 55.003(a)(2)–(3). A hospital must comply with statutory notice and recording requirements to secure its lien. *Id.* § 55.005. The Hospital undisputedly complied with those requirements in this case.

Ideally, the statute serves its purpose: an accident victim receives necessary medical treatment, and the treating hospital is ensured at least partial payment, even when the patient is indigent. This case requires us to examine the consequences when, notwithstanding a valid lien and settlement proceeds to which the lien attaches, a hospital does not receive the payment contemplated by the statute.

A. Payment of Charges under Section 55.007

The applicability of section 55.007 of the Hospital Lien Statute forms the crux of the parties' dispute. That section, which addresses the effect of a hospital lien on the validity of a release of the underlying cause of action to which the lien has attached, provides in pertinent part:

> (a) A release of a cause of action . . . to which a lien under this chapter may attach is not valid unless:
>
> > (1) the charges of the hospital or emergency medical services provider claiming the lien were paid in full before the execution and delivery of the release;
> >
> > (2) the charges of the hospital or emergency medical services provider claiming the lien were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release; or
> >
> > (3) the hospital or emergency medical services provider claiming the lien is a party to the release.

Id. § 55.007(a). The satisfaction of one of the three options in section 55.007(a) is thus a condition to the validity of the release. In this case, it is undisputed that the Hospital's charges for treating Gil and Hernandez were not and have not been paid in full, and that the Hospital was not a party to the releases of the patients' causes of action against Benavidez. *See id.* § 55.007(a)(1), (3). The parties dispute only whether the Hospital's charges were "paid . . . to the extent of any full and true consideration paid to [Gil and Hernandez]," such that the releases were valid under section 55.007(a)(2).

State Farm argues that, by issuing settlement checks to the patients and the Hospital as copayees, and delivering those checks to the patients, State Farm made a good-faith effort to pay the Hospital's charges "to the extent of any full and true consideration" paid to Gil and Hernandez. State Farm contends that it effectively "paid" the Hospital, even though the Hospital was never notified that the claims had been settled, never endorsed the checks, and never received any compensation for the patients' treatment costs. The Hospital argues that, having never received any actual compensation for the services it rendered to Gil and Hernandez, it was not, in fact, "paid" in the sense that section 55.007 requires.

Because this case involves State Farm's use of negotiable instruments to satisfy its underlying obligations, we turn to the Uniform Commercial Code (UCC), as codified in the Texas Business and Commerce Code, to evaluate the parties' dispute. *See* TEX. BUS. & COM. CODE § 3.102. The issue may be framed as follows: whether issuance of a draft made out jointly to two nonalternative payees, one of whom presented the draft for payment without the endorsement of the other, discharges the drawer's obligation to the payee whose endorsement was not obtained. The

court of appeals addressed a similar issue involving a forged endorsement in *Benchmark Bank v. State Farm Lloyds*, and State Farm relies heavily on that case. 893 S.W.2d 649 (Tex. App.—Dallas 1994, no writ). In *Benchmark*, the drawer issued drafts to nonalternative copayees (Benchmark and the Calderons) and delivered the drafts to the Calderons, who forged Benchmark's endorsement and presented the drafts for payment. *Id.* at 650. The court of appeals held that (1) possession of the draft by one joint payee constitutes constructive possession by the other, and (2) Benchmark had no further recourse against the drawer after the drafts were honored and paid. *Id.* at 651. As discussed below, while we agree with the court's first holding, we disagree with its conclusion that the copayee had no further recourse against the drawer.

First, we hold that State Farm's delivery of the drafts to Gil and Hernandez constitutes constructive delivery of the drafts to the other copayee, the Hospital. TEX. BUS. & COM. CODE § 3.420 cmt. 1. However, that does not end our analysis. The UCC instructs that "an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the instrument." *Id.* § 3.602(a). And the UCC explains that, when a draft is issued to nonalternative copayees, one copayee acting alone is not entitled to enforce, and thus may not discharge, the instrument. Specifically, the statute provides: "If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them." *Id.* § 3.110(d). The Comment to this section of the Code further clarifies:

> If an instrument is payable to X and Y, neither X nor Y acting alone is the person to whom the instrument is payable. Neither person, acting alone, can be the holder of the instrument. The instrument is "payable to an identified person." The "identified

> person" is X and Y acting jointly. . . . Thus, . . . X or Y, acting alone, cannot be the holder or the person entitled to enforce or negotiate the instrument because neither, acting alone, is the identified person stated in the instrument.

Id. cmt. 4.

Applying these principles, the Massachusetts Supreme Judicial Court, addressing the same issue presented here, reached the opposite conclusion of the *Benchmark* court. In *General Motors Acceptance Corp. v. Abington Casualty Insurance Co.* (*GMAC*), an automobile insurer issued a check jointly payable to its insured and to the company that held a security interest in the insured's vehicle. 602 N.E.2d 1085, 1086 (Mass. 1992). The insured presented the check without the lienholder's endorsement and received full payment. *Id.* The lienholder sued the insurer—but not the insured or the payor bank[3]—for recovery of the insurance proceeds, claiming that the insurer's underlying obligation to a copayee was not discharged when another copayee cashed a check without the proper endorsements. *Id.* at 1086–87. Agreeing with the lienholder, the court held that, although delivery to one copayee constitutes delivery to the other, "[o]bligations on a negotiable instrument . . . do not end with delivery to a payee." *Id.* at 1087. Citing Massachusetts' analogous UCC provisions, the court noted that the insured copayee could not have become a holder of the draft without the lienholder's endorsement and that, "[w]ithout payment to a holder, the liabilities of the parties to the check are not discharged." *Id.* at 1088. The court ultimately concluded: "[T]o protect the rights of all joint payees as well as the integrity of the commercial paper itself, we hold that payment of a check to one copayee without the endorsement of the other copayee does not

[3] Under the UCC, "payor bank" means a bank that is the drawee of a draft. TEX. BUS. & COM. CODE § 4.105(3). A "drawee" is a person ordered in the draft to make payment. *Id.* § 3.103(a)(4).

discharge the drawer of either his liability on the instrument or the underlying obligation." *Id.* at 1088.

Guided by a well-respected legal treatise in evaluating the opposing holdings in *GMAC* and *Benchmark*, we conclude that the approach adopted in *GMAC* is "representative of the better view." 28 WILLISTON ON CONTRACTS § 72:36 (4th ed. 2003); *see also* Restatement (Second) of Contracts § 299 (1981) (noting that the UCC creates an exception for negotiable instruments to the general rule that tender of performance to any joint obligee discharges a promisor's liability to all). The court recognized in *GMAC* that holding otherwise would result in "no assurance that all the joint payees would receive payment" and would dissolve any distinction between drafts made out to alternative copayees and drafts made out to nonalternative copayees. 602 N.E.2d at 1088. Other jurisdictions have cited *GMAC* with approval and adopted its reasoning. *See State ex rel. N.D. Housing Fin. Agency v. Ctr. Mut. Ins. Co.*, 720 N.W.2d 425, 429–30 (N.D. 2006) (holding that forged endorsement by nonalternative copayee did not discharge drawer's obligation to other copayee); *Crystaplex Plastics, Ltd. v. Redevelopment Agency of City of Barstow*, 92 Cal. Rptr. 2d 197, 203–04 (Ct. App. 2000) (payee could maintain cause of action against drawer under UCC after copayee cashed check with forged endorsement). We join these jurisdictions and hold that delivery of a check to one copayee constitutes constructive delivery to all. However, because payment to one nonalternative copayee without the endorsement of the other is not payment to a "holder," it does

not discharge the drawer of either his liability on the instrument or his underlying obligation.[4] *GMAC*, 602 N.E.2d at 1088.

State Farm argues that the Hospital's preferred course is to sue the payor bank that improperly paid the instruments lacking the Hospital's endorsement. While the Hospital could have attempted to pursue the payor bank for relief directly,[5] its failure to do so does not affect State Farm's obligations under the UCC. That more efficient avenues of recovery may exist for a wronged copayee does not alter our analysis of whether the Hospital was "paid" in accordance with the UCC and the Hospital Lien Statute.[6]

Accordingly, given that (1) State Farm issued the settlement checks payable to the patients and the Hospital as nonalternative copayees, (2) State Farm delivered the checks to the patients without notifying the Hospital, (3) the Hospital did not endorse the checks, and (4) the patients nevertheless deposited the checks, we hold that State Farm's actions did not constitute payment to a "holder" under the UCC, and therefore State Farm was not discharged of its underlying obligations. In turn, State Farm has not shown that "the charges of the hospital . . . claiming the lien were paid before the execution and delivery of the release [of the injured individual's cause of

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[4] We do not address this holding's applicability to copayees in an agency relationship, as that scenario is not presented. *See Kenerson v. FDIC*, 44 F.3d 19, 23 (1st Cir. 1995) (holding that common law rule of agency relieved drawer of liability where one payee forged endorsement of copayee); *see also GMAC*, 602 N.E.2d at 1087 (noting that the copayees in that case were "not in an agency relationship").

[5] A drawee that makes payment "for a person not entitled to enforce the instrument or receive payment" may be liable in conversion. TEX. BUS. & COM. CODE § 3.420; s*ee also Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 105 (Tex. 2004).

[6] As to State Farm's rights under the UCC, we note that a drawee may not charge its customer's account on an instrument that is not properly authorized. TEX. BUS. & COM. CODE § 4.401(a); *see also id.* § 3.420 cmt. 1; *Tex. Stadium Corp. v. Sav. of Am.*, 933 S.W.2d 616, 622 (Tex. App.—Dallas 1996, writ denied).

action] to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release." TEX. PROP. CODE § 55.007(a)(2). As a result, State Farm was not entitled to summary judgment on this ground.

B. Cause of Action under Hospital Lien Statute

Our conclusion that the Hospital's charges have not been "paid," and its lien not satisfied, logically leads to the issue of the Hospital's proper remedy; specifically, whether a hospital may enforce its lien by directly pursuing the negligent third party or that party's liability insurer. If it can, the Hospital may recover from State Farm. If it cannot, the Hospital has no cause of action against State Farm notwithstanding the invalidity of Gil's and Hernandez's releases of their causes of action against State Farm and its insured.

In *Baylor University Medical Center v. Borders*, 581 S.W.2d 731, 733 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.), the court of appeals held that the Hospital Lien Statute gives hospitals a separate cause of action to enforce a hospital lien independent of the patient's obligation to pay the bill. We have cited the *Borders* holding in discussing the general purpose of the Hospital Lien Statute, but have never been directly presented with or resolved the issue that was decided in that case. *See Bashara*, 685 S.W.2d at 309. The Hospital Lien Statute's language, however, calls the *Borders* court's conclusion into question. *See Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012) ("The plain language of a statute is the surest guide to the Legislature's intent.").

The Hospital Lien Statute does not expressly create a cause of action against third parties to enforce a lien. But section 55.007 does delineate the consequence when a hospital with a valid lien

is not properly paid out of the proceeds of a patient's settlement with a third party. Specifically, as discussed above, the statute invalidates the release of a cause of action "to which a lien under this chapter may attach," *i.e.*, the patient's cause of action against the person whose negligence caused the accident that necessitated treatment. *See Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 411 (Tex. 2007). As a result, the patient's cause of action, previously settled, is revived, and the hospital retains its lien on that cause of action. TEX. PROP. CODE § 55.007(a).

Because the Legislature specified a remedy for failure to properly satisfy a hospital lien, and did not include a concomitant cause of action for enforcement, we question the propriety of reading into the statute such an additional remedy. *See Lee v. City of Houston*, 807 S.W.2d 290, 294–95 (Tex. 1991) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute."). However, resolution of the issue would be improper, as it was not raised in the trial court as a ground for summary judgment and was not briefed in the court of appeals or in this Court, and therefore has not been preserved for our review. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004) (holding that a summary judgment may be affirmed "if any of the theories presented to the trial court and preserved for appellate review are meritorious"). Although counsel for the parties briefly addressed the issue at oral argument in response to questions from the Court, that discussion was insufficient to preserve for our review a ground that was not raised in State Farm's summary judgment motion. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) (holding that summary judgment may not be affirmed on grounds not set out in the motion for summary judgment). Therefore, we do not reach this issue.

III. Conclusion

For the reasons set forth above, we hold that (1) payment of a check to one nonalternative copayee without the endorsement of the other does not constitute payment to a "holder" and thus does not discharge the drawer of either his liability on the instrument or the underlying obligation, (2) the court of appeals erred in holding that the patients' releases of their causes of action against Benavidez were valid under section 55.007 of the Hospital Lien Statute, and (3) the Hospital's liens on those causes of action therefore remain intact. We do not resolve the question of whether the Hospital has a separate cause of action under the Hospital Lien Statute against State Farm, as this issue has not yet been raised as a ground for summary judgment and therefore is not properly before us. Accordingly, we reverse the court of appeals' judgment 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: May 16, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-1000

IN RE FORD MOTOR COMPANY AND KEN STOEPEL FORD, INC., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this design-defect case, the plaintiff sought to expose potential bias of the defendant's two testifying experts by inquiring at their depositions into the frequency with which they testified in favor of design-defect defendants. To further explore bias, the plaintiff now seeks to depose a corporate representative of each expert's employer. We hold that on the facts of this case, the Rules of Civil Procedure do not permit such discovery and we conditionally grant mandamus relief.

This suit arises from injuries plaintiff Saul Morales sustained after a Ford vehicle ran over him. Morales had been in his own vehicle, fleeing police who suspected he was driving drunk. Eventually, Morales stopped his vehicle and continued his flight on foot. One of the police officers likewise left his 2004 Ford Crown Victoria Police Interceptor, then pursued and apprehended Morales. While the officer attempted to handcuff Morales, the officer's vehicle began rolling backward toward the pair. The vehicle struck the officer, then ran over and came to rest on top of Morales, injuring him.

Morales sued Ford Motor Company, which designed and manufactured the police car, and the car's seller, Ken Stoepel Ford, Inc. (collectively "Ford"). In his action, Morales alleged the vehicle had a design defect that allowed the officer unintentionally to place the gear-shift selector between park and reverse, which then caused the vehicle to go into an idle-powered reverse.

To defend the lawsuit, Ford retained two expert witnesses: Erin Harley, of Exponent, Inc., and Hugh Mauldin, of Carr Engineering, Inc. After deposing both Harley and Mauldin, Morales sought corporate-representative depositions from Exponent and Carr Engineering on seventeen topics, arguing the additional depositions were necessary to prove each testifying expert's bias in favor of Ford and other automobile manufacturers.

The Rules of Civil Procedure define the scope and methods of discovery about expert witnesses. Rule 192.3(e) sets forth the scope of information that parties may discover about a testifying expert, which includes "any bias of the witness." TEX. R. CIV. P. 192.3(e). Rule 195 addresses the methods for obtaining such information, limiting testifying-expert discovery to that acquired through disclosures, expert reports, and oral depositions of expert witnesses. TEX. R. CIV. P. 195.

The official comments to Rule 195 articulate a goal of minimizing "undue expense" in conducting expert discovery. TEX R. CIV. P. 195 cmt. 3. This goal comports with efforts by this Court and others to curb discovery abuse through the implementation of carefully crafted principles and procedures. *See In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180–81 (Tex. 1999) (orig. proceeding). We have expressed concerns about allowing overly expansive discovery about testifying experts that can "permit witnesses to be subjected to harassment and might well

discourage reputable experts" from participating in the litigation process. *Ex parte Shepperd*, 513 S.W.2d 813, 816 (Tex. 1974) (orig. proceeding).

The particular deposition notices in this case highlight the danger of permitting such expansive discovery. In his deposition notices to Carr Engineering and Exponent, Morales seeks detailed financial and business information for all cases the companies have handled for Ford or any other automobile manufacturer from 2000 to 2011. Such a fishing expedition, seeking sensitive information covering twelve years, is just the type of overbroad discovery the rules are intended to prevent. *See Alford Chevrolet-Geo*, 997 S.W.2d at 180 (rules of procedure are designed to curb abusive discovery tactics, which some litigants employ simply to increase litigation costs for their adversaries); *see also Russell v. Young*, 452 S.W.2d 434, 437 (Tex. 1970) (orig. proceeding) (denying discovery of financial records from a potential medical expert witness because "[t]here is . . . a limit beyond which pre-trial discovery should not be allowed").

By holding that the requested discovery is impermissible in this case, we do not unduly inhibit discovery of an expert's potential bias. Courts have recognized that discovery into the extent of an expert's bias is not without limits. *See, e.g.*, *In re Weir*, 166 S.W.3d 861, 865 (Tex. App.—Beaumont 2005, orig. proceeding) (per curiam) (holding expert witness did not have to testify about personal financial information because there was other evidence of bias); *Olinger v. Curry*, 926 S.W.2d 832, 834–35 (Tex. App.—Fort Worth 1996, orig. proceeding) (holding the trial court abused its discretion in ordering the production of the expert's tax returns because the expert witness had already admitted 90% of his services were provided to defendants in litigation).

Indeed, the most probative information regarding the bias of a testifying expert comes from the expert herself. In this case, for example, Harley testified that only 5% of the cases she handles are for plaintiffs and that she has never testified against an automobile manufacturer. Similarly, Mauldin testified that historically about 50% of Carr Engineering's work is done for Ford. Moreover, Mauldin admitted that in park-to-reverse cases, he has never testified that a vehicle has a design defect. Mauldin's deposition in this case also revealed that he worked at Ford for several years before becoming a consultant at Carr Engineering.

Morales argues that we have recognized at least one instance in which deposing the expert's employer was justified. In *Walker v. Packer*, we held that discovery beyond the individual expert's deposition might be permissible when extrinsic evidence, discovered after the expert's deposition, puts his credibility in doubt. 827 S.W.2d 833, 838–39 (Tex. 1992) (orig. proceeding). In that case, the expert witness, a physician, testified in his deposition that his employer had no policy restricting its doctors from testifying for plaintiffs in medical-malpractice cases. *Id*. at 837. When the deposing party discovered contrary evidence in an unrelated case, we held that deposing an employer's representative was appropriate to "narrowly seek information regarding the potential bias." *Id*. at 838.

We adopted Rule 195—establishing disclosures, expert reports, and oral depositions as the permissible methods for expert discovery—after we decided *Walker*. *See* TEX. R. CIV. P. 195. Assuming that this aspect of our holding in *Walker* survived the adoption of Rule 195, we disagree that *Walker* compels the result Morales seeks. Unlike *Walker*, neither expert's credibility has been

impugned in this case. And Morales has not demonstrated any other circumstance to warrant deposing the witnesses' employers' corporate representatives.

Therefore, pursuant to Rule 52.8(c) of the Rules of Appellate Procedure, we conditionally grant Ford's petition for writ of mandamus without hearing oral argument and direct the trial court to vacate its discovery order. As we are confident that the trial court will comply, the writ will issue only if the trial court fails to do so.

OPINION DELIVERED: March 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-1002

MARCIA FULLER FRENCH, ET AL., PETITIONERS,

v.

OCCIDENTAL PERMIAN LTD., RESPONDENT

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

Argued February 5, 2014

CHIEF JUSTICE HECHT delivered the opinion of the Court.

One method of enhanced oil recovery is to inject carbon dioxide (CO_2) into a reservoir to sweep the oil to the production wells. The CO_2 returns to the surface entrained in casinghead gas — gas produced with the oil.[1] In this case, royalty owners contend that the royalty due on the casinghead gas under the parties' agreements must be determined as if the injected CO_2 were not present, and that they are not required to share with the working interest the expense of removing

[1] "'Casinghead gas' is generally defined as '[g]as produced with oil in oil wells, the gas being taken from the well through the casinghead at the top of the well, as distinguished from gas produced from a gas well.'" *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 684 n.5 (Tex. 1992) (quoting 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW: MANUAL OF OIL AND GAS TERMS 156 (1991)); *cf.* TEX. NAT. RES. CODE ANN. § 86.002(10) ("'Casinghead gas' means any gas or vapor indigenous to an oil stratum and produced from the stratum with oil."); *Amarillo Oil Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990) (applying statutory definition).

the CO_2 from the gas. We disagree and therefore affirm the judgment of the court of appeals.[2]

I

A

Petitioners, collectively "French",[3] own the royalty interests under two oil and gas leases in the Cogdell Field, one from the owners of the Fuller Rough Creek Ranch in Scurry and Kent Counties in 1948, and the other from the owners of the Cogdell Ranch in Kent County in 1949. Respondent Occidental Permian Ltd. ("Oxy") owns the working interest.

The Fuller Lease calls for a royalty "on gas, including casinghead gas or other gaseous substance produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom" equal to "the market value at the well of one-eighth (1/8th) of the gas so sold or used". The Cogdell Lease calls for a royalty of "1/4 of the net proceeds from the sale" of "gasoline or other products manufactured and sold" from casinghead gas "after deducting [the] cost of manufacturing the same." Both provisions were standard forms in common use at the time.[4]

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[2] 391 S.W.3d 215 (Tex. App.—Eastland 2012).

[3] Petitioners are Marcia Fuller French; Gillian Fuller; Lesa Oudt; French Capital Partners, Ltd.; Connie Delle Cogdell, individually and as trustee of the David M. Courtney Trust, and as trustee of the John Cogdell Courtney Trust; John Courtney, trustee of the Carol C. Courtney Disclaimer Trust; Penny Cogdell Carpenter, individually and as co-independent executor of the estate of William Munsey ("Billy") Cogdell and as co-trustee of the Cogdell Marital Trust; Billy Rank Cogdell, individually and as co-independent executor of the estate of William Munsey ("Billy") Cogdell and as co-trustee of the Cogdell Marital Trust; Dick Munsey Cogdell, individually and as co-independent executor of the estate of William Munsey ("Billy") Cogdell and as co-trustee of the Cogdell Marital Trust; Jim David Cogdell; and Happy State Bank and Trust Company, as trustee for the Martha Ann Cogdell Hospital Trust.

[4] The market value royalty provision in the Fuller Lease is essentially identical to the provisions we interpreted in *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 241-242 (Tex. 1981) (one lease provided that the royalty "on gas, including casinghead gas or other gaseous substances, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, shall be the market value at the well of one-eighth of the gas so

Generally speaking, a royalty is "free of the expenses of production [but] subject to postproduction costs, including . . . treatment costs to render [production] marketable", but "the parties may modify this general rule by agreement."[5] Under the Fuller Lease, the royalty on casinghead gas is based on its market value at the well — "what a willing buyer under no compulsion to buy will pay to a willing seller under no compulsion to sell."[6] Since gas is a commodity, its market value at the well does not depend on the individual producer's costs of bringing the gas to the surface. As a result, the royalty owner does not share in the costs of production. But postproduction processing that makes the gas marketable enhances its value after it leaves the well. The market price of the processed gas reflects the value of the unprocessed gas at the well only if reasonable postproduction processing costs are deducted.[7] In effect, for gas sold only after processing, the royalty owner shares in those costs, which may vary depending on the

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sold or used, provided that on gas so sold at the wells the royalties shall be one-eighth of the amount realized from such sale"). The proceeds provision in the Cogdell Lease is similar to the alternative "amount realized" clause for gas sold at the well in *Middleton*. *Id., see also, e.g., Badger v. King*, 331 S.W.2d 955 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.) ("a royalty of one-eighth (1/8) of the value of natural gas produced from said premises when said gas is sold or used off the premises, or one-eighth (1/8) of the net proceeds of the sale of such gas and a royalty of one-eighth (1/8) of the net amount of gasoline manufactured from natural or casinghead gas"); *Ladd v. Upham*, 58 S.W.2d 1037 (Tex. Civ. App.—Fort Worth 1933), *aff'd*, 95 S.W.2d 365 (Tex. 1936).

[5] *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121-122, 123 (Tex. 1996) (citations omitted). The Court concluded, however, that because the leases set the royalty as a fraction of market value at the well, the commonly accepted meanings of "royalty" and "market value at the well" rendered the leases' "postproduction" clauses — providing that there shall be no deductions from value of the royalty for, *e.g.*, processing, transportation and marketing costs — surplusage as a matter of law; market value at the well, in the absence of evidence of comparable sales, was established by lessors' concessions that lessee deducted only reasonable marketing costs from market value at the point of sale. *Id.*

[6] *Id.* at 125 (Owen, J., concurring) (citing *Exxon Corp. v. Middleton*, 613 S.W.2d at 246); *see also Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 374 (Tex. 2001) (quoting *Middleton*).

[7] *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d at 122 ("market value at the well" may be determined by "subtracting reasonable post-production marketing costs" — including the costs of "transporting the gas to the market and processing the gas to make it marketable" — "from the market value at the point of sale") (citations omitted).

quality of the gas coming from the ground.[8] Under the Cogdell Lease, the royalty on casinghead gas products is based on the proceeds from their sale, which, again, are unaffected by production expenses, and expressly net of manufacturing — *i.e.*, postproduction — costs. Thus, under both leases, the casinghead gas royalty is net of postproduction expenses but not production expenses. Postproduction, as the word itself implies, ordinarily means *after* production in time, but in this case, the royalty owners contend that the production process does not end at the wellhead. The dispute is over whether certain expenses are properly considered to be production costs or postproduction costs.

In 1954, not long after primary production had begun from the Canyon Reef formation, the leases were pooled to form the Cogdell Canyon Reef Unit ("CCRU"). The purpose, as stated in the Unitization Agreement among the working interest owners and royalty owners, was "to effect secondary recovery operations or pressure maintenance for oil and gas from the Canyon Reef . . . to increase the ultimate recovery of oil therefrom".[9] In the Agreement, the royalty owners consented

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[8] *See Freeland v. Sun Oil Co.*, 277 F.2d 154, 159 (5th Cir. 1960) ("The principle is . . . that in determining market value costs which are essential to make a commodity worth anything or worth more must be borne proportionately by those who benefit. To put it another way: in the analytical process of reconstructing a market value where none otherwise exists with sufficient definiteness, all increase in the ultimate sales value attributable to the expenses incurred in transporting and processing the commodity must be deducted. The royalty owner shares only in what is left over, whether stated in terms of cash or an end product. In this sense he bears his proportionate party of that cost, but not because the obligation (or expense) of production rests on him. Rather, it is because that is the way in which [the] law arrives at the value of the gas at the moment it seeks to escape from the wellhead.").

[9] Such pooling, which is subject to Railroad Commission approval, had been authorized by the Legislature only five years earlier. Act of May 12, 1949, 51st Leg., R.S., ch. 259, 1949 Tex. Gen. Laws 479 [SB 24], formerly TEX. REV. CIV. STAT. ANN. art. 6008b, now codified as TEX. NAT. RES. CODE §§ 101.011-.018. "The Legislature has made it the policy of this state to encourage secondary recovery of minerals". *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 46 (Tex. 2008); *accord Railroad Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 569-570 (Tex. 1962). "Secondary recovery operations are carried on to increase the ultimate recovery of oil and gas, and it is established that pressure maintenance projects will result in more recovery than was obtained by primary methods. It cannot be disputed that such operations should be encouraged, for as the pressure behind the primary production dissipates, the greater is

to the injection of extraneous substances into the oil reservoir and gave the working interest complete discretion in determining whether and how to conduct the operations:

> Royalties owners hereby grant unto the working interest owners, at the working interest owners' sole discretion, . . . the right to inject gas, extraneous gas, water, air or other substances, or any combination of two or more of them, in whatever amounts the working interest owners may deem expedient, into the unit area . . . .
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> * * *
>
> The working interest owners shall have full discretion in determining if gas, extraneous gas, air, water or other substances, or any combination of two or more of them, should be injected into the unit area in connection with secondary recovery and pressure maintenance operations. In any event the working interest owners shall be the sole judges of the kind of secondary recovery and pressure maintenance operations which shall be conducted in the unit area . . . .

The Agreement defined "gas" as "natural gas (including casinghead gas) and all of its constituent elements produced from wells on lands and leases in the Cogdell Field producing from the Canyon Reef underlying the unit area." Thus, the working interest owners were given discretion to reinject casinghead gas into the field as part of the operations. The parties agreed that no royalty would be paid on such gas:

> All unitized substances . . . used in connection with the operation or development of the unit area [or] in injection operations in the unit area . . . shall be deducted before the royalties, overriding royalties and other payments out of production payable to royalty owners hereunder are determined, calculated or paid; and no royalty, overriding royalty or other payment out of production shall be due or payable to any royalty owner hereunder on any unitized substances so . . . used . . . .[10]

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the public necessity for applying secondary recovery forces." *Id*. at 568.

[10] The Agreement added this proviso: "provided, that, notwithstanding the foregoing provisions, if under the laws of the State of Texas any royalty owner is entitled to be paid royalty on oil . . . used in the operation . . . , such royalty shall be paid to said royalty owner under its individual leases in the unit area in accordance with said laws."

"Unitized substances" were defined to include "all oil, gas, . . . or any other substance produced and saved from the Canyon Reef underlying the unit area."

Finally, the Agreement assigned the cost of the operation to the working interest except to the extent it was already to be borne by the royalty interests:

> No part of the costs and expenses incurred in the development and operation of the unit area, including secondary recovery and pressure maintenance costs, shall be charged to any royalty owner unless such royalty owner is already obligated to pay such costs or expenses by the terms of other agreements. Such costs and expenses shall be borne by the working interest owners . . . .

The parties' only other agreements were the leases. Thus, the costs of secondary recovery were not to be charged to the royalty owners except as permitted by the leases — that is, in determining the market value of the gas at the well under the Fuller Lease and the cost of manufacturing casinghead gas products under the Cogdell Lease.

B

The secondary recovery operation in the CCRU involved injecting water into the reservoir to increase and maintain pressure lost through primary production and to sweep oil toward producing wells. The operation has proved very successful. The CCRU has produced more than 270 million barrels of oil and billions of cubic feet of casinghead gas,[11] together valued at more than $1.15 billion, with about half the oil remaining in the reservoir. Waterflooding continues, but by the late 1990s, it had become less effective. Oil production had declined from some 30,000 barrels per day at the peak to about 1,500 barrels per day.

[11] The data stated throughout this opinion are as of the time of trial, February 2009.

Since the CCRU was formed, several methods of enhanced oil recovery have been developed, sometimes referred to as tertiary because they typically follow secondary recovery. One is by injecting CO_2 into the reservoir. This increases pressure in the reservoir, just as water injection does. But more importantly, CO_2 is miscible with water and, under high pressure and temperature, with oil. In solution with oil and water, CO_2 can act to reduce oil's viscosity and reduce surface tension, thus easing separation of oil from water in the formation, and improving movement of oil through the formation to the production wellbores. CO_2 flooding requires enormous volumes of CO_2, and supplies are limited and expensive.[12] Special well equipment must also be used to withstand the corrosive properties of CO_2. And the effectiveness of CO_2 flooding is not assured; it depends on the nature of the oil in the ground and the formations in the reservoir. CO_2 flooding is more expensive and riskier than waterflooding.

Oxy began a CO_2 flood in the CCRU in 2001, and it, too, has proved very successful.[13] The roughly 106 active wells in the unit produce about 5,800 barrels of oil daily. Without the CO_2 flood, oil production would have declined to 200 barrels per day and would no longer have been economically viable, and more than half the oil in the reservoir would have been lost forever.

The wells also produce daily about 140,000 barrels of water, and casinghead gas containing about 110 million cubic feet of CO_2. Separating the oil from the water is relatively simple. The mixture is placed in large storage tanks, where the oil floats on the heavier water and is simply skimmed off. Emulsifiers are added to assist the process. The water is then reinjected into the field.

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[12] Oxy pays 66¢/mcf for CO_2.

[13] The parties do not dispute that the CO_2 flood is permitted and governed by the Unitization Agreement.

The royalty owners have never been charged any part of the expense of this process. The working interest owners have treated the separation of water from oil for reinjection into the field as part of production.

The CO_2 produced with the casinghead gas is also reinjected into the field, along with additional purchased CO_2. More than 10 million cubic feet of casinghead gas per day is simply transported in pipelines from the production wells back to the injection wells and pumped back into the reservoir. As noted above, the Unitization Agreement provides that no royalty is due on such gas, and none is paid. All the casinghead gas could be reinjected the same way, and Oxy considered this possibility in designing the CO_2 flood operation, but the casinghead gas is only about 85% CO_2, and ideally, the injection stream should be more highly concentrated. Also, the hydrocarbon content of the casinghead gas stream not only includes methane (CH_4) but is rich in natural gas liquids (NGLs) — ethane (C_2H_6), propane (C_3H_8), butane (C_4H_{10}), pentane (C_5H_{12}), and natural gasoline (heavier molecules) — which can be extracted and sold. To increase the concentration of CO_2 in the reinjected stream, and to realize the value of the NGLs entrained in the casinghead gas, Oxy elected to process the gas to remove the CO_2 and extract the NGLs.

Before the CO_2 flood, the casinghead gas produced from the field was less than 2% CO_2 and was processed at the Fuller Gasoline Plant to remove other contaminants like hydrogen sulfide (H_2S)[14] and nitrogen (N_2),[15] and to extract NGLs, which were then sold along with the residual gas.

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[14] Hydrogen sulfide is a colorless gas with the characteristic foul odor of rotten eggs. It is heavier than air, very poisonous, corrosive, flammable, and explosive.

[15] Nitrogen is a colorless, odorless, relatively inert gas that comprises about 78% of Earth's atmosphere.

The processing was undisputedly a postproduction expense shared by the royalty owners and the working interest. French received royalties based on the value of the NGLs and residual gas net of the processing costs.

But the Fuller plant, like most ordinary gasoline plants, could not process gas that is 85% CO_2. Oxy considered constructing a field refrigeration unit to extract some of the NGLs but ultimately decided to opt for full processing of the casinghead gas. Oxy contracted with Kinder Morgan to build a plant that could process CO_2-laden gas, an investment of millions of dollars. Using Cynara membrane technology, the Kinder Morgan plant removes at least 90% of the CO_2 and most of the H_2S for reinjection, and also extracts some of the NGLs, about two-thirds of the total produced from the gas stream. Kinder Morgan contracts in turn with Torch Energy Marketing to further process the gas at its Snyder Gasoline Plant. There, the rest of the CO_2 and H_2S are removed for reinjection, and the rest of the NGLs are extracted. For its services, Kinder Morgan receives from Oxy a monthly fee of 33¢/mcf of gas delivered to Cynara, plus 30% of the total NGLs in kind and all the residual gas at the tailgate of the Snyder plant. The residual gas is not marketable because of its high nitrogen and low Btu content, but Kinder Morgan uses the gas in its electric generation plant nearby. Kinder Morgan pays Torch a monthly fee, beginning at 25¢/mcf of gas delivered to Snyder and escalating over time. Oxy pays French a royalty on 70% of the NGLs,[16] but not on the 30% given to Kinder Morgan as in-kind compensation, or on any of the residual gas also given as in-kind compensation. Oxy considers the monetary fee paid to Kinder Morgan a production expense

[16] The value of the NGLs produced through this process, from January 2002 through February 2009, is $226,492,474, 70% of which is $158,544,732.

and does not charge any part of it to French.[17]

C

French sued Oxy for underpaying royalties on casinghead gas since the beginning of the CO_2 flood. French contends that processing the casinghead gas, except for the removal of H_2S and the extraction of NGLs at Snyder, is all part of production that must be borne by Oxy as the working interest owner. This includes the transportation of the casinghead gas from its gathering point to the Cynara plant some 15 miles away, the processing at the Cynara plant, the transportation of the partially processed streams of NGLs and gas to the Snyder plant, the removal of CO_2 there, and the transportation of the permeate streams of CO_2 and H_2S from both plants back to the injection wells. French argues that the extraction of NGLs and removal of H_2S at Cynara are merely incidental byproducts of the removal of CO_2 and thus part of production. French does not contend that the compensation for Kinder Morgan's services is unreasonable, only that it is not a postproduction expense she must share. French asserts that her royalty should be based on the value of 100% of the NGLs net of the expense of extracting them from the gas and removing H_2S, plus the value of the residue gas — or in other words, French claims a royalty based on the value of the native casinghead gas stream that was being processed at the Fuller Plant before the CO_2 flood. Oxy counters that removal of the CO_2 is necessary to make the casinghead gas marketable and is therefore a postproduction expense that must be shared by the royalty owners. Oxy acknowledges that production activities occur at the Cynara plant, but it argues that the monetary fee it pays Kinder

[17] Kinder Morgan's fees total $85 million.

Morgan, no part of which is charged to French, covers those activities.[18]

After a four-day trial to the bench, the trial court agreed with French and awarded her $10,074,262.33 in underpaid royalties, a declaratory judgment defining Oxy's ongoing royalty obligations consistently with the award, and attorney fees. The court of appeals reversed,[19] focusing on French's damages calculations. It disagreed with French that all the processing at the Cynara plant was part of removing CO_2 and thus a production expense. If nothing else, the court reasoned, the cost of removing H_2S, which French admitted was a postproduction expense at Snyder, was no less a postproduction expense at Cynara, to be subtracted from the value or proceeds of the NGLs in calculating royalties.[20] Because French had not proved the amount of that expense, the court concluded, she had not proved the value or proceeds of the NGLs and residue gas on which her royalty should be calculated.[21] Thus, the court did not reach the issue whether the cost of separating CO_2 from the casinghead gas was a production expense.[22]

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[18] Kinder Morgan pays a part of the fee to Torch for all processing at the Snyder plant, part of which — the removal of H_2S and extraction of NGLs — French acknowledges is for postproduction activities. Under French's theory, Oxy would be entitled to charge French part of the fee. Oxy makes no such claim.

[19] 391 S.W.3d 215 (Tex. App.—Eastland 2012).

[20] *Id.* at 223.

[21] *Id.*

[22] *Id.* at 224. French also claims, and the trial court found, that Oxy's refusal to pay a royalty on the 30% of the NGLs and the residual gas given to Kinder Morgan constituted a breach of the implied covenant to market under the leases. The court of appeals concluded that there is no such covenant in a market value lease, citing *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 699 (Tex. 2008), and that French had not proved a breach of the covenant in the proceeds lease because she had not proved an underpayment of royalties. Because we hold that Oxy had no such royalty obligation, not merely that French failed to prove a breach, we reach the same result as the court of appeals, though for a different reason.

We granted French's petition for review.[23]

II

Royalty owners and working interest owners are, of course, free to agree on what royalty is due, the basis on which it is to be calculated, and how expenses are to be allocated.[24] Often, as in this case, agreements contain provisions that are standard throughout the oil and gas industry, provisions that have been judicially interpreted many times over many years. Careful adherence to those interpretations, and consistent application of them, is important to industry stability.

As we have said, all costs of production are generally borne by the working interest,[25] and here the Unitization Agreement assigned all costs of the enhanced recovery operations to the working interest "unless [a] royalty owner is already obligated to pay such costs or expenses by the terms of other agreements." The leases are other agreements in which such an obligation might be found, so we turn to them.

The Fuller Lease provides for a royalty on casinghead gas based on its market value at the well. The only market value evidence in this case is of the NGLs and residue gas at the tailgate of the Snyder plant, after processing is complete. French argues that royalties must be based only on the value of the non-CO_2 gas, the "native" gas, at the well, determined by deducting only the processing costs unrelated to the removal of CO_2 from the value of the final products. The Cogdell

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[23] 57 Tex. Sup. Ct. J. 154 (Jan. 15, 2014).

[24] *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121-122 (Tex. 1996) ("Royalty is commonly defined as the landowner's share of production, free of expenses of production. Although it is not subject to the costs of production, royalty is usually subject to post-production costs, including taxes, treatment costs to render it marketable, and transportation costs. However, the parties may modify this general rule by agreement.") (citations omitted).

[25] *See Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 180 n.2 (Tex. 2012).

Lease provides for a royalty based on the sales proceeds of casinghead gas products net of the cost of manufacturing them. French argues that that cost does not include the expense of removing CO_2 from the gas. French contends that removing CO_2 for reinjection is part of production, the expense of which is solely that of the working interest. Oxy argues that for both leases, the cost of removing CO_2 is a postproduction expense involved in extracting the NGLs that must be deducted from their market price in determining royalties.

French relies principally on our decision in *Humble Oil & Refining Co. v. West*.[26] That case involved a waterdrive natural gas reservoir that was being depleted by production and could be used for storage of extraneous gas but only if that gas were injected before the native gas was completely produced, to prevent water from encroaching into the field and destroying it.[27] The royalty owners, the Wests, sued Humble, the owner-operator of the field, to enjoin injection of extraneous gas until all the native gas had been produced.[28] We held that Humble had the right to proceed.[29] The Wests then argued that all the gas in the field, native and injected, was subject to their royalty interest.[30] We disagreed, holding that the injected gas remained Humble's property on which no royalty would be due when such gas was removed from storage, but also that Humble, because it had commingled its injected gas with the native gas, had the burden of showing when production of the pre-injection

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[26] 508 S.W.2d 812 (Tex. 1974).

[27] *Id.* at 813.

[28] *Id.* at 813-814.

[29] *Id.* at 816.

[30] *Id.* at 816-817.

volume of native gas was complete and the royalty obligation extinguished.[31]

Under *West*, the CO_2 injected into the Cogdell Field remains Oxy's property, and French is not entitled to a royalty based on its value when it is produced with the casinghead gas. French argues, correctly, that under *West* she is entitled to a royalty on the value of the non-CO_2 portion of the casinghead gas. But that value is far less while the hydrocarbons and CO_2 are commingled, and whether a royalty owner must share in the cost of separation was not in issue or addressed in *West*. The parties agree that removing contaminants indigenous to the production field, like H_2S, from casinghead gas is not part of production, and the royalty owners must share in the expense. But they have cited no case, and we have found none, involving separation of extraneous substances injected into the field.

French analogizes the process of separating CO_2 injected into the field from the casinghead gas to the process of separating water injected into the field from the oil. Oxy has always treated this oil processing as part of production, charging no part of the expense to French. French argues that the gas processing should be treated the same way. But oil and water are immiscible, and separating them is a relatively simple process compared to separating CO_2 from gas, which requires special technology. More saliently, separating water from oil is essential to continued economic production. The result of waterflooding, which is critical to recovering the oil from the ground, is that an enormous amount of water is produced with the oil — more than 23 barrels of water to one barrel of oil. Separating the water is not only for reinjection into the reservoir; it is necessary to make the

[31] *Id.* at 818-819.

oil marketable. Without waterflooding and the separation of oil and water, oil production would not be viable. The CO_2 flood is also critical to continued oil production, perhaps even essential, and the result is that the casinghead gas stream is more than 85% CO_2. But separating the CO_2 from the casinghead gas is not necessary for the continued production of oil, which is the purpose of both the waterflood and the CO_2 flood. The gas can be reinjected directly into the field, and some of it is. The gas processing is certainly economically beneficial to French and Oxy. Oxy obtains a concentrated stream of CO_2 for reinjection, and French and Oxy share in the value of the extracted NGLs. But the gas processing is not essential to the operation of the field as the oil processing is.

Not only is it unnecessary for continued oil production to separate the CO_2 from the casinghead gas, Oxy has no obligation to do so. The Unitization Agreement gives it the right to reinject the entire production of casinghead gas into the field, and in developing the CO_2 flood, Oxy considered that option. Had it pursued that course, French would not be entitled to any royalty on the casinghead gas. Instead, Oxy decided to process the gas to obtain a more concentrated stream of CO_2 for reinjection and to extract the NGLs to be marketed. Even so, it actually reinjects more than 10% of the gas produced directly back into the field.[32]

In these circumstances, we think that under the parties' agreements, French, having given Oxy the right and discretion to decide whether to reinject or process the casinghead gas, and having benefitted from that decision, must share in the cost of CO_2 removal. Under the Fuller Lease, that cost must be considered in determining the market value of the gas at the well, on which French's

[32] We note that Oxy's decision appears to further the State's policy of encouraging full recovery of hydrocarbons and precluding waste. *See* TEX. NAT. RES. CODE §§ 85.045-.047.

royalty is based, and under the Cogdell Lease, it must be included in the cost of manufacturing the NGLs and residue gas. Oxy acknowledges that the gas processing activities aimed at returning CO_2 to the reservoir are part of production and contends that the monetary fee it pays Kinder Morgan, which is not charged to French, covers those expenses. French does not contend that the 30% of NGLs Oxy gives Kinder Morgan in kind overpays for her share of the postproduction expense of CO_2 removal; she argues only that no part of the CO_2 removal is a postproduction expense. Since we disagree, her claim fails.

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

Affirmed.

Nathan L. Hecht
Chief Justice

Opinion delivered: June 27, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-1006

CITY OF HOUSTON, PETITIONER,

v.

SHAYN A. PROLER, RESPONDENT

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

Argued February 6, 2014

JUSTICE WILLETT delivered the opinion of the Court.

JUSTICE BROWN did not participate in the decision.

Does a firefighter who refuses to fight fires have a "disability" under either state or federal law? We answer no and therefore reverse the court of appeals' judgment in part.

A. Background

Shayn Proler was a firefighter with the Houston fire department. He rose to the level of captain, leading a fire suppression crew. Proler testified that, in 2004, a fellow firefighter complained that Proler would not enter a burning apartment building. Proler disputed this accusation. He was reassigned to the firefighter training academy. He objected to the reassignment and was eventually transferred back to a fire suppression crew, conditioned on periodic evaluations.

In March 2006, Proler arrived at a house fire and was unable to put on his firefighting gear. He was unable to take orders and had difficulty walking. Someone escorted him to a house next door and sat him down on a bucket. He went to a hospital and was diagnosed with "global transient amnesia." Another captain on the scene reported that Proler did not appear to be aware of his surroundings and that he was either frightened or in the throes of an acute medical emergency. A letter from another officer to the assistant chief requested an investigation of Proler to address "this possibly dangerous situation." Shortly thereafter, an assistant chief again assigned Proler to the training academy. The City requested a follow-up medical evaluation from one of Proler's doctors, Dr. Ferrendelli, who noted an episode of global transient amnesia but approved Proler's return to work.

Under the terms of a collective bargaining agreement, Proler filed an administrative grievance seeking reassignment to a fire suppression unit. On administrative appeal, a hearing examiner sided with Proler, who was reassigned to fire suppression. The City appealed this decision to the trial court, alleging jurisdiction under the Declaratory Judgments Act[1] and chapter 143 of the Local Government Code. Proler counterclaimed for disability discrimination under federal and state law.

The trial court granted Proler's plea to the jurisdiction, concluding that it lacked jurisdiction over the City's administrative appeal. The disability claim proceeded to trial. The jury found that the City had discriminated against Proler in reassigning him to the training academy after the March 2006 incident but awarded no damages. The trial court rendered a judgment in favor of Proler that

[1] TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*

enjoined the City from further acts of discrimination and awarded Proler attorney fees of approximately $362,000, together with costs.

The court of appeals reversed the order granting Proler's plea to the jurisdiction insofar as the City (1) claimed the hearing examiner exceeded his jurisdiction by awarding overtime compensation, and (2) requested declaratory judgment relief on this issue.[2] The court of appeals also reversed an award of attorney fees to Proler under the Declaratory Judgments Act, reasoning that this award may have been based on the trial court's conclusion that it lacked jurisdiction over the City's appeal of the hearing examiner's decision.[3] The court of appeals, with one justice dissenting, affirmed the trial court's judgment awarding injunctive relief and attorney fees to Proler on his disability discrimination claim.[4]

B. Discussion

Proler does not challenge that portion of the court of appeals' judgment (1) reversing the trial court's order dismissing the City's claim to the extent the City claimed the hearing examiner exceeded his jurisdiction by awarding overtime compensation, and (2) reversing the trial court's award of attorney fees to Proler related to the City's declaratory judgment action. Accordingly, these portions of the court of appeals' judgment remain in effect.[5]

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[2] 373 S.W.3d 748, 771.

[3] *Id.* at 767–68.

[4] *Id.* at 771.

[5] As Proler did not raise these issues in his response to the petition or in his response brief, they are waived. *See* TEX. R. APP. P. 53.3; TEX. R. APP. P. 55.3.

This leaves Proler's claims for disability discrimination. Proler sued under the federal Americans with Disabilities Act (ADA)[6] and under chapter 21 of the Texas Labor Code. In construing Texas law on this subject, we consider federal civil rights law as well as our own caselaw.[7]

At the outset, we note that the law prohibiting disability discrimination does not protect every person who desires employment but lacks the skills required to adequately perform the particular job. Lacking the required mental, physical, or experiential skill set is not necessarily a disability. Were the law otherwise, any person who, for instance, wishes to be a ballerina or professional basketball player could routinely sue for disability discrimination if the Bolshoi or the San Antonio Spurs declined employment. Under federal law, the applicant must be a "qualified individual,"[8] meaning an individual who "can perform the essential functions of the employment position."[9] Texas law similarly extends to "a physical or mental condition that does not impair an individual's ability to reasonably perform a job."[10] While we might question whether Proler could

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[6] State and federal courts have concurrent jurisdiction over ADA claims. *See Zatarain v. WDSU-Television, Inc.*, No. 95–30604, 1996 WL 97105, at *1–2 (5th Cir. Feb. 7, 1996) (per curiam).

[7] *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 & n.25 (Tex. 2010); *see also* TEX. LAB. CODE § 21.001(3) (stating that purposes of Labor Code chapter 21 include "provid[ing] for the execution of the policies embodied in Title I of the Americans with Disabilities Act of 1990 and its subsequent amendments").

[8] 42 U.S.C. § 12112(a).

[9] *See id.* § 12111(8) ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

[10] TEX. LAB. CODE § 21.105.

reasonably perform the firefighter job, we do not pursue this inquiry because the City does not make this argument here, and the jury was not asked to decide this question.

But the City does argue that Proler did not suffer from a "disability" and that he was not reassigned on account of a disability. We agree with the City that no evidence supports the jury findings on these issues. In reviewing the legal sufficiency of the evidence, the test "must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review."[11] A challenge to legal sufficiency will be sustained if the evidence offered to establish a vital fact does not exceed a scintilla.[12] Evidence does not exceed a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion"[13] or "so slight as to make any inference a guess."[14]

Generally, state and federal law prohibit adverse personnel actions by an employer on account of an employee's disability.[15] The jury was asked whether disability was a motivating factor in the City's decision to reassign Proler to the training academy after the March 2006 incident. The jury answered affirmatively. "Disability" was defined in the charge as "being regarded as having a mental or physical impairment that substantially limits at least one major life activity." This

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

[12] *Id.* at 810.

[13] *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

[14] *Id*.

[15] TEX. LAB. CODE § 21.051; 42 U.S.C. § 12112(a).

definition is consistent with federal and state law.[16] "Major life activity" was defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, thinking or working." This definition tracks state and federal law.[17]

There is no evidence from which a reasonable and fair-minded jury could conclude that Proler was disabled. The jury heard evidence of two incidents where Proler was allegedly unable to provide useful help to his firefighting team during actual fires at two residential buildings. Being unable to set aside the normal fear of entering a burning building is not a mental impairment that substantially limits a major life activity. In determining disability, the issue is whether Proler was "unable to perform the variety of tasks central to most people's daily lives," not whether he was "unable to perform the tasks associated with [his] specific job."[18] Or as we have stated, the issue

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[16] *See* TEX. LAB. CODE § 21.002(6) (defining "disability" as "a mental or physical impairment that substantially limits at least one major life activity" or "being regarded as having such an impairment"); 42 U.S.C. § 12102(2) (same).

[17] *See* 29 C.F.R. § 1630.2(i)(1)(i) (2012) (EEOC regulation defining "major life activity" to include "[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working"); *see also Haggar Apparel Co. v. Leal*, 154 S.W.3d 98, 100 & n.9 (Tex. 2004) (citing section 1630.2 and noting that "[t]he definition of 'disability' in chapter 21 [of the Texas Labor Code] . . . is essentially the same as in the ADA.").

Effective January 1, 2009, Congress amended the ADA. *See* Pub. Law. No. 110-325, 122 Stat. 3353 (2008); *see also Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011) (noting that the ADA Amendments Act of 2008 applies to conduct occurring after January 1, 2009). In 2009, the Texas Legislature added new provisions to the Labor Code that corresponded to the federal amendments. Section 21.001(12-a) was added to provide: "'Regarded as having such an impairment' means subjected to an action prohibited . . . because of an actual or perceived physical or mental impairment, other than an impairment that is minor and is expected to last or actually lasts less than six months, regardless of whether the impairment limits or is perceived to limit a major life activity." Act of May 27, 2009, 81st Leg., R.S., ch. 337, §1, 2009 Tex. Gen. Laws 868, 869 ("Act"). Section 21.021(a)(2) was added to provide that the term "disability" "includes an impairment that is episodic or in remission that substantially limits a major life activity when active." Act § 2. These amendments apply to personnel actions occurring after September 1, 2009, and hence do not apply to today's case. *See* Act §§ 6–7.

[18] *Toyota Motor v. Williams*, 534 U.S. 184, 200–01 (2002); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 493 (1999) (holding that inability to perform a single, particular job does not substantially limit the major life activity of working).

is not whether the plaintiff can perform his particular job, but whether his impairment "severely limit[s] him in performing work-related functions in general."[19] Again, if one considers the NBA, the capacity to play professional basketball is an ability; the rest of us do not suffer from a disability because we cannot play at that level. A job skill required for a specific job is not a disability if most people lack that skill.[20] The jury was in fact instructed, we think correctly, that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."

Proler does not argue that he in fact suffered from a disability, but argues instead that he was perceived as suffering from a disability. The charge, consistent with federal and state law, defined a disability to include "being regarded" as having a disability.[21] But there is no evidence from which a reasonable and fair-minded jury could find that the City perceived Proler to be suffering from a mental impairment that substantially limited a major life activity. The evidence was entirely to the contrary—indicating Proler was removed from a front-line firefighting position only because City decision-makers had received information that Proler had frozen at two fires, and he was therefore perceived to be unable to do his particular job as captain of a firefighting crew. Even Proler's mother agreed that the department acted properly in removing him from the scene of the second fire.

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[19] *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 318 (Tex. 1987); *see also Williams*, 534 U.S. at 200 ("[E]ven assuming that working is a major life activity, a claimant would be required to show an inability to work in a 'broad range of jobs,' rather than a specific job.").

[20] *See Carter v. Ridge*, 255 F. App'x 826, 830 (5th Cir. 2007) (holding that plaintiff alleging sleeping disability must show "his affliction is worse than that suffered by a large portion of the nation's adult population") (citation omitted); 29 C.F.R. §1630.2(j)(1)(ii) (2012) ("An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.").

[21] *See supra* note 15.

Fighting fires is not a major life activity; it is a job requiring highly specialized skills, unique training, and a special disposition. A district captain testified without contradiction that firefighting is one of the world's most dangerous jobs, that firefighters must perform in "IDLH" conditions—immediately dangerous to life and health—and that Houston firefighters had died in the line of duty "quite a lot in the last ten years." He explained that all firefighters must learn to overcome an instinctive disinclination to go into a fire, stating that "everything . . . in your person is screaming: Get out, get out, get out, go the other way." A reluctance to charge into a burning building is not a mental impairment at all; it is the normal human response. Such a reluctance cannot be characterized as an "impairment," much less an impairment that substantially limits a major life activity, if it does not limit "the ability of an individual to perform . . . as compared to most people in the general population."[22]

Proler testified that he suffered from depression for years. He testified he had been treated for depression before he started working for the fire department and may need treatment for the rest of his life. But there is no evidence that the City perceived Proler to suffer from an impairment that substantially limited his ability to perform a major life activity such as thinking or performing work-related functions in general. On this record, to find otherwise does not rise above the level of mere surmise or suspicion. In fact, the City reassigned him to another job that required him to think and

[22] 29 C.F.R. §1630.2(j)(1)(ii) (2012); *see also Greenberg v. New York*, 919 F. Supp. 637, 643 (E.D.N.Y. 1996) (holding that inability of corrections officer applicant to make decisions in emergency situations or perform effectively under stress are personality traits, not mental impairments under ADA).

work.[23] He testified that while he was employed at the academy he conducted research on firefighter injuries and worked with recruits as a safety officer. Hector Trevino, the assistant chief who reassigned Proler, understood that Proler would do administrative and training work at the academy. Proler testified that he was "able to work" in this reassigned position and received his regular paycheck as a captain. The fire department also offered Proler a captain position in communications, but he turned it down because he only wanted to work in fire suppression. A treating physician, Dr. Raichman, described Proler as taking several medications but "able to function well at work." Raichman described Proler's condition as a "mood disorder" not otherwise specified, that did not rise to the level of major depression or bipolar disorder. Raichman's psychiatric report describes Proler as "cognitively intact" and as having "no thought disorder." Proler's father, a physician, testified that Proler had suffered from depression for years but had always been able to work. The record is devoid of evidence that the City viewed Proler as unable to think, perform work-related functions generally, or perform some other major life activity.

Even assuming that Proler's depression or other medical disorder interfered with a major life activity, the record yields no evidence that he was reassigned because of this condition and hence was discriminated against on account of a disability. There is no evidence that the City was aware of Proler's treatment by Dr. Raichman or other physicians for depression. Trevino, the official who reassigned Proler, testified that he had no knowledge of Proler's history of depression until trial preparation years after the reassignments. The record is clear that Proler was reassigned twice to

[23] *See Thomann v. Lakes Reg'l MHMR Ctr.*, 162 S.W.3d 788, 799 (Tex. App.—Dallas 2005, no pet.) ("The fact that Lakes Regional offered Thomann a different job shows that Lakes Regional believed she was qualified for other positions and that Lakes Regional did not regard her as disabled.").

the training academy because (1) he allegedly failed to perform his firefighting duties during a fire in 2004, and (2) he indisputably failed to perform his duties during a fire in 2006. The record is devoid of evidence that the City made those reassignments because it perceived Proler to be suffering from a psychological impairment rendering him unable to perform a major life activity.

Instead, the record shows that Proler was reassigned because the City perceived him as unable to perform his specific job as a captain of a firefighting crew. As to the reassignment in 2004, Proler was asked "how did that come about," and answered that the reassignment occurred in response to a specific allegation by another employee "that I didn't go inside an apartment fire with the rest of the crew." As to the March 2006 reassignment, Proler conceded that he had been unable to perform his duties at a house fire and that Trevino had reassigned him because of this specific incident. Trevino had received reports that Proler was not "aware of his surroundings or the environment," that "[e]ither he was scared or there was an acute medical emergency that consumed him," and that "[i]f Captain Proler has some type of medical or psychiatric condition that precludes his safe behavior at a fire, then he should be removed from emergency response." A district chief had received several reports that Proler seemed to be afraid to enter the fire situation. Proler's own mother testified that his behavior at the second fire presented "a real danger" to her son "and to anybody else that would be in that situation." He was reassigned three days after the March 2006 house fire. Trevino testified without contradiction that he reassigned Proler because of the reports regarding his performance at that fire. Based on these reports—indicating Proler was unable to buckle up his own gear, respond to simple orders, or lead his firefighters—Trevino concluded that Proler should be reassigned because Proler had created an "extremely dangerous situation" for

himself and other firefighters. The decision was also based in part on Trevino's recollection of the 2004 reassignment resulting from information indicating that Proler "was scared to go in fires." Trevino had received two reports in 2004 that Proler "wasn't going into fires. . . . My perception was that he was scared to go into the fire scenes." Other than occasions when Proler was faced with the immediate task of entering a burning building, there was no evidence that Trevino or other City officials knew of occasions when Proler's ability to function was compromised. At oral argument, counsel for Proler confirmed that there was no "evidence in the record that Mr. Proler experienced similar mental difficulties in other everyday areas of his life." On this record a reasonable and fair-minded jury could only conclude that the City reassigned Proler because it questioned his ability to perform his particular job fighting fires and supervising his crew in those harrowing conditions, which are not major life activities. There is no evidence that the City reassigned him because it perceived him as unable to perform a major life activity such as walking, thinking, or working in general, due to an underlying mental or physical disorder.

C. Conclusion

The court of appeals' judgment remains in effect insofar as it (1) reversed the trial court order dismissing the City's claim to the extent the City claimed the hearing examiner exceeded his jurisdiction by awarding overtime compensation and requested declaratory relief relative to this claim, and (2) reversed the trial court's award of attorney fees to Proler related to the City's declaratory judgment action. We remand the case to the trial court for further proceedings on the City's claim. We reverse the court of appeals' judgment insofar as it affirmed the trial court's

judgment granting injunctive relief and attorney fees on Proler's disability discrimination claims, and render a take-nothing judgment on those claims.

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Don R. Willett
Justice

OPINION DELIVERED: June 6, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-1013

SCHLUMBERGER TECHNOLOGY CORPORATION, PETITIONER,

v.

CHRISTOPHER ARTHEY AND DENISE ARTHEY, RESPONDENTS

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

Argued January 8, 2014

CHIEF JUSTICE HECHT delivered the opinion of the Court.

JUSTICE GREEN did not participate in the decision.

Under Texas law, a social host has no duty to prevent someone from drinking and driving.[1] But in this case, the driver became intoxicated on a small, chartered fishing boat during a business retreat, and plaintiffs contend that their action against the host is governed by federal maritime law,

[1] *Reeder v. Daniel*, 61 S.W.3d 359, 361-362, 364-365 (Tex. 2001) (refusing to recognize a negligence per se or ordinary negligence cause of action against social hosts for making alcohol available to guests under eighteen years old); *Smith v. Merritt*, 940 S.W.2d 602, 605, 608 (Tex. 1997) (concluding that social hosts owed no common law tort duty to a nineteen-year-old guest's passenger to refrain from providing alcohol to the guest and that hosts were not negligent per se); *Graff v. Beard*, 858 S.W.2d 918, 921-922 (Tex. 1993) (holding that a social host has no duty to a third party to prevent an adult guest from drinking and driving); TEX. ALCO. BEV. CODE §§ 2.01-.03 (imposing liability only on commercial providers); *cf. Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 311 (Tex. 1983) (holding that an employer who affirmatively exercises control over an incapacitated employee must exercise ordinary care to prevent the employee from causing an unreasonable risk of harm to others).

which, they argue, would recognize liability.[2] For maritime law to apply, the action must fall within admiralty jurisdiction, and under the tests prescribed by the United States Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,*[3] it does not. Accordingly, we reverse the judgment of the court of appeals[4] and render judgment for petitioner.

I

To foster good business relations, Schlumberger Technology Corp. invited employees from some of its business partners, along with several of its salesmen, to a retreat at Schlumberger's expense at the Shoal Grass Lodge in Aransas Pass near the Gulf of Mexico. From Wednesday afternoon to Friday afternoon, Schlumberger had the Lodge provide the twelve guests with rooms, meals, an open bar, and a total of eight to ten hours of bay fishing from small boats with professional guides. The Lodge did not provide alcoholic beverages on the boats, but Schlumberger's outfitter, who arranged the event, could "make it happen", and did, at guests' request.

One guest was David Huff, an employee of Petrobras America, Inc., a company that did millions of dollars of business with Schlumberger. On Friday morning, Huff, a Schlumberger employee named William Ney, and a guide left the Lodge on a fishing boat between 9:00 and 10:00. Huff and Ney did not remember whether there was alcohol on the boat that morning, though Huff assumed so, and there had been the day before. Ney recalled that Huff was drinking something from

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[2] We express no opinion on the substantive maritime law.

[3] 513 U.S. 527, 534 (1995).

[4] 398 S.W.3d 831 (Tex. App.—Corpus Christi–Edinburg 2012).

a can wrapped in a "koozie",[5] though Huff slept most of the time they were out. The boat returned to the Lodge between 12:30 and 1:00 p.m., and Huff left to drive home.

At 2:34 p.m., some 40 miles from the Lodge, Huff crossed into oncoming traffic and struck a motorcycle ridden by Christopher and Denise Arthey. Both Artheys were severely injured, and as a result, lost their left legs. Other motorists had seen Huff driving erratically, but the investigating officer did not smell alcohol on his breath. Huff was taken to a hospital where, three hours after the accident, his blood alcohol content tested 0.25, more than three times the legal limit.[6] An expert retained by the Artheys extrapolated Huff's blood alcohol content at the time of the accident to be 0.31. According to the expert, Huff could not have drunk enough after leaving the boat to reach that level and yet still continue to function, and thus he must have been drinking on the boat. Huff conceded he was "significantly intoxicated" at the time of the accident. He pleaded guilty to intoxication assault, a third degree felony,[7] and was given a probated sentence by a jury.

The Artheys sued Schlumberger,[8] alleging that it negligently allowed Huff to drink excessively. As noted, Texas law does not recognize such social host liability,[9] but the Artheys

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[5] A koozie is a fabric or foam device that wraps around a beverage container, providing thermal insulation.

[6] Legal intoxication is 0.08 grams of alcohol per deciliter of blood. TEX. PEN. CODE § 49.01(1), (2)(B).

[7] *Id.* § 49.07.

[8] They also sued Huff, the Lodge, the fishing guide, and others.

[9] *Supra* note 1. In the trial court, in their pleadings and their response to Schlumberger's motion for summary judgment, the Artheys asserted that Schlumberger was liable under the Texas Dram Shop Act as a commercial provider and under Texas common law. The trial court granted summary judgment without specifying its grounds. On appeal, the Artheys argued that Schlumberger was liable as a commercial provider under the Act because its agent — the fishing trip outfitter — provided or served alcohol to an intoxicated Huff. The court of appeals reversed without reaching the issue. 398 S.W.3d at 841 n.5. In this Court, petitioner Schlumberger argues that it owes no duty and cannot be held liable under the Texas Dram Shop Act, and the Artheys' response does not address any state law claim. We agree that

assert that federal maritime law applies because Huff became intoxicated while on the fishing boat the morning of the accident. The Artheys contend that maritime law would impose liability in these circumstances. The trial court granted summary judgment for Schlumberger, and the Artheys appealed. A divided court of appeals reversed and remanded, concluding that maritime law applies and that fact issues precluded summary judgment.[10]

We granted Schlumberger's petition for review.[11]

II

A

The parties agree that for maritime law to apply, the Artheys' action must lie within admiralty jurisdiction.[12] The test for determining admiralty jurisdiction over tort claims has evolved, as recounted by the United States Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge*

Schlumberger is not a "provider" within the meaning of the Act. *See* TEX. ALCO. BEV. CODE § 2.01 (1) ("'Provider' means a person who sells or serves an alcoholic beverage under authority of a license or permit issued under the terms of this code or who otherwise sells an alcoholic beverage to an individual."). The trial court therefore did not err in granting summary judgment on this ground.

[10] 398 S.W.3d at 837, 841.

[11] 57 Tex. Sup. Ct. J. 53 (Nov. 22, 2013).

[12] *See Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex. 1991) ("Where applicable *and* properly invoked, general maritime law preempts state causes of action and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, art. 3, § 2, cl. 1. The 'saving to suitors' clause of 28 U.S.C. 1333(1) permits state courts to adjudicate maritime actions 'constrained by the "reverse-*Erie*" doctrine which requires that substantive remedies afforded by States conform to governing federal maritime standards.'") (citations omitted); *see also Stier v. Reading & Bates Corp.*, 992 S.W.2d 423 (Tex. 1999).

& Dock Co.[13] Traditionally, "whether the tort occurred on navigable waters" was conclusive.[14] "If it did, admiralty jurisdiction followed; if it did not, admiralty jurisdiction did not exist."[15] Now,

> a party seeking to invoke federal admiralty jurisdiction . . . over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.[16]

Schlumberger is entitled to summary judgment only if it established as a matter of law that, under these tests, the Artheys' action is not within admiralty jurisdiction.

B

The evidence clearly presents a factual dispute over whether the Artheys can satisfy the location test. Schlumberger argues that there is no evidence that Huff was drinking alcoholic beverages on the boat the morning of the accident, or even that alcoholic beverages were present, or if they were, that Schlumberger furnished them. But the Artheys' expert's analysis of the level of Huff's intoxication at the time of the accident is some evidence that he must have been drinking on the boat. And even if there is no evidence that Schlumberger provided alcoholic beverages on Huff's boat Friday morning, Ney was present and could see Huff's condition. If Schlumberger had

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[13] 513 U.S. 527, 531-534, 547-548 (1995) (holding that district court had admiralty jurisdiction over barge owner's Limitation Act suit).

[14] *Id.* at 531-532.

[15] *Id.*

[16] *Id.* at 534 (citations, quotation marks, and related punctuation omitted).

a duty under maritime law to prevent Huff from drinking just before driving home, Ney's failure to take any action is at least some evidence that the duty was breached on the boat.[17]

C

Applying the two-part connection test is more difficult. Both parts of the test require an examination of the general character of the incident and the activity giving rise to it, not the specifics.[18]

> This focus on the general character of the activity is, indeed, suggested by the nature of the jurisdictional inquiry. Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question.[19]

The first part of the connection test asks whether an incident, described "at an intermediate level of possible generality", has a potentially disruptive impact on maritime commerce.[20] The second part asks

> whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity[, that is] whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand.[21]

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[17] Schlumberger does not question that the bay where the party was fishing was navigable, or that any liability for a tort falling within admiralty jurisdiction would extend to the injuries and damages suffered by the Artheys on land. *See* 46 U.S.C. § 30101(a) ("The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.").

[18] *Grubart*, 513 U.S. at 538-540.

[19] *Sisson v. Ruby*, 497 U.S. 358, 364-365 (1990).

[20] *Grubart*, 513 U.S. at 538-539.

[21] *Id.* at 539.

Grubart derived this connection test from two prior cases, *Foremost Insurance Co. v. Richardson*[22] and *Sisson v. Ruby*,[23] and we look to those three cases for guidance in applying the test.

In *Foremost*, two small "pleasure boats" collided, one used for riding and water-skiing and the other a bass boat.[24] The Supreme Court described the incident as "a collision between boats on navigable waters" and the activity giving rise to the incident as "navigation".[25] The Court rejected arguments that a collision between boats not engaged in commerce could not disrupt commerce, and that the use of the boats was not a traditional maritime activity to which uniform rules of admiralty should apply.

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. . . . For example, if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. Furthermore, admiralty law has traditionally been concerned with the conduct alleged to have caused this collision by virtue of its "navigational rules — rules that govern the manner and direction those vessels may rightly move upon the waters." The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.[26]

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[22] 457 U.S. 668 (1982) (holding that complaint by decedent's beneficiaries, based on a collision between two small vessels, stated a claim within the admiralty jurisdiction of the federal courts).

[23] 497 U.S. 358 (1990) (holding that district court had admiralty jurisdiction over yacht owner's Limitation Act claim).

[24] *Foremost*, 457 U.S. at 670-671; *id.* at 678 (Powell, J., dissenting).

[25] *Id.* at 675.

[26] *Id.* at 674-675 (emphasis in original).

The Court added:

> Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In [*Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972)], for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity. However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.[27]

In *Sisson*, a yacht docked at a marina caught fire around its washer/dryer unit and damaged neighboring vessels and the marina.[28] The Supreme Court described the incident as "a fire on a vessel docked at a marina on navigable waters".[29] This, the Court said, "plainly satisf[ies] the requirement of potential disruption to commercial maritime activity."[30] The Court described the activity giving rise to the incident as "the storage and maintenance of a vessel at a marina on navigable waters."[31]

> Clearly, the storage and maintenance of a vessel at a marina on navigable waters is substantially related to "traditional maritime activity" given the broad perspective demanded by the second aspect of the test. Docking a vessel at a marina on a navigable waterway is a common, if not indispensable, maritime activity. At such a marina, vessels are stored for an extended period, docked to obtain fuel or supplies, and moved into and out of navigation. Indeed, most maritime voyages

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[27] *Id.* at 675 n.5.

[28] *Sisson*, 497 U.S. at 360; *see also Grubart*, 513 U.S. at 541 (*Sisson* did not consider the activities of the washer/dryer manufacturer; the actions of the boat owner supplied the necessary substantial relationship to traditional maritime activity).

[29] *Sisson*, 497 U.S. at 363.

[30] *Id.*

[31] *Id.* at 365.

> begin and end with the docking of the craft at a marina. We therefore conclude that, just as navigation, storing and maintaining a vessel at a marina on a navigable waterway is substantially related to traditional maritime activity.[32]

In *Grubart*, a contractor using a crane on a barge to replace wooden pilings around the piers of several bridges across the Chicago River punched through the river bottom into a freight tunnel, resulting in the flooding of several buildings.[33] The Supreme Court described the incident as "damage by a vessel in navigable water to an underwater structure".[34] "So characterized," the Court continued,

> there is little question that this is the kind of incident that has a "potentially disruptive impact on maritime commerce." As it actually turned out in this suit, damaging a structure beneath the riverbed could lead to a disruption in the water course itself [because of an eddy that formed in the river above the leak]; and, again as it actually happened, damaging a structure so situated could lead to restrictions on the navigational use of the waterway during required repairs.[35]

The Supreme Court described the activity leading to the incident as "repair or maintenance work on a navigable waterway performed from a vessel".[36] "Described in this way," the Court explained, "there is no question that the activity is substantially related to traditional maritime activity, for barges and similar vessels have traditionally been engaged in repair work similar to what Great Lakes contracted to perform here."[37]

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[32] *Id.* at 367.

[33] *Grubart*, 513 U.S. at 529-530.

[34] *Id.* at 539.

[35] *Id.*

[36] *Id.* at 540.

[37] *Id.*

In all three cases, the Supreme Court concluded that the connection test for admiralty jurisdiction had been met. Applying the same approach, we reach the opposite conclusion in this case.

The incident here, generally described, is the consumption of alcoholic beverages by guests aboard small, chartered fishing boats on navigable waters. The question, according to *Grubart*, is "whether the incident [can] be seen within a class of incidents that posed more than a fanciful risk to commercial shipping."[38] It cannot. Such consumption poses no threat to navigation because the guests do not operate the boat; the guide does. Indeed, as actually happened in this case, a guest consuming alcoholic beverages may be likely to fall asleep, and thus be unlikely to disrupt anything. Should a guest fall overboard because of his impairment, he is likely to be rescued immediately by others on the boat or not at all. In either event, the possibility of the need for rescue operations disrupting water traffic in the area is remote. Drinking while fishing, if not a time-honored tradition, is certainly common enough that, if it posed more than a fanciful risk to commercial shipping, reports of disruptions to commerce would abound. We think the incident here clearly does not meet the first part of the connection test.

For the second part, the activity in this case was the supervision of the consumption of alcoholic beverages by a guest aboard a small, chartered fishing boat on navigable waters. We do not think such activity could fairly be characterized as substantially related to a traditional maritime activity, but even if it could, there is no apparent need for applying special, uniform admiralty rules in all situations rather than individual states' laws. The need to monitor guests' drinking on small

[38] *Id.* at 539.

fishing boats does not approach the need for standard navigation rules, which the Supreme Court found compelling in *Foremost*.[39] Moreover, as in this case, guests may ordinarily be expected to spend a relatively small part of their time on the boat. Monitoring alcohol consumption on a boat does nothing to control a guest's consumption before boarding and after disembarking. The activity in this case, we think, does not satisfy the second part of the connection test.

The Artheys cite five cases suggesting that allegations of failure to monitor the alcohol consumption of gamblers on floating casinos[40] and seamen on ships[41] fall within admiralty jurisdiction. Without expressing a view on whether those cases were correct insofar as they analyzed the applicability of admiralty jurisdiction, we note that, if there is a significant risk of disruption of maritime commerce posed by the unmonitored consumption of alcoholic beverages on large commercial vessels, that risk is far greater than when the consumption is by a guest on a small fishing boat. And if monitoring consumption is substantially related to the operation of such large

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[39] *Foremost*, 457 U.S. at 675.

[40] *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 145-146 (Iowa 2002) (stating that a claim for damages caused by a driver who became intoxicated on a riverboat casino was "arguably" within admiralty jurisdiction); *Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 2d 832, 834-835 (S.D. Tex. 1999) (stating, although admiralty jurisdiction was not in dispute, that "the incident forming the basis of this action" — a car wreck caused by a driver who became intoxicated aboard a riverboat casino — "satisfies all the requirements of admiralty jurisdiction"); *Bay Casino, LLC v. M/V Royal Empress*, 199 F.R.D. 464, 466 (E.D.N.Y. 1999) (stating that "the incident underlying the proposed cause of action" — against a drunk driver who became intoxicated on a gambling cruise — "satisfies the requirements of admiralty jurisdiction").

[41] *Reyes v. Vantage Steamship Co.*, 609 F.2d 140 (5th Cir. 1980) (treating as within admiralty jurisdiction, without discussion, a seaman's widow's claim for the death of her husband who became intoxicated on board a steamship and jumped overboard, trying to swim to a nearby buoy); *Thier v. Lykes Bros., Inc.*, 900 F. Supp. 864 (S.D. Tex. 1995) (treating as within admiralty jurisdiction, without discussion, a seaman's claim for injuries while driving to dinner with the captain of a merchant marine vessel who had become drunk on board).

vessels, a traditional maritime activity warranting the application of general admiralty rules, the same cannot be said of small fishing boats.

We therefore conclude that the undisputed facts establish, as a matter of law, that the Artheys cannot meet the connection test required by *Grubart* for a claim in admiralty, and consequently, maritime law does not govern their claim against Schlumberger.

III

Social host liability for water recreational activities is, as the United States Supreme Court has said in a related context, at "the intersection of federal and state law."[42] Extending maritime law shoreward

> intrude[s] on an area that has heretofore been reserved for state law [and] would raise difficult questions concerning the extent to which state law would be displaced or preempted . . . . In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts. As the Court declared in *Healy v. Ratta*, 292 U.S. 263 (1934), . . . "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined."[43]

Huff's consumption of alcoholic beverages on navigable water was only a part of a business retreat, during which he consumed far more on land. Schlumberger's conduct occurred almost entirely on land. Applying maritime law to the Artheys' claim is not important to the uniformity of rules governing maritime commerce and makes state law regarding social host liability non-uniform.

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[42] *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211-212 (1971) (citation omitted) (refusing to apply maritime law to a longshoreman's claim for injuries on a dock, cited by *Exec. Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249, 272-273 (1972)).

[43] *Victory Carriers*, 404 U.S. at 212.

Invoking admiralty jurisdiction in this case forces a distinction between business retreats at hunting lodges and those at fishing lodges when in fact there is none. Social host liability in all such situations is more a concern of state law. Today's decision is faithful to the principles of admiralty jurisdiction and also respectful of the State's authority to prescribe legal policy in situations like the one presented.

* * * * *

The Artheys' injuries are, of course, as unquestionably tragic as Huff's conduct was reprehensible, and they have had recourse against him. We are constrained, however, to determine admiralty jurisdiction using *Grubart*'s tests, and having done so, we conclude that such jurisdiction does not exist in this case. The judgment of the court of appeals is therefore reversed and judgment rendered for Schlumberger.

Nathan L. Hecht
Chief Justice

Opinion delivered: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-1039

LUBBOCK COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT AND TOMMY FISHER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE BOARD OF DIRECTORS OF THE LUBBOCK COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT, PETITIONERS,

v.

CHURCH & AKIN, L.L.C., RESPONDENT

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

Argued January 8, 2014

JUSTICE BOYD delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BROWN joined.

JUSTICE WILLETT filed a dissenting opinion.

JUSTICE JOHNSON did not participate in the decision.

In this interlocutory appeal from the denial of a governmental entity's plea to the jurisdiction, we determine whether the parties' lease agreement constituted "a written contract stating the essential terms of [an] agreement for providing goods or services to [a] local governmental entity" under Chapter 271 of the Texas Local Government Code. We hold that, although the lease generally prohibited the lessee from using the property for any purpose other than operation of a marina, the lessee did not agree to provide marina-operation services or any other goods or services to the

governmental entity. Chapter 271 therefore does not waive the governmental entity's immunity from suit, and we dismiss the lessee's claims for lack of jurisdiction.

I.
Background

The Lubbock County Water Control & Improvement District operates the Buffalo Springs Lake. Patrons who use the lake for recreational purposes must pay to access the lake area through a controlled gate. For many years, the Water District operated a marina on the lake, which included a restaurant and gas station. In 2007, the Water District stopped operating the marina and leased the marina premises to Church & Akin, LLC, for a three-year term. The lease provided that the premises were "to be used only as a Lake marina, restaurant, gasoline and sundry sales and as a recreational facility," unless the Water District gave written consent for Church & Akin to use the premises for other purposes. The Water District agreed in the lease not to unreasonably withhold such consent. Church & Akin agreed to pay rent in the amount of $3,000 per year plus 5% of its gross sales, excluding sales of gasoline. The lease also contained a provision stating that the marina would issue "catering tickets," which the marina would redeem for $1.00 each.

The lease gave Church & Akin an option to extend at the end of the initial three-year term for up to five additional five-year terms, as long as it was in compliance with the lease. When the initial term expired in 2010, Church & Akin elected to extend the lease and tendered payment for the following year's rent. The Water District accepted the payment but then terminated the lease six months later. Church & Akin sued the Water District for breach of contract, alleging that the Water District had no right to terminate the lease. The Water District filed a plea to the jurisdiction

asserting governmental immunity and arguing that several possible statutory waivers of immunity, including chapter 271 of the Texas Local Government Code,[1] did not apply. Church & Akin responded by arguing that chapter 271 did apply and amended its pleadings to assert waiver of immunity.

The trial court denied the plea to the jurisdiction, and the Water District filed an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (granting courts of appeals jurisdiction to hear interlocutory appeals from the grant or denial of governmental unit's plea to the jurisdiction). The court of appeals affirmed the trial court's denial of the plea to the jurisdiction, concluding that chapter 271 waived the Water District's immunity from suit for breach of the parties' written lease agreement.[2] The Water District petitioned this Court for review, which we granted.[3]

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[1] TEX. LOC. GOV'T CODE § 271.151(2)(A) (defining "[c]ontract subject to this subchapter"); *id.* § 271.152 (waiving sovereign immunity to suit for purposes of certain breach of contract claims arising out of a "contract subject to this subchapter").

[2] Church & Akin also asserted claims alleging a constitutional taking and various torts. The court of appeals held that the trial court erred in denying the Water District's plea to the jurisdiction with respect to these claims and dismissed the claims for lack of jurisdiction. ___ S.W.3d at ___. Church & Akin has not appealed from the court of appeals' dismissal of these claims, so we do not consider them here.

[3] Generally, a court of appeals' judgment on interlocutory appeal is final. *See* TEX. GOV'T CODE § 22.225(b)(3). This Court has jurisdiction to review such a judgment, however, when "the justices of the court of appeals disagree on a question of law material to the decision or in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court." *Id.* § 22.225(c). In this context, "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.* § 22.225(e). Here, the court of appeals held that Church & Akin agreed to provide services to the Water District because the lease "provided [the Water District] the benefit of an operating marina." ___ S.W.3d at ___. As we explain below, this holding is inconsistent with our holdings in *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 839 (Tex. 2010) (holding that the waiver of immunity under Chapter 271 does not extend to "contracts in which the benefit that the local governmental entity would receive is an indirect, attenuated one") (quoting *Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.—Waco 2009, no pet.)), and *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 925 (Tex. 2013) (holding that a party does not seek or acquire services when "when it merely arranges for a service to be provided to its customers, even if the party indirectly benefits from the provision of that service"). We therefore have jurisdiction to review the court of appeals' judgment on interlocutory appeal.

II.
Immunity and Waiver

The Water District is a local governmental entity. *See* TEX. LOC. GOV'T CODE § 271.151(3)(C). Local governmental entities "enjoy governmental immunity from suit, unless immunity is expressly waived." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth*., 320 S.W.3d 829, 836 (Tex. 2010).[4] Governmental immunity includes both immunity from liability, "which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). A governmental entity that enters into a contract "necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit." *Id.* Unlike immunity from liability, immunity from suit deprives the courts of jurisdiction and thus completely bars the plaintiff's claim. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003).

The doctrine of governmental immunity arose hundreds of years ago from the idea that "the king can do no wrong," but it remains a fundamental principle of Texas law, intended "to shield the public from the costs and consequences of improvident actions of their governments." *Tooke*, 197 S.W.3d at 331–32. Because the decision to require the public to bear the costs and consequences of a particular governmental action requires balancing numerous policy considerations, we have

[4] "Sovereign immunity" protects the State and state-level governmental entities, while "governmental immunity" protects political subdivisions of the State such as counties, cities, and districts like the Water District in this case. *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 324 (Tex. 2006). The two doctrines are otherwise the same, and courts often use the terms interchangeably. *Id*. at 323–24 n.2.

consistently deferred to the Legislature, as the public's elected representative body, to decide whether and when to waive the government's immunity. *Id*. at 332; *see also Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 326–27 (Tex. 2006). When the Legislature makes the policy decision to enact a statute that waives governmental immunity, it can do so "only by clear and unambiguous language." *Tooke*, 197 S.W.3d at 328–29; *see also Wichita Falls State Hosp.*, 106 S.W.3d at 697 ("a statute that waives the State's immunity must do so beyond doubt"). The Legislature itself has demanded such clarity. 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.").

Church & Akin contends that the Legislature has waived the Water District's immunity against this suit through section 271.152 of the Local Government Code, which "provides a limited waiver of immunity for local governmental entities that enter into certain contracts." *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 412 (Tex. 2011); *see also Kirby Lake*, 320 S.W.3d at 838 (stating that the statute "waives immunity from suit for certain contract claims"). This waiver applies only to contracts that are in writing, are properly executed, and state "the essential terms of the agreement for providing goods or services to the local governmental entity." TEX. LOC.

GOV'T CODE § 271.151(2)(A).[5] When a local governmental entity enters into such a contract,[6] it "waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter." *Id.* § 271.152; *see also Sharyland*, 354 S.W.3d at 412–13 (describing "limited waiver of immunity" under section 271.152). One of the "terms and conditions" of the subchapter limits the claimant's recovery to "the balance due and owed by the local governmental entity under the contract," plus attorney's fees and interest. TEX. LOC. GOV'T CODE § 271.153(a)(1).

The principal dispute in this appeal is whether the parties' contract includes an "agreement for providing goods or services to the [Water District]." *Id.* § 271.151(2)(A). The Water District contends that the parties' contract is a lease of real property, not an agreement to provide goods or services. We agree with Church & Akin, however, that courts must look beyond the title of a written contract to determine whether it satisfies chapter 271's waiver requirements. In *Kirby Lake*, for example, although the parties' contract was entitled "Sales Agreement and Lease of Facilities," 320 S.W.3d at 832, we looked to the contract's terms and found that it included an agreement to provide services to the governmental entity. *Id.* at 839. The statute does not require a written contract that *is* an agreement for providing goods or services; rather, it requires a "written contract stating the

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[5] In 2013, the Legislature added a second type of contract to which chapter 271's waiver of governmental immunity applies: "a written contract, including a right of first refusal, regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use." TEX. LOC. GOV'T CODE § 271.151(2)(B). The new provision only applies to claims that arise under a contract executed on or after the effective date of the amendments in 2013. *See* Act of May 22, 2013, 83rd Leg., R.S., ch. 1138, § 2, 2013 Tex. Gen. Laws ___, ___ (codified at TEX. LOC. GOV'T CODE § 271.151(2)(B)). That provision is not at issue here.

[6] The local governmental entity must be "authorized by statute or the constitution to enter into a contract." TEX. LOC. GOV'T CODE § 271.152. The parties do not dispute that the Water District was authorized to enter into the lease with Church & Akin.

essential terms of the agreement for providing goods or services." TEX. LOC. GOV'T CODE § 271.151(2)(A). Although the contract at issue in this case is a lease of real property, "a contractual relationship can include both the granting of a property interest *and* an agreement to provide goods or services." *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 925 (Tex. 2013) (emphasis added). Any written, authorized contract that states the essential terms of an agreement for providing services to the governmental entity triggers the waiver of immunity under chapter 271.

We also agree with Church & Akin that the agreement to provide services to the governmental entity "need not be the primary purpose of the agreement." *Kirby Lake*, 320 S.W.3d at 839. We noted in *Kirby Lake* that this Court had "liberally construed a government-pooled insurance policy" in *Ben Bolt* "as encompassing 'services' rendered by its members based on the fact that the Fund's members elect[ed] a governing board, and a board subcommittee resolved claims disputes." *Kirby Lake*, 320 S.W.3d at 839 (citing *Ben Bolt*, 212 S.W.3d at 327). We recognized that the primary purpose of the contract in *Ben Bolt* was for the fund (a governmental entity) to provide insurance services to its members (also governmental entities), but we concluded that the members had also agreed to provide services to the fund by participating in the election of its governing board and in the resolution of disputed claims. *Ben Bolt*, 212 S.W.3d at 327. The existence of the essential terms of that agreement within the written contract was sufficient to trigger the statute's waiver of immunity. *Id*.

Thus, a written contract that triggers chapter 271's waiver of immunity is one that states the essential terms of an agreement to provide goods or services to the local governmental entity, regardless of the document's title and even if the provision of goods and services is not the primary

purpose of the contract. In this case, Church & Akin argues that the lease includes agreements to provide services to the Water District because Church & Akin agreed to "(1) operate the marina; (2) issue and redeem catering tickets; and (3) return a percentage of its profits from sundry sales."[7] We address each of these arguments in turn.

A. Operation of the Marina

Church & Akin contends that it agreed in the lease's "use" provision to provide a service to the Water District by operating the marina. The court of appeals agreed, relying on our opinions in *Kirby Lake* and *Ben Bolt. See* — S.W.3d —, —. In *Kirby Lake*, we observed that chapter 271 does not define the term "services," and that the ordinary meaning of the term "is broad enough to encompass a wide array of activities." 320 S.W.3d at 839. In support of this statement, we cited authorities holding that the term "includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed," *id.* (quoting *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962)), but would not extend to "contracts in which the benefit that the local governmental entity would receive is an indirect, attenuated one." *Id.* (quoting *Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.—Waco 2009, no pet.)).

Applying these authorities, the court of appeals concluded in this case that, "[a]lthough the operation of a marina was not the stated primary purpose of the contract," the contract's "use"

[7] The lease also requires Church & Akin to maintain the premises, maintain adequate insurance coverage, and pay ad valorem taxes imposed on the property. The Water District contends that these duties are merely standard obligations of a lessee, and do not constitute agreements to "provide services" separate from those standard duties. Church & Akin does not argue to the contrary, so we do not address these agreements in this case.

provision "elevated the lease to more than simply a lease of real property . . . it provided [the Water District] the benefit of an operating marina." — S.W.3d at —. The Water District argues that the "use" provision of the lease did not, as the court of appeals implied, obligate Church & Akin to operate a marina on the leased premises; it merely prohibited Church & Akin from using the premises for any other purpose, at least without first obtaining the Water District's consent. Church & Akin disagree, contending that the "use" provision's restriction that the premises "are leased *to be used* only as a Lake marina" indicates that the lease not only prohibited other uses but also mandated that the premises "be used" as a marina.

We agree with the Water District on this point. Under the terms of the written lease agreement, Church & Akin could have elected not to use the premises for any purpose. Specifically, the lease states:

> The premises are leased to be used only as a Lake marina, restaurant, gasoline and sundry sales and as a recreational facility. Lessee agrees to restrict their use to such purposes, and not to use, or to permit the use of, the premises for any other purpose without first obtaining the consent in writing of Lessor or Lessor's authorized agent. Lessor agrees not to unreasonably withhold consent.

Under this language, Church & Akin was not required to operate a marina; it was merely restricted from using the premises for a different purpose without consent. This Court has previously recognized the important difference between an agreement that *restricts* the use of property *to* a specific purpose and one that *requires* the use of property *for* a specific purpose: "a provision in a lease that the premises are to be used only for a certain prescribed purpose imports no obligation on the part of the lessee to use or continue to use the premises for that purpose; such a provision is a covenant against a noncomplying use, not a covenant to use." *Universal Health Servs., Inc. v.*

Renaissance Women's Grp., P.A., 121 S.W.3d 742, 747 (Tex. 2003) (quoting *Weil v. Ann Lewis Shops, Inc.*, 281 S.W.2d 651, 653 (Tex. Civ. App.—San Antonio 1955, writ ref'd)). Thus, although both parties may have contemplated that Church & Akin would operate a marina, the language of the contract did not require it to do so, and thus Church & Akin did not contractually agree to do so. When a party has no right under a contract to receive services, the mere fact that it may receive services as a result of the contract is insufficient to invoke chapter 271's waiver of immunity. At best, such services are only an "indirect" and "attenuated" benefit under the contract. *Cf. Kirby Lake*, 320 S.W.3d at 839.

Moreover, even if we could construe the lease to include a contractual agreement to use the property as a marina, Church & Akin's provision of marina services to the Water District's constituents would not constitute the provision of such services to the Water District itself. We recently rejected a similar argument in *Coinmach*, 417 S.W.3d at 924–26. There, a lessee leased rooms in an apartment complex and installed coin-operated laundry machines for use by the apartment complex's other tenants. *Id.* at 913. Like Church & Akin here, the lessee in *Coinmach* paid rents based on the income it earned from operations on the leased premises. *Id.* at 925. The owner of the apartment complex argued that it was a "consumer" under the Deceptive Trade Practices Act because the lessee provided a "service" to the owner by maintaining the laundry machines, collecting and accounting for the proceeds from the machines, and providing the convenience of the laundry rooms to the other tenants. *Id.* at 925. We disagreed, observing that, as to the owner, the lessee was itself a tenant, and it provided its laundry services to the other tenants, not to the owner of the apartment complex. *Id.* We stated that "[a] party is not a consumer when it

merely arranges for a service to be provided to its customers, even if the party indirectly benefits from the provision of that service." *Id.* The benefits to the lessor were "at best indirect" and therefore were not sufficient to make the lessor a consumer of "services" under the Deceptive Trade Practices Act. *Id.* at 925–26.

Here, as in *Coinmach*, Church & Akin provided its marina services not to its landlord but to its landlord's customers. Although the landlord indirectly benefitted from the provision of these services, Church & Akin was not contractually obligated to operate the marina for the Water District. When the Water District decided to stop operating the marina, it could have elected to contract with a company to manage the marina for it. In the same way, the owner of the apartment complex in *Coinmach* could have contracted with a company to operate the owner's laundry rooms. But in both cases, the owners elected instead to lease the premises, and the lessees did not agree to provide services to the lessor.[8] At least in this context, the distinction between the terms of such a services agreement and the terms of a lease agreement is not simply a matter of form over substance: under chapter 271, the terms of the written agreement are themselves the substance that determines whether immunity is waived. Unless the written contract includes the essential terms of an agreement to provide goods or services to the governmental entity, the waiver of immunity does not apply.

[8] The dissent overlooks this important distinction when it suggests that this lease constitutes an agreement to provide services "[j]ust as" a contractor's agreement to build roads or bridges for a governmental entity constitutes an agreement to provide services. *Ante* at ___ (citing *Kirby Lake*, 320 S.W.3d at 839). If Church & Akin had not leased the premises but had instead agreed to serve as the Water District's contractor to operate the marina for the Water District, the result in this case would be different and chapter 271 would waive the Water District's immunity. By contrast, if a road developer purchased or leased property from a governmental entity and operated its own road on that property, chapter 271 would not waive immunity, because the developer would not have agreed to provide a service to the governmental entity.

Finally, we note that when chapter 271 waives immunity for a contract claim, it limits a successful claimant's recovery to "the balance due and owed by the local governmental entity under the contract," plus attorney's fees and interest. TEX. LOC. GOV'T CODE § 271.153(a)(1)(3). Construing section 271.152's waiver of immunity with section 271.153(a)'s limitation on damages to which the waiver applies, the waiver will typically apply only to contracts in which the governmental entity agrees to pay the claimant for the goods or services that the claimant agrees to provide to the governmental entity. This lease agreement contains no terms in which the Water District agreed to pay Church & Akin any amount for its services, so there is no amount that is "due and owed [from the Water District to Church & Akin] under the contract." Instead, Church & Akin agreed to pay the Water District for a leasehold interest in the property. While a party may agree to provide goods or services in exchange for something other than payment, the absence of any agreement by the governmental entity to pay for goods or services may indicate that the claimant did not in fact agree to provide goods or services to the governmental entity. Such is the case here. The fact that the Water District did not agree to pay Church & Akin for services supports our conclusion that Church & Akin did not agree to provide services to the Water District.

We agree with Church & Akin that the term "services" is broad and encompasses a wide array of activities, including activities such as the operation of a marina. *See Kirby Lake*, 320 S.W.3d at 839. But the contract did not require Church & Akin to provide marina-operation services. And at best, the operation of the marina only indirectly benefited the Water District. *See id.* (citing *Berkman* as distinguishing "indirect, attenuated" services); *Coinmach Corp.*, 417 S.W.3d at 925 (discussing indirect services under a lease). For these reasons, we cannot conclude that the lease's

restriction on Church & Akin's "use" of the premises stated, in writing, "the essential terms of [an] agreement for providing [marina-operating] services to the [Water District]." *See* TEX. LOC. GOV'T CODE § 271.151(2)(A).

B. Catering Tickets

The lease's "use" clause also states: "The marina will issue catering tickets that will be redeemed at the gate for admittance to the lake. These tickets will be redeemed by the marina at the price of $1.00 each. They will only be available to persons coming into the marina." Although Church & Akin did not rely on this language in the trial court or the court of appeals, it argues here that this provision required Church & Akin to provide a service to the Water District by "issuing catering tickets." The Water District responds that Church & Akin "completely misconstrues the catering ticket provision," which provides for a contractual benefit to Church & Akin, not a contractual obligation that Church & Akin assumed. The dissent agrees with Church & Akin, but we disagree for at least two reasons. First, their position is based on a construction of the catering-ticket language that neither the agreement's language nor the record supports. And second, even accepting Church & Akin's assertions about how the catering tickets worked, the lease does not state "the essential terms of [an] agreement for providing [catering-ticket] services to the [Water District]." *See* TEX. LOC. GOV'T CODE § 271.151(2)(A).

The Water District had the burden, in its plea to the jurisdiction, to establish that it is a governmental entity entitled to governmental immunity. Once it satisfied that burden, the burden shifted to Church & Akin to establish, or at least raise a fact issue on, a waiver of immunity. *See City of Corsicana v. Stewart*, 249 S.W.3d 412, 413 (Tex. 2008) (considering whether "claimants met their

evidentiary burden of showing" waiver of immunity under the Texas Tort Claims Act); *Tex. Parks & Wildlife Dep't v. E.E. Lowrey Realty, Ltd.*, 235 S.W.3d 692, 694 (Tex. 2007) (holding that claimant failed to meet its burden of showing a waiver of sovereign immunity). Although Church & Akin asserted a waiver of immunity under chapter 271, it did not rely on the catering-ticket provision in the trial court or the court of appeals and, in fact, never mentioned this provision in its response to the Water District's plea to the jurisdiction or in its court-of-appeals briefing. As a result, the record contains very little evidence relating to catering tickets or how they worked.[9]

Church & Akin's counsel contended at oral argument that this provision's references to "the marina" are references to Church & Akin. Based on that contention, she asserted that Church & Akin would issue catering tickets to persons who visited the marina; the Water District would "redeem" these tickets at the gate to allow the person entry to the lake; and Church & Akin would then "redeem" the tickets from the Water District for $1 each, so that the Water District would receive $1 for each ticket-holder's entrance instead of the $6 that it otherwise charged at that time. Although the actual meaning of this provision seems less than clear, even accepting Church & Akin's explanation we cannot construe it to constitute an agreement by Church & Akin to provide a service

[9] The only evidence we have located in the record relating to catering tickets is in the deposition testimony of Tommy Fisher, a member of the Water District's board of directors. This testimony indicates that the parties had a separate dispute over the Water District's demand that the marina stop selling something called "marina bucks." Apparently, Church & Akin contended that "marina bucks" were the same thing as "catering tickets," and that the lease's catering-tickets provision permitted the marina to issue them. Fisher testified that "[t]he catering ticket is not the same thing as a marina buck," that the catering tickets were "for parties and things that [Church & Akin] would cater at the lake," that Church & Akin would "give them out personally" when it catered events, and that "they could be redeemed at the front gate." Fisher's deposition testimony does not support Church & Akin's contention that the catering-ticket provision obligated Church & Akin to provide a service to the Water District. To the contrary, it indicates that the catering-ticket provision provided a contractual benefit to Church & Akin, and the parties disputed whether that benefit include the right to sell "marina bucks." This evidence is certainly not conclusive, but Church & Akin did not put forward any contradicting evidence.

to the Water District. To the contrary, the catering tickets appear—from Church & Akin's own contentions about how the tickets would be handled—to be a benefit that Church & Akin "will" give to its marina customers to promote its own business.[10]

Church & Akin contends that the catering tickets would benefit the Water District as well as Church & Akin because the issuance of the tickets would potentially increase the amount of marina sales and thus also increase the amount that Church & Akin must pay to the Water District as rent. But there is nothing in the lease language or in the record to support the contention that the tickets would, were intended to, or in fact did increase traffic. Nor does the lease or the record substantiate the implication that any such increase would benefit the Water District, particularly considering that (at least, under Church & Akin's explanation) the Water District took a $5 loss on each person who accessed the lake with a catering ticket. And even to the extent the tickets may have increased marina sales, any indirect benefit to the Water District from Church & Akins increased profits could not, alone, convert Church & Akin's efforts to promote its own business into services *to the Water District*. *Cf. Kirby Lake*, 320 S.W.3d at 839.

[10] The dissent acknowledges that the word "will" has "many possible meanings" depending on the context, but determines that the context here indicates a promise to provide a "ticketing service." *Post* at __. Actually, the contract makes no reference to any "ticketing service." It only references "catering tickets," which Church & Akin contends it had a right under the lease to sell to its patrons. And as we have explained, the record does not tell us much about the context of the "catering tickets" provision because Church & Akin never argued it expressed a promise in the courts below. So for context we can only look to the contract itself, and consider Church & Akin's assertions about the provision's meaning. For the reasons we explain, the contract, taken as a whole, indicates that the parties expected Church & Akin to operate a marina on the leased premises, and they restricted Church & Akin's ability to use the premises for any other purposes, but they did not contractually require Church & Akin to operate a marina on the premises. Under Church & Akin's own explanation, the catering tickets provision gave it the right to sell "catering tickets" to its patrons and obligated the Water District to admit ticket-bearing patrons without paying the usual access fee. Within this context, we read the provision as expressing the parties' acknowledgment of Church & Akin's intent to issue tickets, not as a contractual promise to do so.

Church & Akin also asserts that the catering-tickets provision is evidence that the lease *required* Church & Akin to operate a marina. According to Church & Akin,

> If [Church & Akin] simply declined to open its doors to the Buffalo Springs community, then no persons could enter the marina and purchase catering tickets. Further, the Lease Agreement specifically mandated that the catering tickets could *only* be redeemed at the marina. Therefore, no catering tickets could be issued or redeemed at all if [Church & Akin] did not open the marina to allow persons to enter.

We agree that Church & Akin would not have been able to sell or "issue" catering tickets if it did not operate the marina, because the lease only permitted catering tickets for "persons coming into the marina." But we disagree that the catering-ticket language created an implied duty to operate the marina. Since the purpose of the catering tickets was to benefit Church & Akin's marina business, and the lease did not require Church & Akin to operate the marina, we cannot construe the provision that states that the marina "will issue catering tickets" as an agreement not only to issue catering tickets but also to operate the marina. Rather, we read this provision of the agreement as the parties' acknowledgement that Church & Akin intended to and could issue marina tickets for the benefit of its business, not as agreement to issue such tickets as a service to the Water District.

Moreover, even if we read the catering-ticket provision to constitute a contractual agreement by Church & Akin to "issue catering tickets," the contract does not state the "essential terms" of that agreement. TEX. LOC. GOV'T CODE § 271.151(2)(A) (providing that a contract waives immunity only if it states "*the essential terms* of the agreement for providing goods or services to the local governmental entity") (emphasis added). The lease provides no requirements as to how many catering tickets Church & Akin must issue, when it must issue them, to whom it must issue them,

or any other details necessary to make the issuance of catering tickets an enforceable agreement by Church & Akin.[11]

We thus cannot conclude that the lease's catering-ticket language stated, in writing, "the essential terms of [an] agreement for providing [catering-ticket] services to the [Water District]." *See* TEX. LOC. GOV'T CODE § 271.151(2)(A).

C. Profit-based Rent

Finally, Church & Akin argues that its agreement to pay rent in the amount of 5% of its gross revenue for sales of products other than gasoline represents an agreement to provide services to the Water District and further supports its contention that the lease required it to operate a marina. Again, we disagree. The rent provision requires that Church & Akin pay the Water District 5% of its non-gas sales proceeds. But it does not require that Church & Akin have any sales proceeds. If Church & Akin had $0 in sales for the year, payment of only the $3,000 base-rent would satisfy its contractual obligation. *See, e.g.*, *Weil*, 281 S.W.2d at 655.

[11] The dissent disagrees, concluding that the lease "tells Church & Akin everything it needs to know" about the catering tickets, including "what is to be provided, for how much, and to whom." But the dissent does not explain how Church & Akin was to perform such "ticketing service."

The lease indicates that the marina "will issue" catering tickets, but Church & Akin contends it was entitled to "sell" the tickets. Was Church & Akin obligated to give out tickets to marina visitors to encourage them to visit the lake area, as the dissent contends, or could it sell the tickets for a profit as Church & Akin contends?

The lease states that the marina will "redeem" the catering tickets for $1, which Church & Akin asserts is the price it was to pay the Water District for each catering ticket used for gate access. If the lease requires Church & Akin to sell catering tickets, as it contends, at what price must it sell them? Can it sell them for $6 (the usual cost of gate access, according to Church & Akin), such that the patron receives no benefit and the only effect is that the patron pays $6 to Church & Akin rather than $6 to the Water District?

The lease provides no minimum, maximum, or other parameters on quantity. Could Church & Akin issue one catering ticket during the lease's three-year term and satisfy its supposed obligation?

Absent such specifics, the provision lacks the essential terms that would be necessary to create an enforceable contractual agreement to provide a ticket-issuing service to the Water District.

Like this lease, the lease in *Weil* restricted use of the leased premises to a particular purpose (a retail store) and required the lessee to pay the lessor base-rent of $650 per month plus 5% of its sales proceeds, less the base-rent. *Id.* at 653. The lessee never opened the store on the premises and the lessor sued, arguing that the lease obligated the lessee to operate a store on the premises and that it was due damages for the absence of sales proceeds. *Id.* As discussed above, the court disagreed, holding that a lease provision that restricts use of the leased premises to a certain purpose "imports no obligation on the part of the lessee to use or continue to use the premises for that purpose." *Id.* at 654 (quoting *Dickey v. Phila. Minit-Man Corp.*, 105 A.2d 580, 581 (Pa. 1954)). The court reached that conclusion in spite of the lease's payment requirement, observing that even if it were to hold that the lease required operation of a store on the premises, it could not imply some minimum amount of sales proceeds that the lessee would have to generate. *Id.* at 655–56. We adopted this holding in *Universal Health Services* and relied on it to hold that a contract that restricted Universal's use of the premises to operation of a hospital and required Universal to obtain related permits and insurance agreements nevertheless did not obligate Universal to operate a hospital on the premises. 121 S.W.3d at 747. For the same reasons, we conclude that Church & Akin's agreement to pay the Water District 5% of its sales revenue does not constitute an agreement to generate sales revenue, operate a marina, or provide other services to the Water District.

III.
Conclusion

Having determined that the parties' lease does not include an "agreement for providing services to the [Water District]," we hold that chapter 271 of the Local Governmental Code does not

waive the Water District's immunity against Church & Akin's breach of contract claims. We reverse the portion of the court of appeals' judgment with respect to those claims, the only claims remaining in the suit, and dismiss them for lack of jurisdiction

_____

Jeffrey S. Boyd
Justice

Opinion delivered: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 12-1039

LUBBOCK COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 AND TOMMY FISHER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE BOARD OF DIRECTORS OF THE LUBBOCK COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1, PETITIONERS,

v.

CHURCH & AKIN, L.L.C., RESPONDENT

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

JUSTICE WILLETT, dissenting.

For decades the Lubbock Water District operated a marina at Buffalo Springs Lake. In 2007, the District leased the marina property to Church & Akin. The lease agreement specified that the property could only be used as a marina, and the lease required that "the marina" issue tickets to visitors for admission to the lake. When Church & Akin declined the District's request to increase the marina's hours of operation, the District terminated the lease before the end of the fixed term. Church & Akin sued for breach of contract. The Court holds the District enjoys governmental immunity because the lease agreement does not contain a contract for services to the District. I respectfully dissent because I believe the lease agreement obligates Church & Akin to operate a marina as a service to the District.

I. Waiver of Governmental Immunity

The Legislature has waived local governments' immunity for breach of contract claims arising from "a written contract stating the essential terms of [an] agreement for providing goods or services to [a] local governmental entity."[1] A contract contains its "essential terms" when it outlines the material terms necessary to make a contract enforceable.[2] And "services" is a term "broad enough to encompass a wide array of activities."[3]

"[W]e construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served."[4] Each portion of a contract must be read in light of its other operative parts. "We consider the entire writing to harmonize and effectuate all provisions such that none are rendered meaningless."[5] While contract interpretation does involve close scrutiny of its individual components, "we must evaluate the overall agreement to determine what purposes the parties had in mind at the time they signed the [agreement]."[6] When seeking to determine the intent of the parties, we also look to the text "as understood in light of the facts and circumstances surrounding

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[1] TEX. LOCAL GOV'T CODE § 271.151(2)(A).

[2] *See Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010) (holding that an agreement satisfied the "essential terms" requirement because it "clearly outlined" "[t]he names of the parties, property at issue, and basic obligations").

[3] *Id.* at 839.

[4] *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 63 (Tex. 2014) (internal quotation marks omitted).

[5] *Id.*

[6] *Kirby Lake*, 320 S.W.3d at 841.

the contract's execution."[7] We must interpret contracts as entire instruments, with an eye toward the practical intent of the parties and the surrounding circumstances, and we must give meaning and harmony to the contract's various parts. I believe the Court has deviated from this well-worn course in its analysis of the District's lease agreement.

II. Interpretation of the Lease Agreement

Applying the above principles, I would hold that the District has waived its immunity by contracting for the obligatory operation of a marina as a service to the District.

A. The lease agreement requires Church & Akin to operate a marina.

The Court concludes that any benefit that accrues to the District from Church & Akin's operation of a marina is too indirect to constitute a contract for services to the District because the lease agreement did not *require* operation of a marina. I agree that contingent terms in a contract can be too attenuated to trigger waiver of governmental immunity. But I believe the lease agreement did not simply *commend* marina operation—it *commanded* it.

The lease agreement contains the following language under the "USE" provision of the contract:

> The premises are leased to be used only as a Lake marina, restaurant, gasoline and sundry sales and as a recreational facility. Lessee agrees to restrict their use to such purposes, and not to use, or to permit the use of, the premises for any other purpose without first obtaining the consent in writing of Lessor or Lessor's authorized agent. Lessor agrees not to unreasonably withhold consent.

[7] *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011).

The Court says that this "marina only" provision does not *require* Church & Akin to do anything—it is only a restriction on use. Thus, Church & Akin would not be violating the provision if it did *nothing* with the property.

But another clause in the "USE" section indicates that Church & Akin cannot just abandon any use of the premises. The ticketing clause in the "USE" section of the lease says:

> The marina will issue catering tickets that will be redeemed at the gate for admittance to the lake. These tickets will be redeemed by the marina at the price of $1.00 each. They will only be available to persons coming into the marina.

The ticketing clause requires Church & Akin to use the premises. In mandatory language, the clause demands that Church & Akin *will* issue the tickets. In other words, Church & Akin cannot, as the Court claims, do *nothing* with the property given the ticketing clause's requirement that Church & Akin issue catering tickets. And if it uses the property at all, Church & Akin triggers the "marina only" clause, thus requiring operation of a marina, a restaurant, a retail and gas store, and a recreational facility. Thus, the ticketing clause and the "marina only" clause lead to this inexorable syllogism:

> If Church & Akin decides to actually use the premises, it must operate a marina.
>
> Church & Akin must use the premises to issue tickets for admission to the lake.
>
> Therefore, Church & Akin must operate a marina.

Harmonizing these two clauses, as we must, I would hold that they invariably lead to the conclusion that Church & Akin was obligated to operate a marina.

Also, the ticketing clause seems to take for granted that Church & Akin will operate a marina because it states that "the marina" will issue and redeem the tickets. The Court disregards this

necessary implication by deciding that the ticketing clause is a benefit to Church & Akin rather than a service that Church & Akin provides to the Water District. This reading of the contract flouts the wording of the contract, which states the marina *will* provide the ticketing service. In this context, "will," although it has many possible meanings depending on context, here indicates a mandatory requirement.[8] The Court points out that "will" can also indicate a statement of intent. But the phrase "will issue catering tickets" is situated in a contract in which parties lay out their respective duties and rights. In that context, "will issue catering tickets" establishes a duty, not a statement of intent. To read this as a statement of mere intent or plan makes the phrase at worst gratuitous and at best a very roundabout and awkward way of stating that Church & Akin is *allowed* to issue and redeem catering tickets. Neither is the most natural reading of the contract. If the contract was not establishing a duty but simply recognizing that the catering tickets are allowed and intended, language like "may" or "will be allowed to" issue catering tickets should be expected. And we should avoid readings that turn contract language into gratuitous surplusage. I believe the phrase "will issue catering tickets" reads most naturally as an obligatory act. It strains language and logic to construe a binding obligation ("the marina *will* issue catering tickets") as nothing more than a possible benefit to the bound party.

Moreover, the Court's analysis strips the language in the "USE" provision of independent meaning. The Court says "to be used only as a Lake marina" is just a restriction on use. But that reading renders meaningless the clause that immediately follows. After stating that the property is

[8] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2617 (3rd ed. 1961) ("will" may be "used to express a command, exhortation, or injunction").

"to be used only as a Lake marina, restaurant," etc., the agreement says: "Lessee agrees to restrict their use to such purposes, and not to use, or to permit the use of, the premises for any other purpose . . . ." We can only give independent meaning to both clauses by reading the first clause as a mandated use, and the second as a restricted use. Under the Court's reading, these two clauses mean the exact same thing.

The headings and structure of the lease agreement also indicate that the District contracted for a marina with other attendant uses. The "marina only" provision falls under the "USE" section in the lease. Immediately following the "USE" section is a section titled "PROHIBITIONS ON USE." Under the Court's reading, the "USE" section contains *only* a prohibition on use. It seems odd to read the "USE" section as nothing more than a restriction on use, since it is so clearly separated from the "PROHIBITIONS ON USE" section. I would give some weight to the structure and headings of the agreement that provide further support for the conclusion that Church & Akin was obligated to operate a marina.

Even if Church & Akin need not operate a marina, it must at the very least provide a ticketing service. The Court worries that the ticket provision does not provide the essential terms of the contract. But a contract satisfies this requirement where it outlines the parties, subject matter, and basic obligations.[9] The ticketing clause meets this low threshold. It tells Church & Akin everything it needs to know—what is to be provided, for how much, and to whom. I do not see how Church & Akin could be confused about its responsibility under this clause. The Court argues that the clause

[9] *See Kirby Lake*, 320 S.W.3d at 838.

does not supply essential terms because it does not tell us the price at which the tickets should be sold to the public or the quantity. I disagree. We have held that "[w]here the parties have done everything else necessary to make a binding agreement for the sale of goods or services, their failure to specify the price does not leave the contract so incomplete that it cannot be enforced."[10] If the price for a sale or service between the parties need not be stipulated, then surely the price of an ancillary transaction between a contracting party and the third-party visitors to the lake is not necessary to create an enforceable contract either. And as for quantity, the clause can be reasonably read as requiring the marina to provide ticketing services to all visitors to the lake. But even so, enforceable contracts such as output or requirement contracts regularly do not stipulate quantity. Thus, the Court's concerns regarding price and quantity are unfounded.

As with any other contract, we should also take into consideration the surrounding circumstances at the time of contracting.[11] The District had been using this property as a marina for decades. A practical reading sensitive to context and circumstance confirms that these parties never envisioned the possibility that Church & Akin could be allowed to let a massive recreational area sit fallow, while at the same time carrying out its contractual duties to prevent permissive waste, maintain the premises in "as good" condition, make necessary repairs, prevent nuisances, and purchase property and liability insurance for "all activities." The Court's wooden approach to language stands in uneasy opposition to other portions of the agreement, the circumstances

[10] *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (quoting *Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966)).

[11] *Houston Exploration Co.*, 352 S.W.3d at 469.

surrounding the contract, and our "practical" and "utilitarian" approach to contract interpretation. Church & Akin had a contractual obligation to operate a marina, and, at the very least, provide a ticketing service for admission to the lake.

B. The services required by the lease are services to the District.

I would also conclude that these obligatory services are services *to* the District. We have held that construction of public infrastructure by third-party contractors constitutes a service *to* the contracting authority (even though the public enjoys the benefits of the infrastructure).[12] Just as a third-party contractor who builds roads or bridges primarily for the public thereby provides a service to the governing authority, Church & Akin provides a service to the District by operating the marina. After all, Church & Akin took over a function that the District would have otherwise performed. The District had operated a marina on the property for many years, and considered those operations to be an important part of its service to the public. Further, the specific ticketing service, while small, is also a direct service to the District because selling the tickets assisted the District in managing the flow of visitors to the lake.

The Court says this case would be different if Church & Akin were not a lessee and had just contracted to operate the marina. But surely Church & Akin's status as a tenant does not determine whether its use of that property is a service *to* the District. The more accurate version of the analogy posited by the Court[13] is that of a local government entity leasing a pre-existing road to a construction company and including a requirement that the lessee repair potholes. The fact that the

[12] *See Kirby Lake*, 320 S.W.3d at 839.

[13] ___ S.W.3d ___.

pothole repair clause is part of the lease agreement does not change the nature of the service being provided. Nor should it. I worry that the Court's decision paves the way for local governments to avoid immunity waivers. All they need do now is turn the service provider into a lessee. Not only is this result problematic, but the statutory language does not support a distinction that relies on the label we apply to the contracting party. Thus, I reject the Court's argument that Church & Akin's tenancy changes the analysis of whether operating the marina is a service to the District.

* * *

Church & Akin was obligated under the lease agreement to operate a marina, restaurant, retail and gas store, and recreational facility. Church & Akin also had a duty to provide ticketing services. These are services to the District. I would therefore conclude that the District does not enjoy immunity. Because the Court holds otherwise, I respectfully dissent.

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Don R. Willett
Justice

OPINION DELIVERED: July 3, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0006

ZAHER EL-ALI, PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

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

JUSTICE WILLETT, joined by JUSTICE LEHRMANN and JUSTICE DEVINE, dissenting to the denial of the petition for review.

This is the story of a Chevrolet truck, but to some observers it evokes less Chevy than Kafka. The modern Texas asset-forfeiture regime bears little resemblance to what we reviewed in 1957 when we last visited this subject.[1] In my view, the civil-forfeiture realities of 2014—the prevalence, procedures, and profitability—compel us to reexamine the constitutional protections due innocent property owners.

The stakes are grave indeed, as asset-forfeiture cases threaten not merely property but, more fundamentally, property *rights*, something we have recently (and unanimously) extolled as essential

[1] *State v. Richards*, 301 S.W.2d 597 (Tex. 1957).

to "freedom itself."[2] Civil forfeiture springs from the Legislature's broad police power,[3] but as we recently made clear, police power cannot go unpoliced.[4]

Put simply, this important subject deserves attentive constitutional reconsideration, if not recalibration. Much has changed since our Eisenhower-era decision in *State v. Richards*. Forfeiture 2014-style is not forfeiture 1957-style. But even if the Court were to reaffirm its ruling from 57 years ago that due process is unoffended, 21st-century practice merits 21st-century scrutiny. If the State of Texas wants to ensnare guiltless citizens and seize their homes and other property, it must do so—always—within the bounds of our Constitution.

* * *

The pertinent facts are undisputed. Zaher El-Ali ("Ali") owned a 2004 Silverado pick-up. He held title to the truck, and it was registered in his name, but he was selling it to someone who was still making payments. The buyer, while driving the truck, was arrested for driving while intoxicated, evading arrest, and possessing cocaine. Ali was neither in the truck nor involved in the crime. The State, however, seized the vehicle and filed a civil-forfeiture proceeding against it: *State of Texas v. One 2004 Chevrolet Silverado*.

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[2] *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012).

[3] *Richards*, 301 S.W.2d at 600.

[4] *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126 (Tex. 2010).

Under Section 59.02(c) of the Texas Code of Criminal Procedure, Ali bore the burden of proving that he was innocent of the crime[5]—that is, he was required to prove a negative: that he "did not know or should not reasonably have known" that his truck was being used illegally.[6] If Ali fell short, law enforcement officials could either use the truck or sell it, keeping the proceeds.

Asset forfeiture is increasingly routine. The current Texas civil-forfeiture law, enacted in 1989,[7] greatly expanded both the scope of forfeiture (now including most felonies and some misdemeanors) and the types of property that can be seized (now including homes, land, vehicles, etc.). The government's burden is slight while the citizen's burden is significant. Law enforcement can seize property it believes is "contraband,"[8] something it need only show by a preponderance of the evidence.[9] If the property owner doesn't answer the State's forfeiture action, the State keeps the seized property. If the owner has the wherewithal to challenge the seizure, he can assert an "innocent owner" defense, which requires him to prove he "did not know or should not reasonably have known of the [allegedly criminal] act or omission."[10] In this case, Ali initially raised innocent-owner status, but he later dropped that argument, he explains, "because it placed the burden of proof

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[5] TEX. CODE CRIM. PROC. art. 59.02(c). There are two types of forfeiture actions: criminal and civil. With criminal forfeiture, government seizes property only after its owner has been found guilty. With civil forfeiture, owners need not be convicted of a crime, or even charged with one, before government can seize their homes, cars, cash, or other property.

[6] *Id*.

[7] Act of July 19, 1989, 71st Leg., 1st C.S., ch. 12, § 1, 1989 Tex. Gen. Laws 14 (codified at TEX. CODE CRIM. PROC. art. 59).

[8] TEX. CODE CRIM. PROC. art. 59.02(a).

[9] *Id.* at art. 59.05(b).

[10] *Id*. at art. 59.02(c)(1).

on him, not the government, and he believed that requiring him to prove his innocence was unconstitutional."

Ali argues that the burden placed on owners to prove their innocence violates his due-process rights under Article 1, Section 19 of the Texas Constitution. The lower courts both ruled for the State, with the court of appeals dutifully noting our 1957 decision in *Richards*, which held that the Texas Constitution does not protect innocent property owners from having their property forfeited. The court of appeals held: "even if the Supreme Court of Texas would not decide this case today the same way it decided *Richards* in 1957, that is a decision for that court and not this one."[11]

We have not examined the rights of innocent property owners in more than half a century. Back then, the Dodgers were still in Brooklyn, *American Bandstand* premiered on network TV, Sputnik blasted off, and President Eisenhower sent federal troops to integrate Central High School. Asset forfeiture in 1957 was exceedingly narrow. Fast-forward 57 years, and forfeiture is ubiquitous given the sweep of expanded state and federal laws and, most fatefully, the direct profit incentive baked into them. Indeed, it was the earmarking feature added in 1989 that sparked the explosion in Texas forfeiture actions: Law enforcement agencies and prosecutors can agree to split the revenue for their own use.[12] Some forfeiture critics lament that the bottom line . . . is the bottom line.

A generation ago in America, asset forfeiture was limited to wresting ill-gotten gains from violent criminals. Today, it has a distinctive "Alice in Wonderland" flavor, victimizing innocent citizens who've done nothing wrong. To some critics, 21st-century excesses are reminiscent of

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[11] 388 S.W.3d 890, 894.

[12] TEX. CODE CRIM. PROC. art. 59.06(c).

pre-Revolutionary America, when colonists chafed under the slights and indignities inflicted by King George III and Mother England—among them, "writs of assistance" that empowered government to invade homes and seize suspected contraband. Legal scholars have declared these writs "among the key grievances that triggered the American Revolution."[13]

Indeed, the Founders were intimately acquainted with confiscatory government. The Father of the United States Constitution, James Madison (who turned 85 the day the Republic of Texas adopted its Constitution and lived barely 100 days more, long enough to see Texas free) warned in Federalist 48 of the "encroaching nature" of government power.[14] Contemporary legal scholarship and journalism contend that modern civil-forfeiture law, which has spread with kudzu-like ferocity in recent years (amassing billions in seized profits along the way), seems less Madisonian than Orwellian.[15]

Modern government wields vast power, power that tests the boundaries of constitutional guarantees. Criminals in our legal system enjoy a presumption of innocence, requiring government to prove their guilt beyond a reasonable doubt. But property owners are actually treated worse, presumed guilty and required to prove their innocence. Indeed, owners trying to retrieve their homes and other possessions bear a heavier burden than the government that confiscated them.

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[13] Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 75 (1998).

[14] THE FEDERALIST NO. 48, at 332 (James Madison) (J. Cooke ed., 1961).

[15] *See, e.g.*, Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013); Louis S. Rulli, *On the Road to Civil Gideon*, 19 J.L. POL'Y 683 (2011); Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77 (2001); Blumenson & Nilsen, *supra* note 13.

Until 1970, when Congress resurrected forfeiture as part of racketeering laws,[16] forfeiture outside the maritime context had been largely dormant since Colonial times—two notable exceptions being actions against criminal bootleggers during Prohibition[17] and the 1861 law allowing President Lincoln to seize the estates of Confederate soldiers.[18] But things changed radically in 1984, when Congress, as part of the war on drugs, began allowing government to seize property without first charging, let alone convicting, the owner—*and* letting law enforcement pocket the proceeds. States quickly got in on the act, passing their own forfeiture laws. And in the 30 years since then, virtually every crime-fighting measure enacted has widened the use of forfeiture, filling government coffers in the process.

Texas, like the federal government and other states, has dramatically expanded the use of civil forfeiture. But as asset forfeiture grows, so grows the risk of abuse—what some call "policing for profit." Across America, cash-strapped governments at all levels increasingly rely on civil forfeiture to boost revenue—to fund operations, buy new equipment, and so on. Government budgeteers relish multiple spigots, and money from confiscated property provides an irresistible profit incentive. But the intersection of power and profit is a troubling one.[19] When agency budgets

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[16] 21 U.S.C. § 881.

[17] National Prohibition Act, ch. 85, § 26, 41 Stat. 305, 315–16 (1919) (repealed 1933).

[18] *See* Act of Aug. 6, 1861, ch. 60, 12 Stat. 319 (codified as amended at 50 U.S.C. § 212) (declaring that any property "used or employed, in aiding, abetting, or promoting [] insurrection or resistance to the laws, or any person or persons engaged therein; or if . . . owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found.").

[19] Ali also challenges on both state and federal constitutional grounds the direct-profit incentive in Texas forfeiture law.

grow dependent on asset forfeiture, not as an occasional windfall or supplement but as indispensable revenue to fund basic operations, constitutional liberties are unavoidably imperiled.[20] Unsurprisingly, a cottage industry has emerged to advise law enforcement how to boost their asset-seizing potential.

One wonders if our colonial ancestors, transported to 2014, would be astonished—watching government seize, then sell, the property of guiltless citizens who have not been charged with any crime, much less convicted of one. And unsurprisingly, civil forfeiture, once focused on the illicit goodies of rich drug dealers, now disproportionately ensnares those least capable of protecting themselves, poor Texans who usually capitulate without a fight because mounting a defense is too costly.

Funding government is important. Safeguarding the constitutional rights of Texans is more important. Fundamental rights should never be sacrificed with nonchalance. The Texas Constitution places limits on capricious government abridgements, and does so on purpose. As Justice Brandeis warned in his prescient *Olmstead* dissent: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."[21]

In 2008 the Bureau of Alcohol, Tobacco, Firearms and Explosives sought bids for 2,000 Leatherman toolkits for its agents, to be inscribed with "Always Think Forfeiture," a play on the

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[20] Some states dampen the incentive to maximize forfeiture proceeds by limiting how such funds can be used. For example, Kansas law enforcement cannot use proceeds for "normal operating expenses," while their Texas counterparts have broad discretion in using proceeds for office-related purposes. *Compare* TEX. CODE OF CRIM. PROC. arts. 59.06(c)(1) & 59.06(c)(2)–(3) *with* KAN. STAT. ANN. § 60-4117(d)(3) (West, Westlaw through 2013 Reg. and Special Legis. Sess.).

[21] *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (partially overruled by *Katz v. United States*, 389 U.S. 347 (1967)).

agency's familiar "ATF" initials.[22] The agency cancelled the order after some embarrassing press reports, but it underscored the government's alarming focus on enriching itself by seizing private property. To quote Chief Justice John Marshall, "This is too extravagant to be maintained."[23]

We have not addressed civil forfeiture since the Eisenhower Administration. Much has changed since our 1957 decision, most notably the vast expansion in 1989 of Texas forfeiture laws. In the quarter-century since, we have yet to revisit the protections due in such proceedings. Given the proliferation of modern forfeiture actions, accelerated by a stark profit incentive, I would reexamine the protections afforded property owners who are often ill-equipped to fight back. Depriving Texans of their liberty requires government to scale a high hurdle. Does depriving Texans of their homes or life savings merit less constitutional protection? Should government bear the burden of proving an owner's knowledge of his property's involvement in criminal activity? Does our Constitution have anything to say about a "presumed guilty" proceeding in which citizens are not arrested or tried, much less convicted, but are nonetheless punished, losing everything they've worked for? Does it matter, by the way, that government is given a handsome stake in forfeited property? Does the lure of revenues distort law-enforcement priorities, steering finite resources to reap the rewards of forfeitable assets, and thus blind officials to the risk of constitutional corrosion inflicted on the innocent? Are these all policy-laden judgments committed exclusively to the political branches, or does the Constitution set a baseline?

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[22] Erika Bolstad, *ATF Drops Slogan That Offended Property Rights Advocates*, MCCLATCHY DC, May 17, 2008, http://www.mcclatchydc.com/2008/07/17/37489/atf-drops-slogan-that-offended.html.

[23] *Marbury v. Madison*, 5 U.S. 137, 179 (1803).

The Texas Constitution's protection of private property rights is unsubtle.[24] It is a building-block guarantee we have lauded as "fundamental, natural, inherent, [and] inalienable."[25] Our Constitution was written precisely to prevent *carte blanche* assertions of governmental power, to prevent police power from devolving into police state. The United States Supreme Court, for example, has recognized that forfeiture endangers rights and that the Eighth Amendment's "excessive fines" clause prohibits disproportionate civil forfeitures.[26] Given the ubiquity and muscularity of modern forfeiture practice, I believe the judiciary should take a moment to reassess and ensure that 2014 practice comports with constitutional protections.

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The civil-forfeiture landscape has changed radically since we last examined this subject in 1957. Perhaps we would rule now as we ruled then, that Texas forfeiture law does not treat innocent property owners unconstitutionally. Even so, modern practice warrants modern study.[27]

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[24] TEX. CONST. art. I, § 19.

[25] *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 535 (Tex. 2013) (citation omitted).

[26] *Austin v. United States*, 509 U.S. 602, 604 (1993).

[27] JUSTICE BOYD notes the United States Supreme Court's 5-4 decision in *Bennis v. Michigan*, 516 U.S. 442, 446 (1996), which upheld the Michigan forfeiture statute against due-process and takings challenges under the United States Constitution. But in today's case, Ali isn't bringing a federal constitutional claim; he's bringing a *state* constitutional claim. To be sure, the U.S. Supreme Court has final-word authority on what the Federal Constitution means. Just as sure, *this* Court has ultimate authority to interpret the *Texas* Constitution, including whether it affords greater-than-federal protection to property owners. Federal courts are not the exclusive vindicators of individual rights; state courts are fully capable of protecting citizens' liberty—and not as a mere mirror of federal law. As Hamilton wrote in *Federalist No. 17*, aiming to reassure Anti-Federalists that state judiciaries would not be supplanted under the Federal Constitution, state courts are "the immediate and visible guardian of life and property." THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Indeed, individual rights may find greater refuge in state courts, as many state constitutions have enshrined protections that extend beyond those in federal law. *See* Jeffrey S. Sutton, *What Does—And Does Not—Ail State Constitutions*, 59 U. KAN. L. REV. 687, 703 (2011). I agree wholeheartedly with a former justice of the Colorado Supreme Court: "For most Americans, Lady Justice lives in the halls of state courts." John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at A18. The Texas

Done right, forfeiture is a potent crime-fighting tool. But when a guiltless Texan is permanently stripped of his home and possessions, his property, however valuable, is not the most precious thing being surrendered. The forfeiture regime involves inherent imbalances, and judges must ensure that the constitutional scales aren't overly tipped in the government's favor. At minimum, I urge the Legislature, with senses heightened to what Edmund Burke called a "fierce spirit of liberty,"[28] to contemplate anew how Texas law treats its citizens.[29]

The issues in this case implicate solemn constitutional principles that deserve oral argument and further Supreme Court scrutiny. Because the Court decides otherwise, I respectfully dissent.

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Don R. Willett
Justice

Constitution boasts independent protective force, and this Court pronounces its reach and potency. For a compelling discussion of the role of state judiciaries in our constitutional order, *see generally* Jennifer Walker Elrod, *Don't Mess With Texas Judges: In Praise of the State Judiciary*, 37 HARV. J.L. & PUB. POL'Y (forthcoming 2014).

Nor do I understand JUSTICE BOYD's mootness/standing point. Ali argues that the statute's burden-shifting scheme is unconstitutional. He refuses to assert innocent-owner status because he contends he shouldn't have to prove his innocence. Ali isn't required to rely on article 59.02(c) in order to attack its constitutionality. Plus, Ali is raising two separate constitutional arguments, targeting not only the "presumed guilty" feature of Texas forfeiture law, but also the direct-profit incentive that propels it, a feature enacted 32 years after *Richards*. Bottom line: Determining the constitutional protections due innocent Texans is a "Supreme Court case" by any measure. I have no idea if Ali would ultimately prevail. Maybe we would affirm *Richards*, or overrule it, or distinguish it. Mystery abounds. Such mysteries are why we should grant the case, hear oral argument, circulate opinion drafts, and engage in the sort of vigorous debate that results in meticulous Supreme Court decisions.

[28] EDMUND BURKE, *Speech on Moving His Resolutions for Conciliation with the Colonies*, Mar. 22, 1775, in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 189 (Peter J. Stanlis ed., 2009).

[29] In many states, for example, *government* bears the burden of proving the property owner knew his property was involved in criminal conduct. *See* OR. CONST. art. XV, §§ 3, 10(5)–(6) (West, Westlaw through Nov. 2012 General Election); CAL. HEALTH & SAFETY CODE § 11488.5(d)(1) (West, Westlaw through Ch. 3 of 2014 Reg. Sess.); COLO. REV. STAT. ANN. § 16-13-505(10)(a–b) (West, Westlaw through Ch. 1–3 and 5–7 of 2014 2d Reg. Sess.); FLA. STAT. ANN. § 932.703(6)(a) (West, Westlaw through 2013 1st Reg. Sess.); KAN. STAT. ANN. § 60-4106(a) (West, Westlaw through 2013 Reg. and Special Legis. Sess.).

OPINION DELIVERED: March 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0006

ZAHER EL-ALI, PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

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

JUSTICE BOYD, joined by JUSTICE GUZMAN, concurring in the denial of the petition for review.

The opinion dissenting to the Court's denial of this petition for review is both eloquent and persuasive. I agree that the State of Texas should not "ensnare guiltless citizens and seize their homes and other property." But courts resolve cases, not just issues, and this case presents a particularly poor opportunity to resolve the issues that disturb the dissent.

To prevail in this case, petitioner Zahir El-Ali bears a difficult legal burden. The Texas civil forfeiture statute allows the State to seize and take private property if the State proves that the property was used, or was intended to be used, in or to facilitate the commission of certain crimes, or that the property constitutes the proceeds from the commission of certain crimes. TEX. CODE CRIM. PROC. art. 59.01(2), 59.02(a). Ali argues that this statute is unconstitutional because it does not also require the State to prove the property owner knew or should have known of the illegal conduct. This Court has already rejected that exact argument. *See State v. Richards*, 301 S.W.2d

597, 603 (Tex. 1957) (holding that the forfeiture statute is not unconstitutional "as applied to the property rights of an innocent owner who entrusts his vehicle to another"). And many other courts, including the United States Supreme Court, have rejected it as well. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (reaffirming the "long and unbroken line of cases [that] holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use").[1]

Certainly, we could decide to overrule *Richards* and reject the reasoning of the "long and unbroken line of cases" that the United States Supreme Court has reaffirmed. But Ali does not ask us to do that. Instead, he notes that the Texas statute now provides an "innocent owner defense," which enables the property's owner to avoid forfeiture by proving that the owner "did not know or should not reasonably have known" that the property was being used illegally. TEX. CODE CRIM. PROC. art. 59.02(c). Having decided to protect the rights of innocent owners, Ali asserts, the State may not constitutionally require him to prove his own innocence; instead, the State must prove that he is not innocent. The State, of course, contends that this just gets us back to the argument we

[1] As the dissent notes, Ali bases his challenge on the Texas Constitution's due course of law provision rather than the U.S. Constitution's due process clause. But Ali does not identify any difference between the two that is material to the issue in this case, and under such circumstances "we treat them as the same." *In re E.R.*, 385 S.W.3d 552, 566 n.25 (Tex. 2013) (citing *Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 867–68 (Tex. 2005)). In fact, instead of distinguishing the federal clause, Ali's briefs address a national problem and cite federal as well as Texas decisions. His opening brief does not mention *Bennis*, but instead quotes from Justice Thomas's dissent in *United States v. James Daniel Good Real Prop*erty: "Given that current practice under [the federal forfeiture statute] appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture." 510 U.S. 43, 82 (1993) (Thomas, J., dissenting). I do not disagree with most of the concerns that Justice Thomas and this Court's dissenting opinion raise, I simply conclude that this is not "an appropriate case" in which to address them.

rejected in *Richards*: if the owner's innocence is irrelevant to the statute's constitutionality, then the burden of proving the owner's innocence is likewise irrelevant.

Even if Ali's reliance on the enactment of the article 59.02(c) defense is sufficient to distinguish *Richards*, it creates significant procedural and jurisdictional issues. Although Ali's brief assures us that he is "wholly innocent of any wrongdoing," he refused in the trial court to offer any evidence, even a simple affidavit, to support that claim. More importantly, he amended his pleadings to specifically abandon any reliance on the article 59.02(c) defense. Yet in this appeal, he challenges the constitutionality of article 59.02(c), the very statute on which he has refused to rely. The State contends that, by abandoning any reliance on article 59.02(c), Ali has mooted, and now lacks standing to assert, any challenge to that article's constitutionality.

Although the dissent urges us to apply "21st-century scrutiny" in light of the current "prevalence, procedures, and profitability" of 21st-century forfeiture practices, I'm confident that the dissent is not suggesting that the words of the Constitution mean something different from what they meant in 1957. So we are left in this case with either overruling *Richards* or distinguishing it based on a statutory provision upon which the petitioner intentionally does not rely. Although I share the Court's desire that the State not become like old Mother England, I'm not convinced that, in this case, we should consider either option.

Finally, by calling for "21st-century scrutiny" and "modern study," the dissenting opinion could be read to suggest that the Court has not studied and scrutinized these issues when deciding, today, whether to grant this petition for review. I write in response to the dissent mainly to confirm that we certainly have.

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Jeffrey S. Boyd
Justice

OPINION DELIVERED: March 28, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0012

THE CITY OF WATAUGA, PETITIONER,

v.

RUSSELL GORDON, RESPONDENT

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

Argued December 4, 2013

JUSTICE DEVINE delivered the opinion of the Court.

The Texas Tort Claims Act waives governmental immunity for, among other things, personal injuries allegedly caused by the negligent use of property. TEX. CIV. PRAC. & REM. CODE § 101.021. The Act does not waive immunity when the claim arises out of an intentional tort, however. *Id.* § 101.057(2). The question in this interlocutory appeal is whether an arrestee's lawsuit against a city for injuries, accidentally caused by a police officer's use of handcuffs, states a battery or negligence claim. The court of appeals concluded that the underlying claim was for negligence and therefore affirmed the trial court's order, denying the city's governmental-immunity plea. 389 S.W.3d 604 (Tex. App.—Fort Worth 2013). We conclude, however, that the underlying claim is for battery. Because the city's governmental immunity has not been waived for this intentional tort, we reverse the court of appeals' judgment and dismiss the case.

I. Background

City of Watauga police officers stopped Russell Gordon on suspicion of drunk driving and asked him to submit to a sobriety test. Gordon declined. He was then arrested without resistance. Gordon was handcuffed at the scene and again later when transported from a nearby police station to the city jail. Gordon asserts that on both occasions he informed the officers that his handcuffs were too tight but that his complaints were ignored.

Gordon subsequently sued the City for injuries to his wrists allegedly caused by the officers' negligent use of property—the handcuffs. The City responded with a plea to the jurisdiction, asserting immunity from suit under the intentional-tort exception to the Tort Claims Act's sovereign-immunity waiver. TEX. CIV. PRAC. & REM. CODE § 101.057(2). The trial court denied the City's plea. The City appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting interlocutory appeal of an order granting or denying a plea to the jurisdiction by a governmental unit). The court of appeals affirmed, concluding that Gordon's pleadings asserted a negligence claim and that the City's plea and jurisdictional evidence did not show an exception to the applicable immunity waiver. 389 S.W.3d at 607-08.

II. Jurisdiction

Because this is an interlocutory appeal, we begin with the issue of our own jurisdiction. As a general rule, appeals may be taken only from final judgments. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Exceptions to this general rule are provided by statutes that specifically authorize interlocutory appeals of particular orders. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 51.014 (listing a number of interlocutory orders that may be appealed). Another general rule

provides for finality of these appeals in the courts of appeals. TEX. GOV'T CODE § 22.225(b)(3) (providing generally that petition for review is not allowed to the supreme court in an interlocutory appeal). But again, exceptions exist. One such exception provides that the supreme court is not deprived of jurisdiction to consider an interlocutory appeal when a justice dissents in the court of appeals or when the court of appeals' decision conflicts with a prior decision. *Id*. § 22.225(c).

The City here asserts conflicts jurisdiction, arguing that the decision in this case conflicts with several prior decisions that, unlike this case, apply the intentional-tort exception to bar personal-injury claims arising from a police officer's use of tangible property during an arrest. *See, e.g., Harris Cnty. v. Cabazos*, 177 S.W.3d 105 (Tex. App.–Houston [1st Dist.] 2005, no pet.) (holding immunity not waived for officer's intentional discharge of pistol); *City of Garland v. Rivera*, 146 S.W.3d 334 (Tex. App.—Dallas 2004, no pet.) (holding immunity not waived for intentional use of pepper spray, handcuffs, and police service dog); *Morgan v. City of Alvin*, 175 S.W.3d 408 (Tex. App.–Houston [1st Dist.] 2004, no pet.) (holding immunity not waived for officer's physical assault of arrestee) ; *City of Laredo v. Nuno*, 94 S.W.3d 786 (Tex. App.–San Antonio 2002, no pet.) (holding immunity not waived for intentional use of handcuffs and excessive force in arrest). A conflict in decisions is defined as an "inconsistency . . . 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). We agree that such a conflict is presented here and turn to the issue of the City's immunity.

III. The Underlying Claim: Negligence or Battery

The City of Watauga, as a political subdivision of the State, is protected from tort claims by governmental immunity. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). Governmental immunity[1] generally protects municipalities and other state subdivisions from suit unless the immunity has been waived by the constitution or state law. *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994). The Texas Tort Claims Act provides a limited waiver of this immunity and is asserted as the basis for the underlying suit here.

In pertinent part, the Tort Claims Act waives immunity for injuries caused by the negligent use of tangible property, stating:

> A governmental unit in the state is liable for . . . personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE § 101.021(2). This limited waiver does not apply to intentional torts, however. *Id*. § 101.057. Thus, to sue a governmental unit under the Act's limited waiver, a plaintiff may allege an injury caused by negligently using tangible personal property, *York*, 871 S.W.2d at 178 n.5, but to be viable, the claim cannot arise out of an intentional tort, *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001).

The City maintains that its immunity has not been waived because Gordon's underlying claim arises from an intentional tort, a battery, also sometimes referred to as an assault. Texas courts have recognized private causes of action for both assault and battery for well over a century. *See*

[1] "Sovereign immunity protects the State, state agencies, and their officers, while governmental immunity protects subdivisions of the State, including municipalities and school districts." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 n.2 (Tex. 2008).

Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P., 343 S.W.3d 112 , 115–116 (Tex. 2011) (citing *Sargent v. Carnes,* 84 Tex. 156, 19 S.W. 378, 378 (1892)). These two intentional torts are related, but conceptually distinct. 4 J. HADLEY EDGAR, JR, & JAMES B. SALES, TEXAS TORTS & REMEDIES § 50.01[1] at 50-3 (2013). An assault occurs when a person is in apprehension of imminent bodily contact, whereas a battery is committed when an individual actually sustains a harmful or offensive contact to his or her person. *See generally,* 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS §§ 33-40 (2d ed. 2012) (hereafter "THE LAW OF TORTS").

Today, the Texas Penal Code combines common-law concepts of assault and battery under its definition of "assault." TEX. PEN. CODE § 22.01(a). Reliance on the criminal-assault statute has led several Texas civil courts to meld common-law concepts of assault and battery under the rubric of assault.[2] This statute provides that a person commits an assault if the person either:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another . . . ;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury . . . ; or
>
> (3) intentionally or knowingly causes physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. PEN. CODE § 22.01(a).

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[2] *See Waffle House, Inc. v. Williams,* 313 S.W.3d 796, 801 n.4 (Tex. 2010) (noting several courts' observation that the elements of civil and criminal assault are the same); *Forbes v. Lanzl*, 9 S.W.3d 895, 900 (Tex. App.–Austin 2000, pet. denied) (noting that elements of assault are the same in both civil and criminal cases); *Hogenson v. Williams,* 542 S.W.2d 456, 458 (Tex. Civ. App.–Texarkana 1976, no writ) (same); *see also* Comm. On Pattern Jury Charges, Texas Pattern Jury Charges—General Negligence § 6.6 (State Bar of Texas 2006) (using Penal Code's definition of assault in civil cases); *but see Miller ex. rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 767 (Tex. 2003) (referring to a physician's act of operating without consent as a battery).

The statute's second alternative definition mirrors the traditional notion of common-law assault, while the first and last alternatives correspond to separate forms of common-law battery. The Second Restatement of Torts similarly identifies two forms of battery: one form that results in harmful bodily contact and another that results in offensive bodily contact. RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965). Because its police officers did not intend any harmful bodily contact when they arrested Gordon, the City relies on the latter form of battery, maintaining that the arrest constituted an offensive bodily contact.

In *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), we recognized this type of battery. In that case, the manager of a motel restaurant snatched a plate from the hands of a black man as he stood in a buffet line, shouting that he would not be served. *Fisher*, 424 S.W.2d at 628-29. We held the manager's conduct to be actionable as a battery. *Id*. at 630. Relying on the Restatement, we noted that it was the offensive nature of the contact, not its extent, that made the contact actionable: "Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting." *Id*. (citing RESTATEMENT (SECOND) OF TORTS § 18); *see also Waffle House*, 313 S.W.3d at 802-03 (recognizing continued viability of offensive-contact batteries).

A. Consent

The court of appeals concluded that Gordon's pleadings[3] asserted a claim for negligence instead of battery because, as Gordon alleged, the officers did not intend to injure him and he did not resist arrest. 389 S.W.3d at 607. The court reasoned that Gordon's compliance indicated his consent to the arrest, thereby negating the contact's offensive nature. *See id.* (noting that "the officers' application of the handcuffs did not involve an offensive touching or contact of Gordon by the officers as required to constitute the intentional tort of assault or battery"). The court further suggested that Gordon's consent distinguished the case from other cases involving alleged excessive force or other offensive contact during an arrest. *Id*. at 607-08 (citing cases).

The City, of course, disagrees with the court's analysis, arguing that Gordon's compliance was not consent in any relevant legal sense. The City submits that Gordon did not volunteer to be arrested because he had no choice. *See, e.g.,* TEX. PEN. CODE §§ 38.03-.04 (criminalizing resisting

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[3] The court of appeals summarizes the substance of Gordon's pleadings in the following footnote:

> [O]ne evening City of Watauga police pulled him over on suspicion of driving while intoxicated; after Gordon politely refused to perform field sobriety tests, the officers told him that he would be placed under arrest and handcuffed; Gordon "consented to the arrest and allowed the officer to place the cuffs on him without any resistance"; Gordon repeatedly informed the officer that the handcuffs were too tight and were hurting him, but the officer did not check the tightness of the handcuffs. Gordon pleaded that at the police station, after he had refused to perform any additional sobriety tests, he was told that he would be handcuffed and taken to jail. Gordon again consented, and the placement of handcuffs occurred without incident. Gordon told the officers that the handcuffs were too tight and were causing him pain. Again, the officers did not check or loosen the handcuffs. Gordon pleaded a negligence claim, pleading that the officers acted negligently in their use of tangible personal property, specifically the use of handcuffs, in one or all of the following ways: by failing to properly use the handcuffs as designed; by failing to follow proper policies and procedures as to the proper use of handcuffs; and by applying the handcuffs on him in a manner that was too tight on his wrists.

389 S.W.3d at 605 n.1.

arrest). Moreover, the City argues that Gordon clearly did not consent to have the handcuffs applied too tightly, else he would have no claim under any liability theory.

Several amici[4] support the City's position, arguing that using restraints on an arrestee is undoubtedly offensive to a reasonable sense of personal dignity and technically a battery in the absence of privilege. Amici point to the Restatement, which recognizes that an arrest "usually involves conduct which, unless privileged, is an 'assault' or 'battery'" but that where the privilege exists "it justifies not only the confinement but also any conduct which is reasonably necessary to effect the arrest." RESTATEMENT (SECOND) OF TORTS § 118, cmt. b (1965).

We agree that Gordon's compliance during the arrest was not legal consent to what otherwise would have been a battery. Preeminent tort authorities have noted that "[a]s to false imprisonment or battery, it is clear that yielding to . . . the assertion of legal authority . . . must be treated as no consent at all, but submission against the plaintiff's will . . ." W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, 121 (5th ed. 1984). Even were we to agree that Gordon's compliance constituted consent to reasonable force, his pleadings indicate that the police exceeded that consent by applying the cuffs with excessive force.

Consent to contact "negatives the wrongful element of the defendant's act, and prevents the existence of a tort." *Id*. at 112; *see also Smith v. Holley*, 827 S.W.2d 433, 437 n.3 (Tex. App.–San Antonio 1992, writ denied) (quoting PROSSER & KEETON). But exceeding consent makes the tortfeasor liable for the excess. *See* RESTATEMENT (SECOND) OF TORTS § 892A(4) (1965). Gordon's

[4] Amici include the Texas Municipal League, Texas City Attorney's Association, Texas Association of Counties, and Texas Association of Counties Risk Management Pool.

pleadings assert that he protested repeatedly that the handcuffs were too tight and causing him pain, thus plainly terminating any assumed consent. The court of appeals' reliance on Gordon's "consent" therefore fails to distinguish this case from other cases that have applied the Tort Claims Act's intentional-tort exception to arrests involving excessive-force allegations. *See, e.g.*, *Morgan*, 175 S.W.3d at 418; *Rivera*, 146 S.W.3d at 337-38; *Nuno*, 94 S.W.3d at 789.

B. Intentional Tort or Unintended Injury

Gordon argues that his case is different from other cases involving excessive force in that the police here did not intend to injure him. Quoting from *Reed Tool Co. v. Copelin*, Gordon further submits that the "fundamental difference" between a negligent injury and an intentional injury is the "specific intent to inflict injury." 689 S.W.2d 404, 406 (Tex. 1985). Gordon reasons that, if a specific intent to inflict injury is an intentional tort, an unintended or accidental injury must conversely result from negligence. Although the City agrees that any injury here was accidental, it does not agree that a worker's compensation case like *Reed Tool* has any relevance to the City's immunity claim.

In *Reed Tool*, an employee argued that the Texas Worker's Compensation Act should not limit his recovery because his employer intentionally caused his injury. The employee maintained that his employer exhibited that intent by willfully providing an unsafe workplace. *Id*. at 405. In holding that the employee's injury was not intentional, we reasoned that the failure to furnish a safe workplace was not the kind of actual intention to injure that robs the injury of its accidental character and thus avoids the exclusive remedy provision of the worker's compensation act. *Id*. at 406. Distinguishing intentional injuries from accidents, we observed that an employer's toleration

of a dangerous condition might set the stage for an accidental injury but was not a "deliberate infliction of harm comparable to an intentional left jab to the chin." *Id*. at 407 (quoting 2A A. LARSON, THE LAW OF WORKER'S COMPENSATION § 69.13 (1982). In line with that, we noted that "direct assaults by an employer on an employee" would fall within the act's intentional injury exception, elaborating further that the fundamental difference between accidental and intentional injuries was "the specific intent to inflict injury." *Id*. at 406.

We agree with the City here that the distinction drawn in *Reed Tool* between intentional and accidental injuries is not particularly helpful in distinguishing a battery from negligence. Although a specific intent to inflict injury is without question an intentional tort, and many batteries are of this type, a specific intent to injure is not an essential element of a battery.[5] As already discussed, a battery does not require a physical injury, and thus it follows that an intentional physical injury is also not required.[6] In fact, even a harmful or offensive contact that is intended to help or please the plaintiff can be actionable as a battery.[7] According to the Restatement:

> If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery . . . although the act was not done with the intention of bringing about the resulting bodily harm.

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[5] *Fisher*, 424 S.W.2d at 629-30; *see also Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 650 (Tex. App.–Houston [1st Dist.] 2005, pet. denied) (rejecting argument that an intent to injure is the only way to prevail on an assault claim).

[6] *See* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 36-37 (5th ed. 1984) ("The defendant may be liable although . . . honestly believing that the act would not injure the plaintiff.").

[7] *See id.* at 41-42 ("[T]he Defendant may be liable even when intending only a joke, or even a compliment, as where an unappreciated kiss is bestowed without consent or a misguided effort is made to render assistance"); *see also Gravis v. Physicians & Surgeons Hosp*., 427 S.W.2d 310, 311 (Tex. 1968) (noting that battery action lies against physician who, with intent to cure the plaintiff, operated without plaintiff's consent).

RESTATEMENT (SECOND) OF TORTS § 16 (1965).

That the defendant intends "bodily contact that is 'offensive'" is enough, then. 1 THE LAW OF TORTS § 33 at 81; *accord Fisher*, 424 S.W.2d at 630. Liability in battery moreover extends to harmful bodily contacts even though only offensive contacts were intended.[8] Thus, while we agree that intentional injuries are by definition a consequence of intentional torts, we do not agree with the notion that accidental injuries are never a consequence.

IV. Excessive Force and the Texas Tort Claims Act

The gravamen of Gordon's complaint against the City is that its police officers used excessive force in effecting his arrest. Claims of excessive force in the context of a lawful arrest arise out of a battery rather than negligence, whether the excessive force was intended or not. *See City of San Antonio v. Dunn*, 796 S.W.2d 258, 261 (Tex. App.–San Antonio 1996, writ denied) (noting that injuries caused by excessively tight handcuffing "certainly cannot be attributed to the City as negligence"); *Cameron Cnty. v. Ortega*, 291 S.W.3d 495, 499 (Tex. App.–Corpus Christi 2009, no pet.) (allegations that deputy was negligent in his use of handcuffs and used excessive force held indistinguishable from assault as defined in the penal code). The District of Columbia Court of Appeals has explained the relationship between negligence and battery in this context:

> While it may be, as the trial court here noted, that the officers may have mistakenly believed that they needed to exert the amount of force that they did, that does not affect the intentionality of the initial action or the objective excessiveness of the force. An unwanted touching may in its inception be intentional, a battery, or accidental, possibly negligent. But once it is found to be intentional, a battery

[8] *See, e.g., Caudle v. Betts*, 512 So. 2d 389, 389 (La. 1987) (holding that liability in battery extends to consequences which the defendant did not intend or even reasonably foresaw); *see also* 1 THE LAW OF TORTS § 45 (discussing the concept of extended liability or transferred intent applicable in battery but not in negligence).

> tortfeasor is liable for the full range of consequences, intended or not, including harm and transferred liability. [citation omitted]. Therefore, where the excessive force is the product of a battery, an unwanted touching inherent in any arrest, which escalates in an unbroken manner into excessive force, the cause of action is a battery alone, with the privilege having ended at the point where excessive force began. To instruct in such circumstances on a separate and distinct tort of negligence is not only doctrinally unsound but a potential source of jury confusion.

District of Columbia v. Chinn, 839 A.2d 701, 707 (D.C. 2003). We agree that when an arrest, lawful in its inception, escalates into excessive-force allegations, the claim is for battery alone.

The court of appeals in this case is not the first Texas court to conclude that allegations of unintended injury during an arrest state a negligence claim. *See, e.g.*, *City of Lubbock v. Nunez*, 279 S.W.3d 739, 742-43 (Tex. App.–Amarillo 2007, pet. granted & dism'd by agr.) (concluding that the death of an uncooperative suspect caused by a police officer's repeated use of a taser was unintentional and consequently the result of negligence). But again, we agree with *Chinn* that such a conclusion is "doctrinally unsound." *Chinn*, 839 A.2d at 707. The actions of a police officer in making an arrest necessarily involve a battery, although the conduct may not be actionable because of privilege. *Love v. City of Clinton*, 37 Ohio St. 3d 98, 524 N.E.2d 166, 167 n. 3 (Ohio 1988); *cf. Fuerschbach v. Sw. Airlines Co.*, 439 F.3d 1197, 1209 (10th Cir. 2006) (applying New Mexico law to hold that use of handcuffs in a pranking incident is some evidence of contact that "offends a reasonable sense of personal dignity"). The officer is privileged to use reasonable force. *Petta*, 44 S.W.3d at 579. But a police officer's mistaken or accidental use of more force than reasonably necessary to make an arrest still "arises out of" the battery claim. *Dunn*, 796 S.W.2d at 261. "As the saying goes, there is no such thing as a negligent battery, since battery is defined to require an intentional touching without consent not a negligent one." 1 THE LAW OF TORTS § 31 at 77.

The Texas Tort Claims Act waives governmental immunity for certain negligent conduct, but it does not waive immunity for claims arising out of intentional torts, such as battery. TEX. CIV. PRAC. & REM. CODE § 101.057(2). Because Gordon alleges that the police used excessive force in his arrest, a claim that arises out of a battery, his pleadings do not state a claim for which governmental immunity has been waived under the Tort Claims Act. We accordingly reverse the court of appeals' judgment and render judgment dismissing the case.

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John P. Devine
Justice

Opinion Delivered: June 6, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0014

CARDIAC PERFUSION SERVICES, INC. AND MICHAEL JOUBRAN, PETITIONERS,

v.

RANDALL HUGHES, RESPONDENT

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

PER CURIAM

In this case the trial court concluded based on jury findings that Michael Joubran, an officer, director, and majority shareholder of Cardiac Perfusion Services, Inc. (CPS), engaged in "oppressive conduct to the rights of [Randall] Hughes," a minority shareholder. The court ordered Joubran and CPS to buy out Hughes's shares for $300,000, the amount the jury found to be their "fair value." The Dallas Court of Appeals affirmed. In *Ritchie v. Rupe*, ___ S.W.3d ___ (Tex. 2014), this Court declined to recognize a common-law cause of action for shareholder oppression and concluded that the only statutory remedy for "oppressive" actions is a rehabilitative receivership. We therefore reverse in part and affirm in part the court of appeals' judgment, and we remand to the trial court in the interest of justice.

Joubran founded CPS and hired Hughes as his first employee. A year later, Joubran, as the sole shareholder, voted to offer Hughes 10% of CPS's total shares for $25,000. Hughes accepted the offer and purchased the shares, and the parties entered into a written buy-sell agreement. The buy-sell agreement restricted the sale or transfer of any shares and required each shareholder to purchase the other shareholder's shares upon "the severance of [that] shareholder's employment relationship with [CPS]," with the price to be calculated using the shares' book value as of the preceding fiscal year. A dispute later arose between the parties, and Hughes's employment with CPS terminated in August 2006.

The day after Hughes's employment terminated, CPS and Joubran sued Hughes for breach of fiduciary duties and for tortious interference with a contract, and also requested declaratory relief in the form of an order declaring that (1) the buy-sell agreement governed Joubran's obligation to purchase Hughes's shares, and (2) the amount Joubran owed to Hughes for the purchase of his stock should be reduced by the damages that Hughes's wrongful conduct caused to CPS. Hughes filed counterclaims against Joubran alleging (1) breach of fiduciary duties "as officer and director" of CPS, and (2) breach of fiduciary duty "as majority shareholder." Hughes alleged that Joubran "engaged in oppressive conduct toward Hughes[] and unfairly squeezed Hughes out of [CPS]," and requested that the court require CPS to buy out his shares for their fair value as of the date Joubran "wrongfully squeezed Hughes out of the corporation."

On Joubran's and CPS's claims for affirmative relief, the jury found that Hughes did not tortuously interfere with any contract or breach any fiduciary duties. With regard to Hughes's counterclaim against Joubran for breach of fiduciary duties, the jury found that no relationship of

trust and confidence between Joubran and Hughes that would support the existence of any "informal" fiduciary duties.[1] The jury did find, however, that Joubran (1) suppressed payment of profit distributions to Hughes, (2) paid himself excessive compensation from CPS's corporate funds, (3) improperly paid his family members using CPS funds, (4) improperly used CPS funds to pay his personal expenses, (5) wrongfully used his control of CPS to lower the value of Hughes's stock, and (6) refused to let Hughes examine CPS's books and records. The jury also found that the fair value of Hughes's shares was $300,000.

Based on the jury's findings, the trial court issued findings of fact and conclusions of law in which it concluded that Joubran engaged in "oppressive conduct to the rights of Hughes." The court concluded that Joubran was not entitled to a declaration of his right to purchase Hughes's shares for "book value" under the buy-sell agreement, and instead, as an equitable remedy, ordered Joubran to buy out Hughes's shares for their "fair value" of $300,000. The final judgment ordered that CPS and Joubran take nothing on their claims against Hughes, that Hughes take nothing on his claim against Joubran for breach of fiduciary duties, and that, as an equitable remedy for oppressive conduct, Joubran and CPS redeem Hughes's shares for $300,000. The court also awarded Hughes prejudgment interest, postjudgment interest, and attorney's fees. The court of appeals affirmed.

[1] As the court of appeals correctly acknowledged in this case, this Court has never recognized a formal fiduciary duty between a majority and minority shareholder in a closely held corporation. An informal fiduciary duty "arises separate and apart from business relationships." *See Ritchie*, ___ S.W.3d at ___ n.27 (citing *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005)) ("Informal fiduciary duties 'arise from "a moral, social, domestic, or purely personal relationship of trust and confidence."' . . . Informal fiduciary duties are not owed in business transactions unless the special relationship of trust and confidence existed prior to, and apart from, the transaction(s) at issue in the case.").

We need not reach the issue of whether the evidence is legally sufficient to support the jury's findings and the trial court's conclusion that Joubran engaged in oppressive conduct because, even if he did, Texas law does not authorize the buy-out order as a remedy. In *Ritchie*, we clarified that a claim for shareholder oppression is only available under section 11.404 of the Texas Business Organizations Code, and that the only remedy available under that statute is a rehabilitative receivership. ___ S.W.3d at ___.

Because a buy-out order is not available under a common-law claim for shareholder oppression or under the receivership statute, and because no alternative claim supports the trial court buy-out order, we reverse that part of the trial court's judgment. However, "[w]e have broad discretion to remand for a new trial in the interest of justice where it appears that a party may have proceeded under the wrong legal theory." *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993); *see also id.* ("Remand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled."). When we declined in *Ritchie* to follow the Texas courts of appeals' decisions recognizing a common-law cause of action for shareholder oppression, we did so in part because of the adequacy of other existing legal protections. ___ S.W.3d at ___. We noted that a minority shareholder in a closely held corporation may recover equitable relief, in some cases individually as well as on behalf of the corporation, through a derivative action for breach of fiduciary duties under section 21.563(c) of the Business Organizations Code. *See id.* at ___ ("[T]he Legislature has enacted special rules to allow its shareholders to more easily bring a derivative suit on behalf of the corporation, . . . [a]nd when justice requires, the court may treat a derivative action on behalf of a closely held corporation 'as a

direct action brought by the shareholder for the shareholder's own benefit,' and award any recovery directly to that shareholder."); *see also* TEX. BUS. ORGS. CODE § 21.563(c). Although we express no opinion on whether Hughes may successfully pursue such a claim under the facts of this case, justice requires that we remand to provide him an opportunity to do so.

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 remand the case to the trial court for further proceedings. *See* TEX. R. APP. P. 59.1. The court of appeals affirmed the trial court's judgment on Joubran's and CPS's claims against Hughes for tortious interference and breach of fiduciary duties and on Hughes's claim for breach of "informal" fiduciary duties. No party has challenged those holdings, and we affirm those parts of the court of appeals' judgment. We reverse the part of the court of appeals' judgment affirming the trial court's buy-out order and denial of Joubran's and CPS's request for declaratory judgment, and in the interest of justice, we remand the case for further proceedings consistent with this opinion.

OPINION DELIVERED: June 27, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0043

ROBERT KINNEY, PETITIONER,

v.

ANDREW HARRISON BARNES (A/K/A A. HARRISON BARNES, A. H. BARNES, ANDREW H. BARNES, HARRISON BARNES), BCG ATTORNEY SEARCH, INC., EMPLOYMENT CROSSING, INC. AND JD JOURNAL, INC., RESPONDENTS

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

Argued January 9, 2014

JUSTICE LEHRMANN delivered the opinion of the Court.

A hallmark of the right to free speech under both the U.S. and Texas Constitutions is the maxim that prior restraints are a heavily disfavored infringement of that right. So great is our reticence to condone prior restraints that we refuse to allow even unprotected speech to be banned if restraining such speech would also chill a substantial amount of protected speech. This danger is before the Court today, as we are asked whether a permanent injunction restraining future speech is a constitutionally permissible remedy for defamation following an adjudication on the merits. On the one hand, it is well settled that defamation is an abuse of the privilege to speak freely; our

holding today does not disturb that. On the other, it is also well settled that prior restraints are rarely permitted in Texas due to their capacity to chill protected speech.

The issue at hand is more specifically presented as whether a permanent injunction is an unconstitutional prior restraint where the injunction (1) requires the removal or deletion of speech that has been adjudicated defamatory, and (2) prohibits future speech that is the same or similar to the speech that has been adjudicated defamatory. We hold that, while the former does not enjoin future speech and thus is not a prior restraint, the latter constitutes a prior restraint that impermissibly risks chilling constitutionally protected speech. Because the court of appeals failed to recognize this distinction in affirming summary judgment for the defendant, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

BCG Attorney Search, Inc. employed Robert Kinney as a legal recruiter until 2004, when he left and started a competing firm. Several years later, BCG's President, Andrew Barnes, posted a statement on the websites JDJournal.com and Employmentcrossing.com implicating Kinney in a kickback scheme during his time with BCG. Describing allegations in a lawsuit Barnes had previously filed against Kinney in California, Barnes stated:

> The complaint also alleges that when Kinney was an employee of BCG Attorney Search in 2004, he devised an unethical kickback scheme, attempting to pay an associate under the table at Preston, Gates and Ellis (now K&L Gates) to hire one of his candidates. Barnes says that when he discovered this scheme, he and other BCG Attorney Search recruiters immediately fired Kinney. The complaint in the action even contains an email from Kinney where he talks about paying the bribe to an associate at Preston Gates in return for hiring a candidate.

The posted statements prompted Kinney to sue Barnes, BCG, and two other companies Barnes owned (Employment Crossing, Inc. and JD Journal, Inc.) for defamation in Travis County. Kinney did not seek damages in his petition, requesting only a permanent injunction following a trial on the merits.[1] Specifically, Kinney sought an order requiring Barnes to (a) remove the allegedly defamatory statements from Barnes's websites, (b) contact third-party republishers of the statements to have them remove the statements from their publications, and (c) conspicuously post a copy of the permanent injunction, a retraction of the statements, and a letter of apology on the home pages of Barnes's websites for six months. Kinney has since abandoned his demand for an apology and retraction.

Barnes filed a motion for summary judgment on the ground that the relief sought would constitute an impermissible prior restraint on speech under the Texas Constitution. The trial court granted the motion, and the court of appeals affirmed without addressing whether Barnes's statements were defamatory. We too will limit our review to the constitutionality of Kinney's requested relief and assume only for purposes of that analysis that the complained-of statements are defamatory.

II. Discussion

"Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of

[1] According to Barnes, Kinney previously filed and nonsuited a defamation suit against the same defendants seeking monetary damages but no injunctive relief.

speech or of the press." TEX. CONST. art. I, § 8. Enshrined in Texas law since 1836,[2] this fundamental right recognizes the "transcendent importance of such freedom to the search for truth, the maintenance of democratic institutions, and the happiness of individual men." TEX. CONST. art. I, § 8 interp. commentary (West 2007). Commensurate with the respect Texas affords this right is its skepticism toward restraining speech. While abuse of the right to speak subjects a speaker to proper penalties, we have long held that "pre-speech sanctions" are presumptively unconstitutional. *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992); *see also Ex parte Tucker*, 220 S.W. 75, 76 (Tex. 1920).

The First Amendment of the U.S. Constitution is similarly suspicious of prior restraints, which include judicial orders "forbidding certain communications" that are "issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation and internal quotation marks omitted). The U.S. Supreme Court has long recognized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see also id.* ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (quoting A. BICKEL, THE MORALITY OF CONSENT 61 (1975))). As such, they "bear[] a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). This cornerstone of First

[2] The provision as currently worded dates back to 1876, but a similar provision was part of the 1836 Texas Independence Constitution. *Davenport v. Garcia*, 834 S.W.2d 4, 7–8 (Tex. 1992).

Amendment protections has been reaffirmed time and again by the Supreme Court,[3] this Court,[4] Texas courts of appeals,[5] legal treatises,[6] and even popular culture.[7]

Nevertheless, freedom of speech is "not an absolute right, and the state may punish its abuse." *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (citation and internal quotation marks omitted). To that end, the common law has long recognized a cause of action for damages to a person's reputation inflicted by the publication of false and defamatory statements. *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990)); *see also Ex parte Tucker*, 220 S.W. at 76 ("There can be no justification for the utterance of a slander. It cannot be too strongly condemned."). The U.S. Supreme Court and this Court have been firm in the conviction that a defamer cannot use her free-speech rights as an absolute shield from punishment.

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[3] *See, e.g.*, *Stuart*, 427 U.S. at 561 ("[I]t is . . . clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it."); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

[4] *Davenport*, 834 S.W.2d at 9; *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (per curiam); *Ex parte Price*, 741 S.W.2d 366, 369 (Tex. 1987) (Gonzalez, J., concurring) ("Prior restraints . . . are subject to judicial scrutiny with a heavy presumption against their constitutional validity.").

[5] *Tex. Mut. Ins. Co. v. Sur. Bank, N.A.*, 156 S.W.3d 125, 128 (Tex. App.—Fort Worth 2005, no pet.) ("[P]rior restraints on speech are presumptively unconstitutional."); *San Antonio Express–News v. Roman*, 861 S.W.2d 265, 267 (Tex. App.—San Antonio 1993, orig. proceeding) (per curiam).

[6] *See* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 173 (2007) ("[N]ever in the 216 year history of the First Amendment has the Supreme Court found it necessary to uphold a prior restraint in a defamation case . . . ."); A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 656 (2008).

[7] THE BIG LEBOWSKI (PolyGram Filmed Entertainment & Working Title Films 1998) ("For your information, the Supreme Court has roundly rejected prior restraint.").

This case asks us to examine these conflicting principles, and involves a two-part inquiry. First, we examine whether a permanent injunction against defamatory speech, following a trial on the merits, is a prior restraint. Kinney contends that such a "post-trial remedial injunction" is not properly characterized as a prior restraint at all, much less one that is constitutionally impermissible. Barnes maintains that a permanent injunction against future speech, whether issued before or after the conclusion of a defamation trial, is necessarily a prior restraint. If the permanent injunction is a prior restraint, we must then determine whether it overcomes the heavy presumption against its constitutionality. Kinney argues that defamatory speech is not protected and that enjoining its continuation is therefore permissible. Barnes responds that the presumption cannot be overcome because such injunctions pose too great a risk to free speech.

We first acknowledge the parties' arguments regarding whether Article I, Section 8 of the Texas Constitution affords greater free-speech protection than the First Amendment of the U.S. Constitution. *Compare* 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; and no law shall ever be passed curtailing the liberty of speech or of the press."), *with* U.S. CONST. Amend. 1 ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). Barnes argues that we have consistently interpreted Texas's constitutional recognition of free-speech rights more broadly than its federal counterpart. *See Davenport*, 834 S.W.2d at 8–9 ("[O]ur free speech provision is broader than the First Amendment."). In *Operation Rescue–National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, however, we clarified that "Article 1, Section 8 *may* be more protective of speech in some instances than the First Amendment, but if it is, it must

be because of the text, history, and purpose of the provision, not just simply *because*." 975 S.W.2d 546, 559 (Tex. 1998) (first emphasis added) (internal citation omitted). We further concluded: "We know of nothing to suggest that injunctions restricting speech should be judged by a different standard under the state constitution than the First Amendment." *Id.*

We need not determine whether the Texas Constitution provides greater protection than the First Amendment on the specific issue presented to us, as the U.S. Supreme Court has not definitively addressed it. Rather, we reiterate the unremarkable proposition that in interpreting our own constitution, we "should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, but should never feel compelled to parrot the federal judiciary." *Davenport*, 834 S.W.2d at 20. We look to federal cases for guidance, not as binding authority. *Id.*

A. Classification of a Post-Adjudication Permanent Injunction Against Defamatory Speech as a Prior Restraint

The first issue we must dispose of is whether a permanent injunction prohibiting future speech related to statements that have been adjudicated defamatory is a prior restraint. If it is not, then our constitutional concerns regarding the use of prior restraints are inapplicable. This question highlights the distinction Kinney emphasizes between permanent injunctions on speech adjudicated defamatory and pretrial temporary injunctions on allegedly defamatory speech. Kinney argues that this distinction is meaningful. We disagree—as to the question presented, it is a distinction without a difference.

We have squarely held that a temporary injunction prohibiting allegedly defamatory speech is an unconstitutional prior restraint, but we have not specifically addressed the propriety of a post-adjudication permanent injunction in a defamation case. *See Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (per curiam). In *Hajek*, the plaintiff sought and obtained a temporary injunction restraining the defendant from driving his car around the community with a message painted on all four sides that Bill Mowbray Motors sold him a "lemon." *Id.* at 254. We reversed, holding that the injunction was a prior restraint in violation of the Texas Constitution. *Id.* at 255. Accordingly, we overturned the lower courts' decisions granting the injunction.

Our decision in *Hajek* rested on the well-settled legal principles laid out in *Ex parte Tucker*. In that case, the trial court enjoined the members of a worker's union from "vilifying, abusing, or using . . . epithets" against their employer. 220 S.W. 75, 75 (Tex. 1920). In overturning the injunction, we relied on the dichotomy between the Texas Constitution's affirmative grant of the liberty to speak without fear of curtailment and the commensurate responsibility inherent in that right. *Id.* at 76. We stated that "the abuse of the privilege . . . is not to be remedied by denial of the right to speak, but only by appropriate penalties for what is wrongfully spoken." *Id.* Accordingly, we held that the injunction was beyond the power of the trial court to issue. *Id.*

Kinney contends that *Hajek* and *Tucker* classify as prior restraints only temporary injunctions against speech that is alleged, but not proven, to be defamatory, and that these cases therefore do not apply to a post-adjudication permanent injunction. But our holding that the injunctions were prior restraints did not rest on their pretrial issuance. Rather, we took issue with the trial courts' decision

to remedy the defendants' abuse of their liberty to speak by preventing their future exercise of that liberty. *Id.*; *Hajek*, 647 S.W.2d at 255.

In this case, Kinney's request for injunctive relief may be broken down into two categories. First, as reflected in the pleadings, Kinney would have the trial court order Barnes to remove the statements at issue from his websites (and request that third-party republishers of the statements do the same) upon a final adjudication that the statements are defamatory. Such an injunction does not prohibit future speech, but instead effectively requires the erasure of past speech that has already been found to be unprotected in the context in which it was made. As such, it is accurately characterized as a remedy for one's abuse of the liberty to speak and is not a prior restraint. *See Hajek*, 647 S.W.2d at 255.[8]

As Kinney confirmed at oral argument, however, his request is not so limited. Kinney would also have the trial court permanently enjoin Barnes from making similar statements (in any form) in the future. That is the essence of prior restraint and conflates the issue of whether an injunction is a prior restraint with whether it is constitutional. As Professor Chemerinsky has aptly explained:

> Courts that have held that injunctions are not prior restraints if they follow a trial, or if they are directed to unprotected speech, are confusing the question of whether the injunction is a prior restraint with the issue of whether the injunction should be allowed. Injunctions are inherently prior restraints because they prevent future speech.

[8] Of course, the requirements for injunctive relief still must be met. A plaintiff must show that damages are inadequate or cannot otherwise be measured by any pecuniary standard. *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001) (per curiam). And aside from constitutional free-speech considerations, we also express no opinion on the propriety of an injunction that would order Barnes to seek removal of the statements from websites over which he has no control. We hold only that the constitutional concerns applicable to prior restraints are not present when the injunction is limited to requiring removal of a published statement that has been adjudicated defamatory.

Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 165 (2007); *see also Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089 (C.D. Cal. 2012) ("Injunctions against any speech, even libel, constitute prior restraints: they prevent[] speech before it occurs, by requiring court permission before that speech can be repeated." (citation and internal quotation marks omitted)). Even in the few cases in which the Supreme Court has upheld a content-based injunction against speech, it has not been because the injunction was not a prior restraint, but because under the circumstances the restraint was deemed constitutionally permissible. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441–42 (1957) (beginning its analysis with the notion that "'the protection even as to previous restraint is not absolutely unlimited,'" while recognizing that "the limitation [on such protection] is the exception" (quoting *Near*, 283 U.S. at 716)). Accordingly, we hold that an injunction against future speech based on an adjudication that the same or similar statements have been adjudicated defamatory is a prior restraint.[9]

However, "[l]abeling respondents' action a prior restraint does not end the inquiry." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Notably, the U.S. Supreme Court has never approved a prior restraint in a defamation case. Chemerinsky, 57 SYRACUSE L. REV. at 167; *see, e.g.*, *Near*, 283 U.S. at 706 (invalidating statute allowing courts to enjoin publication of future issues of newspaper because previous editions were found to be "'chiefly devoted to malicious, scandalous

[9] The lack of a dispositive distinction between temporary and permanent injunctions as to the second category of injunctive relief requested is highlighted by the requirements that must be satisfied to obtain a temporary injunction. An applicant must "plead and prove," among other things, "a probable right to the relief sought." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Absent a showing of a likelihood of success on the merits, a temporary injunction may not issue. *In re Newton*, 146 S.W.3d 648, 652 (Tex. 2004). While the standard to prevail at trial is certainly higher, the effect of the permanent injunction is the same: speech is restrained before it occurs.

and defamatory articles'"). However, the Court has not decided whether the First Amendment prohibits the type of injunction at issue in this case, leaving that question unsettled.[10] Turning to the issue of whether the injunction against future speech sought by Kinney, though a prior restraint, is nevertheless permissible under the Texas Constitution, we hold that it is not.

B. Prior Restraints on Future Speech Related to Statements That Have Been Adjudicated Defamatory Violate the Texas Constitution

Again, prior restraints bear a heavy presumption against their constitutionality. *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The proponent of such restraints thus "carries a heavy burden of showing justification for the imposition of such a restraint." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). While prior restraints are plainly disfavored, however, the phrase itself is not a "self-wielding sword," but a demand for individual analyses of how prior restraints will operate. *Kingsley Books*, 354 U.S. at 441–42. In examining the propriety of injunctive relief, then, we bear in mind the category of speech sought to be enjoined and the effect of such relief on a person's liberty to speak freely.[11]

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[10] The issue was presented to the Supreme Court in *Tory v. Cochran*. 544 U.S. 734 (2005). In that case, noted attorney Johnnie Cochran sued Ulysses Tory, a former client, after Tory began engaging in activities such as picketing Cochran's office and sending the attorney threatening letters due to Tory's dissatisfaction with Cochran's services. *Id.* at 735. Tory indicated that he would continue his activities barring a court order, and the trial court issued a permanent injunction against Tory's defamatory speech. *Id.* Tory appealed, presenting to the Supreme Court the very issue before us today. *Id.* at 737–38. However, Cochran died shortly after oral argument, and the Court sidestepped the question, holding that Cochran's death resulted in the injunction's "los[ing] its underlying rationale" of protecting Cochran from defamation. *Id.* at 738.

[11] The parties dispute whether Kinney waived his argument that defamatory speech is not "protected" speech under the Texas and U.S. Constitutions. We resolve this dispute by stating only that we cannot divorce the type and quality of speech at issue—in this case, defamatory speech—from the constitutionality of restraining it.

1. Texas Law Comports with the Traditional Rule That Injunctive Relief Is Not Available in Defamation Actions

"The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation." Chemerinsky, 57 SYRACUSE L. REV. at 167 (explaining that the rule dates back to eighteenth-century England and was adopted "with remarkable uniformity" by nineteenth- and twentieth-century American courts); *see also, e.g.*, *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991) ("[T]he maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law."). Our treatment of the temporary injunctions in *Ex parte Tucker* and *Hajek*, and more recent decisions on prior restraints, leave no doubt that the current state of Texas law is in accordance with this traditional rule with regard to future speech.

We have indicated that a prior restraint may be permissible "only when essential to the avoidance of an impending danger," *Davenport*, 834 S.W.2d at 9, and only when it is the least restrictive means of preventing that harm, *Ex parte Tucci*, 859 S.W.2d 1, 6 (Tex. 1993); *see also Hajek*, 647 S.W.2d at 255; *Ex parte Tucker*, 220 S.W. at 76.[12] We explained in *Tucker* the significant distinction between curtailing a person's liberty of speech, which the Texas Constitution forbids, and penalizing a person's abuse of that liberty, which the Constitution allows:

> The purpose of [Article I, Section 8] is to preserve what we call 'liberty of speech' and 'the freedom of the press,' and at the same time hold all persons accountable to the law for the misuse of that liberty or freedom. Responsibility for the abuse of the privilege is as fully emphasized by its language as that the privilege itself shall be free from all species of restraint. But the abuse of the privilege, the

[12] Applying that concept in the context of reviewing a gag order, we held in *Davenport* that such an order "will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm." 834 S.W.2d at 10.

> provision commands, shall be dealt with in no other way. It is not to be remedied by denial of the right to speak, but only by appropriate penalties for what is wrongfully spoken. Punishment for the abuse of the right, not prevention of its exercise, is what the provision contemplates. There can be no liberty in the individual to speak, without the unhindered right to speak. It cannot co-exist with a power to compel his silence or fashion the form of his speech. Responsibility for the abuse of the right, in its nature pre-supposes freedom in the exercise of the right. It is a denial of the authority, anywhere, to prevent its exercise.

220 S.W. at 76. Citing *Tucker*, we plainly stated in *Hajek* that "[d]efamation alone is not a sufficient justification for restraining an individual's right to speak freely." 647 S.W.2d at 255. Our courts of appeals have continued to recognize that the appropriate remedy for defamation is damages, not injunctive relief. *See, e.g.*, *Cullum v. White*, 399 S.W.3d 173, 189 (Tex. App.—San Antonio 2011, no pet.); *Brammer v. KB Home Lone Star, LP*, 114 S.W.3d 101, 108 (Tex. App.—Austin 2003, no pet.) ("Although the specific damages sustained from defamation and business disparagement-related activity is often difficult to measure, it is nonetheless well established that this type of harm does not rise to the level necessary for the prior restraint to withstand constitutional scrutiny.").

2. Injunctions Cannot Effectively Remedy the Harm Caused by Defamation Without Chilling Protected Speech

Contending that *Hajek* "ignored decades of intervening precedent from the U.S. Supreme Court," Kinney relies on Supreme Court case law upholding injunctions in the context of obscenity and commercial speech to argue that post-trial injunctions against defamatory speech are consistent with the First Amendment. In *Kingsley Books*, for example, the Supreme Court considered a New York statute that allowed municipalities to bar the continued sale of written and printed materials adjudicated obscene. 354 U.S. at 437. The Supreme Court upheld the statute, holding that it "studiously withholds restraint upon matters not already published and not yet found offensive." *Id.*

at 445. By contrast, the Court held, the statute struck down in *Near v. Minnesota* had empowered the courts "to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." *Id.*

And in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Supreme Court upheld an administrative order prohibiting a newspaper from continuing to run gender-specific help-wanted ads pursuant to the enforcement of a local anti-discrimination law. 413 U.S. 376, 379 (1973). The Court concluded that the speech at issue constituted illegal commercial speech, holding that the injunction "d[id] not endanger arguably protected speech" and was therefore permissible. *Id.* at 390.

Even after these decisions, several courts addressing the issue presented here have continued to adhere to the traditional rule that defamation alone will not justify an injunction against future speech. *See Metro. Opera Ass'n v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1090 (C.D. Cal. 2012); *Tilton v. Capital Cities/ABC Inc.*, 827 F. Supp. 674, 681 (N.D. Okla. 1993) ("The fundamental law of libel in both Oklahoma and Texas is that monetary damages are an adequate and appropriate remedy and that injunctive relief is not available."); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988) ("[W]e accept as black letter that an injunction is not available to suppress defamatory speech."); *Demby v. English*, 667 So. 2d 350, 355 (Fla. Ct. App. 1995) (per curiam) (noting that the claim for injunctive relief was "frivolous" in light of the "well-established rule that equity will not enjoin either an actual or a threatened defamation" (citation and internal quotation marks omitted)); *Willing v. Mazzocone*, 393 A.2d 1155, 1157–58 (Pa. 1978) (holding that a permanent injunction against

defamatory speech violated a provision of the Pennsylvania Constitution that is substantially similar to Article I, Section 8 of the Texas Constitution). By contrast, a small number of states have cited the Supreme Court cases referenced above in holding that narrowly drawn, post-trial injunctions against defamatory speech are constitutional. *See Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302 (Ky. 2010); *St. James Healthcare v. Cole*, 178 P.3d 696 (Mont. 2008); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007); *Retail Credit Co. v. Russell*, 218 S.E.2d 54 (Ga. 1975); *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975); *see also Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990).

In *Balboa*, for example, the trial court found that Lemen had made defamatory statements about the Balboa Village Inn and issued a permanent injunction prohibiting her from engaging in numerous acts, including repeating those statements. 156 P.3d at 342. The California Supreme Court described *Kingsley Books* and *Pittsburgh Press* as holding that "an injunctive order prohibiting the repetition of expression that had been judicially determined to be unlawful did not constitute a prohibited prior restraint of speech." *Id.* at 346–47. The court concluded that, while the particular injunction at issue in *Balboa* was overbroad, a court may issue an injunction prohibiting a person from repeating statements that have been adjudicated defamatory following a trial on the merits. *Id.* at 349–50.

We do not read *Kingsley Books* and *Pittsburgh Press* so broadly and decline to extend their holdings to the defamation context. To that end, we agree with the district court in *Oakley* that injunctions against defamation are impermissible because they are necessarily "ineffective,

overbroad, or both." 879 F. Supp. 2d at 1090. That is, "[a]ny effective injunction will be overbroad, and any limited injunction will be ineffective." Chemerinsky, 57 SYRACUSE L. REV. at 171.

On the one hand, for any injunction to have meaning it must be effective in its purpose. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) (assessing "the probable efficacy of prior restraint on publication as a workable method" of accomplishing its purpose); *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("It is a traditional axiom of equity that a court of equity will not do a useless thing . . . ."). The narrowest of injunctions in a defamation case would enjoin the defamer from repeating the exact statement adjudicated defamatory. Such an order would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunction. Kinney admitted as much at oral argument, agreeing that the injunction he is seeking would extend to speech that was "substantially the same" or made "non-substantive changes" to the statement that has been adjudicated defamatory.

But expanding the reach of an injunction in this way triggers the problem of overbreadth. Overbroad restrictions on speech are unconstitutional because of their potential to chill protected speech. *See Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 435 (Tex. 1998) ("An overbroad statute sweeps within its scope a wide range of both protected and non-protected expressive activity." (citation and internal quotation marks omitted)); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). In the defamation context, the concern is that in prohibiting speech found to be

defamatory, the injunction unreasonably risks prohibiting nondefamatory speech as well. *See Lawson v. Murray*, 515 U.S. 1110, 1114 (1995) (Scalia, J., concurring in denial of writ of certiorari) ("The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough even when they are based on a completed or impending violation of law.").

The particular difficulty in crafting a proper injunction against defamatory speech is rooted in the contextual nature of the tort. In evaluating whether a statement is defamatory, the court construes it "as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). Given the inherently contextual nature of defamatory speech, even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged.

Kinney dismisses this concern, arguing that in such a scenario the defamer "could speak confident in the knowledge that [the enjoined statement is] no longer defamatory." But how confident could such a speaker be when he is bound by an injunction *not* to speak? The California Supreme Court suggested in *Balboa* that "[i]f such a change in circumstances occurs, [the] defendant may move the court to modify or dissolve the injunction." 156 P.3d at 353. We think it is no answer that a person must request the trial court's permission to speak truthfully in order to avoid being held in contempt. *See Pittsburgh Press*, 413 U.S. at 390 ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker,

before an adequate determination that it is unprotected by the First Amendment."); *see also Balboa*, 156 P.3d at 357 (Kennard, J., dissenting) ("Requiring a citizen to obtain government permission before speaking truthfully is 'the essence of censorship' directly at odds with the 'chief purpose' of the constitutional guarantee of free speech to prevent prior restraints." (quoting *Near*, 283 U.S. at 713, and *Kingsley Books*, 354 U.S. at 445)).

These concerns apply even more forcefully to an injunction that goes beyond restraining verbatim recitations of defamatory statements and encompasses statements that are "substantially similar." Subtle differences in speech will obscure the lines of such an injunction and make it exceedingly difficult to determine whether a statement falls within its parameters. *Balboa*, 156 P.3d at 356 (Kennard, J., dissenting in part); *Oakley*, 879 F. Supp. 2d at 1091 (noting that "a 'similar statement' standard would require a court enforcing the injunction to continuously decide whether new statements by a persistent defendant were sufficiently similar"). For example, let us imagine a trial court enjoins a defendant from repeating the defamatory statement "John Smith sells handguns to minors," as well as similar statements. Can the defamer state more generally that Smith is engaged in the business of illegal gun sales or that Smith's business contributes to the nationwide problems with school shootings? Can the word "handgun" be changed to "shotgun"?[13]

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[13] The *Oakley* court proposed the following conundrum:

> If a court enjoined the word "thief," would related words like pilferer, looter, pillager, plunderer, poacher, and rustler also support the finding of willfulness necessary to hold the speaker in contempt? How about bandit? Pirate? What about phrases, e.g., "she was in the habit of converting other people's property to her own property?" Or further into abstraction, "she may take liberties with your property" or "count your silverware after she leaves your home?"

879 F. Supp. 2d at 1091.

These uncertainties highlight the inapplicability of the Supreme Court's obscenity cases. A permanent injunction restraining a theater owner from screening a film adjudicated to be obscene clearly applies only to that film, and others may be shown without the fear of contempt sanctions. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55–56 (1973) (upholding statute allowing civil injunction restraining exhibition of two films following adjudication that the films were obscene). *Pittsburgh Press*, while it involved commercial speech rather than obscenity, is similarly distinguishable. In that case, as noted above, the Supreme Court upheld an administrative order prohibiting a newspaper from continuing a practice of running gender-specific help-wanted ads pursuant to the enforcement of a local anti-discrimination law. 413 U.S. at 389–90. The Court stressed, however, that the order upheld could not be punished with contempt proceedings and "d[id] not endanger arguably protected speech" because it did not require speculation as to the effect of publication. *Id.* at 390 & n.14. As discussed above, this certainty does not translate to the defamation context, in which the task of crafting an effective injunction against future speech risks enjoining constitutionally protected speech to an unacceptable degree.

By contrast, no such concerns arise when courts issue speech-related injunctions that are not prior restraints, such as ordering the deletion of defamatory statements posted on a website. There is a legally cogent division between mandatory injunctions calling for the removal of speech that has been adjudicated defamatory and prohibitive injunctions disallowing its repetition. The latter impermissibly chills protected speech; the former does not. The distinction thus arms trial courts with an additional tool to protect defamed parties while ensuring the State does not infringe upon the fundamental right to free speech guaranteed by Article I, Section 8.

Accordingly, we hold that the Texas Constitution does not permit injunctions against future speech following an adjudication of defamation. Trial courts are simply not equipped to comport with the constitutional requirement not to chill protected speech in an attempt to effectively enjoin defamation. Instead, as discussed below, damages serve as the constitutionally permitted deterrent in defamation actions.

C. Damages Are Generally the Proper Remedy for Defamation

In keeping with Texas's longstanding refusal to allow injunctions in defamation cases, the well-settled remedy for defamation in Texas is an award of damages. *Ex parte Tucker*, 220 S.W. at 75–76; *Cullum*, 399 S.W.3d at 189; *Brammer*, 114 S.W.3d at 108. This can include economic damages like lost income, noneconomic damages like loss of reputation and mental anguish, and even punitive damages upon a finding of actual malice. *Hancock v. Variyam*, 400 S.W.3d 59, 65–66 (Tex. 2013). And imposition of damages has long been held to be an effective tool against defamers. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

Kinney raises the concern that a victim of defamatory speech by a judgment-proof, serial defamer can obtain no remedy in damages. Damages may not deter the serial defamer, either because she lacks the funds to pay the damages or because she has so much money that paying a series of fines is immaterial to her. It is also easy to imagine a scenario in which an award of damages, even if collectible, will not provide complete relief to the defamed plaintiff. Imagine a statement falsely accusing a person of pedophilia, for example. Presumably, an order prohibiting the statement from being repeated would be of paramount importance to the plaintiff. This scenario

was discussed at length in *Balboa*, the logic of which does not escape us. 156 P.3d at 351 ("Thus, a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation."). However, the constitutional protections afforded Texas citizens are not tied to their financial status. *See, e.g.*, *id.* at 358 (Kennard, J., concurring) ("[N]either this nor any other court has ever held that a defendant's wealth can justify a prior restraint on the constitutional right to free speech."). As the Pennsylvania Supreme Court concluded in *Willing*, "[w]e cannot accept . . . that the exercise of the constitutional right to freely express one's opinion should be conditioned upon the economic status of the individual asserting that right." 393 A.2d at 1158. Yet, conditioning the allowance of prior restraints on a defendant's inability to pay a damage award would do just that.

Moreover, the concern that damages will not provide an effective remedy in defamation cases is not a new one, but we have never deemed it sufficient to justify a prior restraint. For example, in defamation *per se* cases, nominal damages, not injunctive relief, are awarded when actual damages are difficult to prove or are not claimed because "'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.'" *Hancock*, 400 S.W.3d at 65 (quoting RESTATEMENT (SECOND) OF TORTS § 620 cmt. a (1977)). And the Supreme Court has expressly recognized that the potential inadequacy of damages as a remedy for defamation does not open the door to additional relief, stating: "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22–23

(1990) (citation and internal quotation marks omitted). Applying the same reasoning, we too decline to open the door to prior restraints in this context.

D. The Advent of the Internet

Finally, we address Kinney's argument that the Internet is a game-changer with respect to the issue presented because it "enables someone to defame his target to a vast audience in a matter of seconds." The same characteristics that have cemented the Internet's status as the world's greatest platform for the free exchange of ideas, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)—the ease and speed by which any person can take on the role of the town crier or pamphleteer—have also ignited the calls for its receiving lesser protection. *See, e.g.*, Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 863–64 (Feb. 2000).

However, the Supreme Court has steadfastly refused to make free speech protections a moving target, holding that "[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326 (2010). And, with respect to the advent of the Internet, the Court has gone further in championing its role as an equalizer of speech and a gateway to amplified political discourse, holding in *Reno* that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." 521 U.S. at 870. In this way, the Supreme Court has taken a definitive stance guaranteeing equal First Amendment protection for speech over the Internet. The Court has also recognized that damages, while "imperfect," are the remedy the law gives to defamation victims. *Milkovich*, 497 U.S. at 22–23

(citation and internal quotation marks omitted). We are not persuaded that the policy concerns that Kinney raises justify enjoining defamatory speech in a manner that substantially risks chilling constitutionally protected speech.

One final note is warranted in response to Kinney's assertion that the case for injunctive relief is made more compelling by the need to address the phenomena of cyber-bullying and online hate speech. It is enough to say that neither of those is at issue here. Today we simply continue to hold that "[d]efamation *alone* is not a sufficient justification for restraining an individual's right to speak freely." *Hajek*, 647 S.W.2d at 255 (emphasis added). But as discussed above, we have never held that all injunctions against future speech are *per se* unconstitutional, recognizing that they may be warranted to restrain speech that poses a threat of danger. *Id.* We need not and do not address the propriety of a requested injunction against speech that is not at issue, nor should we without analyzing the facts and circumstances underlying such a request.

III. Conclusion

In evaluating whether state action exceeds constitutional bounds governing freedom of speech, courts "must give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007). We hold that, while a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint, an injunction prohibiting future speech based on that adjudication impermissibly threatens to sweep protected speech into its prohibition and is an unconstitutional infringement on Texans' free-speech rights under Article I, Section 8 of the Texas Constitution. Because the trial court concluded that no injunction of any kind would be permissible, the court erred

in granting summary judgment to the extent Kinney's requested injunction did not constitute a prior restraint. We therefore reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0072

YSLETA INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

MARCELINO FRANCO, RESPONDENT

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

PER CURIAM

This Whistleblower Act case raises a familiar issue: whether a report of alleged violations of law is jurisdictionally insufficient if made to someone charged only with internal compliance. TEX. GOV'T CODE § 554.001 *et seq*. A few months ago, in *University of Texas Southwestern Medical Center v. Gentilello*, we held that such reports cannot support an objective, good-faith belief that the reported-to official is an "appropriate law-enforcement authority" under the Act. 398 S.W.3d 680, 686 (Tex. 2013). Even more recently, in *Canutillo Independent School District v. Farran*, we held that complaints to a school board, superintendents, and internal auditor were not good-faith complaints where the officials had no authority to enforce the allegedly violated laws outside the institution itself. 409 S.W.3d 653, 655 (Tex. 2013) (per curiam).

This case poses the same issue: whether a report to personnel whose only power is to oversee compliance within the entity itself is enough to confer "law-enforcement authority" status. The

courts below answered yes, and erred in doing so (though in fairness, we had not yet decided *Gentilello* and *Farran*). We reverse, grant the plea to the jurisdiction, and dismiss the case.

* * *

Marcelino Franco was a principal at the Robert F. Kennedy Pre-K Academy in the Ysleta Independent School District (ISD). He sent a memorandum to his immediate supervisor, the chief academic officer, Gloria Polanco-McNealy, reporting various "asbestos hazards" in the school and raising several "Administrative Issues"—among them:

> staff members [are] suffering from recent cancers, liver ailments, respiratory ailments and several advise [him] that 'they just feel sick'. Absenteeism is high. One teacher has traveled to the Mayo Institute and remains 'sick' but undiagnosed.

Franco feared that he and the teachers, staff, and students were at risk of "contracting a cancer, other related illness(es) or just being chronically 'sick'." Franco asserted that the current working conditions breached his employment contract with the ISD and also the "2472 Code of Ethics and Standard Practices for Texas Educators." Franco requested a transfer to another school within the district. He included a "confidential communiqué" disclaiming any threatening or provocative motives, and he promised that the ISD could "rely on [his] complete trust, loyalty and professional discretion and ethics."

Ms. Polanco-McNealy responded that the ISD's facilities department was unaware of any asbestos at the school. She also told Franco that she would investigate his accusations of asbestos and mold and the allegedly related illnesses.

In response, Franco directed Ms. Polanco-McNealy to the ISD's Asbestos Management Plan, which the district uses to assess asbestos-containing materials located in its buildings. He also

attached a work order showing that floor tiles in the building had been replaced. Franco noted that the following comment appears on the work order: "Have school direct this request to Risk Management-Asbestos Abatement attn: Grant Curtis." Franco highlighted this comment to controvert Ms. Polanco-McNealy's claim that the facilities department was unaware of any asbestos in the school. At the end of his memorandum, Franco again requested a transfer to another school. Eventually, the ISD indefinitely suspended Franco, and he filed this whistleblower claim.

It is unclear from the record what communications the parties had after Franco's second memorandum. Franco testified, however, that he reported the asbestos hazards to several school officials—including the superintendent and trustees of the district. Franco claimed that the ISD violated the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2641 *et seq*., by failing to respond to his asbestos reports. But Franco submitted no evidence showing that the ISD enforces the Asbestos Act beyond overseeing its own internal compliance. And he admitted that he did not report the allegations to anyone other than school officials. He claimed that doing so was unnecessary because the school district is a government entity, and a government entity is a law-enforcement authority under the Whistleblower Act.

The trial court agreed and denied the ISD's plea to the jurisdiction. The court of appeals affirmed, holding that "Franco produced sufficient evidence of his good faith belief that the [ISD's] superintendent and trustees were authorized to regulate under or enforce the Asbestos Act." 394 S.W.3d 728, 732. The court of appeals added that Franco's evidence raised a fact issue about whether his belief was objectively reasonable in light of his training and experience. *Id*. at 733. We disagree.

Our recent cases hold that a report to someone charged only with internal compliance is jurisdictionally insufficient under the Whistleblower Act. *Gentilello*, 398 S.W.3d at 686; *Farran*, 409 S.W.3d at 655. As *Farran* made clear in the school context, reporting to school officials not charged with enforcing laws outside the district falls short of what the Act requires.

In that factually similar case, Farran was executive director of transportation and facilities at Canutillo Independent School District when he reported various alleged violations of law to the school board and other school officials. *Id*. at 654. Like Franco, Farran submitted no evidence of the school district's authority to enforce laws beyond the institution itself. *Id*. at 655. We concluded that "[a]uthority of the entity to enforce legal requirements or regulate conduct within the entity itself is insufficient to confer law-enforcement authority status." *Id*. (quoting *Gentilello*, 398 S.W.3d at 686). Thus, Farran could not establish that the school district was an appropriate law-enforcement authority. *Id*. Consequently, Farran could not show "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.'" *Id*. (quoting *Gentilello*, 398 S.W.3d at 686).

Similarly, on the record before us, Franco has failed to show an objective, good-faith belief that the ISD qualifies as an "appropriate law-enforcement authority" under the Act. Therefore, the courts below erred in denying the ISD's plea to the jurisdiction.

Accordingly, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and dismiss the case. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: December 13, 2013

IN THE SUPREME COURT OF TEXAS

NO. 13-0073

IN RE JOHN DOE A/K/A "TROOPER", RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 7, 2013

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE BROWN joined.

JUSTICE LEHRMANN filed a dissenting opinion, in which JUSTICE JOHNSON, JUSTICE BOYD, and JUSTICE DEVINE joined.

Rule 202 of the Texas Rules of Civil Procedure allows "a proper court" to authorize a deposition to investigate a potential claim before suit is filed.[1] In this original mandamus proceeding, relator argues that a proper court must have personal jurisdiction over the potential defendant, or if not, the rule violates due process guaranteed by the Fourteenth Amendment. We agree with the first

[1] TEX. R. CIV. P. 202.1 ("A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit."); TEX. R. CIV. P. 202.2(b) ("The petition must . . . be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, if suit is anticipated; or (2) where the witness resides, if no suit is yet anticipated . . . ."). All references to rules are to the Texas Rules of Civil Procedure unless otherwise noted.

argument and do not reach the second. Accordingly, we conditionally grant mandamus relief and direct the trial court to vacate its order authorizing discovery.[2]

Calling himself "the Trooper", an anonymous blogger[3] launched an on-line attack on The Reynolds & Reynolds Co. ("Reynolds") and its chairman and CEO, Robert T. Brockman. Reynolds is a privately held company, headquartered in Ohio with offices in Texas and elsewhere, that develops and markets software for use by auto dealerships. Brockman is a resident of Houston, Texas. Under the heading, "Reynolds News and Information", the Trooper's posts discuss inside goings-on at Reynolds, indicating that he is an employee, though his counsel has since denied it. The posts are disapproving of Reynolds' business operations top to bottom, referring to its products as "crap". The posts are also critical of Brockman's character and business management, calling him an "idiot", a "lunatic", and a "crook", and comparing him to Bernie Madoff, Satan, and Bobo the Clown.

To discover the Trooper's identity, Brockman and Reynolds (whom we refer to collectively as Reynolds) filed a Rule 202 petition in the district court in Harris County, seeking to depose Google, Inc., which hosts the blog. The petition requests that Google disclose the name, address, and telephone number of the owner of the blog website and the email address shown on the site. The petition states that Reynolds "anticipate[s] the institution of a suit" against the Trooper. Reynolds

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[2] The only issue before us is the availability of pre-suit discovery under Rule 202. We express no opinion on whether or to what extent discovery would be allowed in a lawsuit.

[3] According to the *Oxford English Dictionary*, a blog—short for weblog—is "[a] frequently updated site consisting of personal observations, excerpts from other sources, etc., typically run by a single person, and usually with hyperlinks to other sites; an online journal or diary." *Blog*, THE OXFORD ENGLISH DICTIONARY, available at http://www.oxforddictionaries.com/us/definition/american_english/blog (last visited August 25, 2014) ("blog" was added in 2003). A *blogger* is someone who blogs.

says it will sue for libel and business disparagement, and, if the Trooper is a Reynolds employee, for breach of fiduciary duty. With the court's permission, Reynolds gave the Trooper the notice of the petition required by Rule 202 by sending it to the blog email address.

Google does not oppose Reynolds' petition,[4] but the Trooper does, appearing through counsel as John Doe, without revealing his identity. The Trooper filed a special appearance, asserting that his only contact with Texas is that his blog can be read on the Internet here. He argues that because he does not have minimal contacts with Texas sufficient for a court in this State to exercise personal jurisdiction over him, there is no "proper court" under Rule 202 to order a deposition to investigate a suit in which he may be a defendant. The Trooper also moved to quash the discovery on the ground that he has a First Amendment right to speak anonymously.

The trial court ordered that Google be deposed as requested to "prevent a failure or delay of justice in an anticipated suit."[5] After unsuccessfully seeking mandamus relief in the court of appeals,[6] the Trooper filed his petition in this Court, and we agreed to hear argument.[7]

This Court promulgated Rule 202 as part of its 1999 revision of the Texas Rules of Civil Procedure governing discovery. Rule 202 covers the subjects of two repealed rules, Rule 187, permitting discovery to perpetuate testimony, and Rule 737, providing for a bill of discovery. The

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[4] "Federal law generally prohibits a 'cable operator' like Google from disclosing a subscriber's personally identifiable information without its consent" unless "disclosure is ordered by a court with notice to the subscriber." *In re John Does 1 and 2*, 337 S.W.3d 862, 864 (Tex. 2011) (citation omitted).

[5] TEX. R. CIV. P. 202.4(a)(1).

[6] *In re Doe*, No. 01-11-00683-CV, 2012 Tex. App. LEXIS 4155, 2012 WL 1893733 (Tex. App.—Houston [1st Dist] May 18, 2012) (mem. op.).

[7] 56 TEX. SUP. CT. J. 864 (Aug. 23, 2013).

practice of taking discovery to perpetuate testimony in imminent danger of being lost, such as by the death or departure of the witness, for use in a later-filed suit is long-standing throughout the United States.[8] In Texas, the practice dates to an 1848 statute, from which Rule 187 was derived.[9] A bill of discovery was an English common-law device for obtaining discovery from an opposing party in a

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[8] *See* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: the Role of Presuit Investigatory Discovery*, 40 U. MICH. J. L. REFORM 217, 225 (2007) ("Nearly all jurisdictions, by rule, statute, or common law, allow prospective parties to petition the court for discovery before filing a formal lawsuit. In most instances, however, the right to use discovery devices before litigation is narrowly tailored. Presuit discovery typically may only be taken to preserve witness testimony when there is a credible risk that the testimony may be lost if it is not recorded immediately.").

[9] The original statute read as follows:

> [W]hen any person may anticipate the institution of a suit . . . and may desire to perpetuate the testimony of a witness . . . to be used in such suit, he . . . may file a written statement in the Court of the county where such suit could be instituted representing the facts and the names of the persons known to be interested adversely to said person, a copy of which statement and writ shall be served on the persons interested adversely, after which depositions may be taken . . . and may be used in any suit . . . in like manner as if such depositions had been taken after the institution of such suit . . . .

Act approved March 16, 1848, 2d Leg., R.S., ch. 95, § 18, 1848 Tex. Gen. Laws 106, 111, *reprinted in* 3 H.P.N. Gammel, *The Laws of Texas* 1822-1897, at 111 (Austin, Gammel Book Co. 1898). The statute was amended in 1874 to refer to a filing in the district court. Act approved April 14, 1874, 14th Leg., R.S., ch. 82, § 1, 1874 Tex. Gen. Laws 103, *reprinted in* 8 H.P.N. Gammel, *The Laws of Texas* 1822-1897, at 105. The 1879 codification substituted "proper court". TEX. REV. CIV. STAT. ANN. art. 2222 (1879). That phrase carried through subsequent codifications. TEX. REV. CIV. STAT. ANN. art. 2277 (1895); TEX. REV. CIV. STAT. ANN. art. 3653 (1911); TEX. REV. CIV. STAT. ANN. art. 3742 (1925). It remained when the statute was revised slightly in 1927, Act of Feb. 19, 1927, 40th Leg., ch. 53, § 1, 1927 Tex. Gen. Laws 76, and when the statute was copied into the 1941 Rules of Civil Procedure, TEX. R. CIV. P. 187, 136 Tex. 431, 499 (Sept. 1, 1941). The rule was rewritten in 1962, TEX. R. CIV. P. 187, 1962 TEX. B.J. 371, 424, 426 (May 22, 1962, eff. Sept. 1, 1962), to be more like Rule 27 of the Federal Rules of Civil Procedure. *See General Commentary*, TEX. R. CIV. P. ANN. 187 (Vernon 1967) (noting that the 1962 revision was modeled after the federal rule). The revised rule provided in part:

> When any person may anticipate the institution of an action in which he may be a party, and may desire to perpetuate his own testimony or that of any other person to be used in such suit, he, his agent or attorney, may file a verified petition in the proper court of any county where venue of the anticipated action may lie.

The rule was revised slightly in 1971, TEX. R. CIV. P. 187, 455-456 S.W.2d (Texas Cases) xxxii, xliv-xlvi (July 21, 1970, eff. Jan. 1, 1971), and 1973, TEX. R. CIV. P. 187, 483-484 S.W.2d (Texas Cases) xxix, xlii-xliii (eff. Feb. 1, 1973), and was then replaced by Rule 202.

pending suit.[10] It was imported to Texas by a 1923 statute that was codified in 1925 and then copied into Rule 737.[11] If the bill of discovery served a purpose in 1923,[12] the 1941 Rules of Civil Procedure might have rendered the practice obsolete. But relief by a bill of discovery was to be granted "in accordance with the usages of courts of equity",[13] a broad charter, and consequently, as we observed

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[10] *See* James P. Alexander, *A Bill of Discovery*, 2 TEX. L. REV. 483, 485 (1924) ("Bills of discovery had their origin in the fact that under the inflexible rules of the common law, the parties to an action were incompetent as witnesses, and no means were provided by which an adverse party could be compelled to produce documents in his possession for the use of his opponent at the trial. Later, the bill was used to secure from the adverse party evidence necessary for the proper prosecution or defense of a cause of action."); W. S. Simkins, *Bills of Discovery*, 2 Tex. L. Rev. 98, 98-99 (1924) ("By the adoption of the common law in Texas in 1840 parties to the record having an interest in the controversy were incompetent to testify in the case. This necessitated filing Bills of Discovery in chancery in which courts the chancellor could require of the parties to the suit a full confession of the facts, which could be used as evidence in the cause at law.").

[11] The 1923 statute provided: "All trial courts in this state having jurisdiction of the subject matter of litigation, shall entertain suits in the nature of bills of discovery, and grant relief therein in accordance with the usages of courts of equity. Such remedy shall be cumulative of all other remedies." Act of Feb. 1, 1923, 38th Leg., ch. 19, § 1, 1923 Tex. Gen. Laws 31. The 1925 codification omitted "in this state having jurisdiction of the subject matter of litigation". TEX. REV. CIV. STAT. ANN. Art. 2002 (1925). Rule 737 made the same omission and added a third sentence: "In actions of such nature, the plaintiff shall have the right to have the defendant examined on oral interrogatories, either by summoning him to appear for examination before the trial court as in ordinary trials, or by taking his oral deposition in accordance with the general rules relating thereto." TEX. R. CIV. P. 187, 136 Tex. 431, 657 (Sept. 1, 1941). *See Crane v. Tunks*, 328 S.W.2d 434, 439-440 (Tex. 1959) (describing the history and effect of Rule 737); *Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389, 394 (Tex. 1950) (same).

[12] Judge Alexander, later Chief Justice of this Court, explained:

> Under the statutes of this state, until recently, such a bill was unnecessary. By means of a deposition, or by examination on the witness stand, one party could compel his adversary to purge his conscience, and disclose all facts necessary to be proved as a basis for a decree. However, our supreme court, in the case of *Sauermann v. El Paso Railway,* [235 S.W. 548 (Tex. 1921),] held that where either party to a suit was a corporation, neither party could take the deposition of the opposite party. Under this holding, it became impossible, in a case where a corporation was a party to a suit, for either party to secure from his adversary, in advance of the trial, any fact necessary to maintain his cause of action, or to establish his defense. The legislature, in an effort to relieve the situation, instead of amending the statutes with reference to taking depositions, gave birth to the old English bill of discovery.

Alexander, *supra* note 10, at 484-485 (1924). *See also* Simkins, *supra* note 10, at 98-99.

[13] *See supra* note 11.

in a 1950 opinion, "every expression on the subject has served to broaden its scope."[14] By 1999, Rule 737 had come to be used to investigate a lawsuit before filing it.[15] Rule 202 incorporated both that facet of pre-suit discovery as well as the perpetuation of testimony.[16]

The requirement that a request for pre-suit discovery be filed in a "proper court" has been part of the perpetuation-of-testimony procedure since 1879,[17] but no court has had occasion to interpret it. The pre-1962 version of Rule 187 and its statutory predecessors added that the court must be one "where such suit [that is, the suit in which the testimony would be used] could be instituted".[18] The phrase certainly referred to venue, as the 1962 revisions to Rule 187 made explicit.[19] And implicitly, at least, the phrase referred to subject-matter jurisdiction. It would make no sense to insist that a court ordering discovery to perpetuate testimony for a later-filed suit be one with venue over the suit but not subject-matter jurisdiction.

The "proper court" phrase was not used in Rule 737 or its statutory predecessors. The 1923 statute required a bill of discovery to be brought in a trial court "having jurisdiction of the subject

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[14] *Hastings*, 234 S.W.2d at 394. We noted that the bill of discovery had been used "to compel a judgment creditor to disclose facts with reference to an alleged fraudulent sale of assets," and concluded that "the inquiry [whether bill of discovery relief was proper] resolves itself into this: Is the order granted by the trial court in accordance with the usages of courts of equity?" *Id.* (internal quotation marks omitted).

[15] *See, e.g.*, *Ross Stores, Inc. v. Redken Lab., Inc.*, 810 S.W.2d 741, 741-742 (Tex. 1991) (per curiam).

[16] Professor Lonny Hoffman has recounted in detail the considerations that led to Rule 202. Hoffman, *supra* note 8, at 241-246.

[17] *See supra* note 9.

[18] *See supra* note 9.

[19] *See supra* note 9.

matter of litigation".[20] Though this phrase was omitted from the 1925 codification and from Rule 737, the omission must either have been inadvertent or made because the phrase was considered unnecessary.[21] Certainly, a court cannot grant relief when it lacks jurisdiction of the subject matter.[22]

Rule 202 now requires all requests for pre-suit discovery to be filed in a "proper court":

> The petition must . . .
>
> (b) be filed in a proper court of any county:
>
> (1) where venue of the anticipated suit may lie, if suit is anticipated; or
>
> (2) where the witness resides, if no suit is yet anticipated . . . .[23]

As under former Rule 187, a proper court must be one with venue over an anticipated action, though if none is anticipated, the court must be in the county where the witness resides. While Rule 202 is silent on the subject, we think it implicit, as it has always been, that the court must have subject-matter jurisdiction over the anticipated action. The rule cannot be used, for example, to investigate a potential federal antitrust suit or patent suit, which can be brought only in federal court. We must determine whether a proper court must also have personal jurisdiction over the potential defendant. For two reasons, we think it must.

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[20] *See supra* note 11.

[21] See *supra* note 11. In *Blocker v. Commercial Nat. Bank of Uvalde*, 295 S.W. 341, 342 (Tex. Civ. App.—San Antonio 1927, no writ), the court considered only venue, and not personal or subject matter jurisdiction, though the court apparently refused to consider, by analogy or otherwise, the phrase requiring the trial court to have "jurisdiction of the subject matter of litigation" because the phrase had since been deleted from the statute.

[22] *E.g.*, *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-554 (Tex. 2000) ("[S]ubject-matter jurisdiction is essential to a court's power to decide a case.").

[23] TEX. R. CIV. P. 202.2(b).

First: To allow discovery of a potential claim against a defendant over which the court would not have personal jurisdiction denies him the protection Texas procedure would otherwise afford. Under Rule 120a, a defendant who files a special appearance in a suit is entitled to have the issue of personal jurisdiction heard and decided before any other matter.[24] Discovery is limited to matters directly relevant to the issue.[25] To allow witnesses in a potential suit to be deposed more extensively than would be permitted if the suit were actually filed would circumvent the protections of Rule 120a. When a potential defendant could challenge personal jurisdiction, the potential claimant could simply conduct discovery under Rule 202 before filing suit.

Not only would the use of Rule 202 eviscerate the protections of Rule 120a, the burden on the defendant could be significant. Suppose a plaintiff sues an Alaska resident in Texas, the case is dismissed for want of personal jurisdiction, and undaunted, the plaintiff undertakes discovery in Texas under Rule 202 for what may eventually be a suit in Alaska. It is no answer that the Rule 202 court must weigh the burden or expense on the defendant in deciding whether to allow the discovery[26] and must afford appropriate protection.[27] The Rule 202 court would still be permitted—

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[24] TEX. R. CIV. P. 120a.2 ("Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard.").

[25] *See In re Stern*, 321 S.W.3d 828, 838-840 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) ("In *Dawson-Austin v. Austin*, [968 S.W.2d 319, 321, 323 (Tex. 1998),] the Texas Supreme Court indicated, without deciding, that discovery sought during the pendency of a special appearance but not directed to the discovery of jurisdictional facts may not be properly had before the special appearance is decided. . . . We conclude that Rule 120a(3) by its plain language authorizes discovery by a party prior to a ruling on a special appearance only with respect to facts 'essential to justify his opposition' to the special appearance.").

[26] TEX. R. CIV. P. 202.4(a)(2).

[27] TEX. R. CIV. P. 202.4(b).

and might even be required, if the discovery sought was considered critical—to deny what Rule 120a promises.

Nor is it any answer to say that a potential defendant can choose to ignore the Rule 202 discovery sought from a third party. In doing so, he runs the risk that it will be used against him in a suit later filed in a court that does have jurisdiction. Rule 120a deems this risk unacceptable. A potential defendant should not be forced to choose between defending discovery in a forum where a claim cannot be prosecuted and risking that it will be used later in a forum where he is subject to suit.

The Trooper cannot ignore this Rule 202 proceeding without losing his claimed First Amendment right to anonymity. By ordering discovery from Google, the court has adjudicated that claim. He has thus been forced to litigate the merits of an important issue before a court that has not been shown to have personal jurisdiction over him.

The Trooper insists that this violates not only Rule 202 but due process as well. It is true that the liberty interest protected by the Fourteenth Amendment "constrains a State's authority to bind a nonresident defendant to a *judgment* of its courts" and does not prohibit all state court proceedings.[28] But Rule 202 has already been used to adjudicate the Trooper's First Amendment issue, which may lead to an adjudication of Reynolds' claims against him. Whether due process affords protection in these circumstances is an issue that has not previously arisen because, as we explain below, no other American jurisdiction allows pre-suit discovery as broadly as Texas does.

[28] *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added).

The prescient words of *Hanson v. Denckla*, written more than half a century ago, require a close look at the Trooper's argument:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, to the flexible standard of *International Shoe Co. v. State of Washington*, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. *See Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. *However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See International Shoe Co. v. State of Washington*, 326 U.S. 310, 319.[29]

Earlier this year, in *Walden v. Fiore*, the Supreme Court repeated the emphasized sentence, adding: "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State."[30] Nevertheless, because we think that a Rule 202 court must have personal jurisdiction over a potential defendant, we need not reach the constitutional issue and intimate no view on it.

Second: To allow a Rule 202 court to order discovery without personal jurisdiction over a potential defendant unreasonably expands the rule. Even requiring personal jurisdiction over the

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[29] 357 U.S. 235, 250-251 (1958) (emphasis added).

[30] 134 S. Ct. at 1123 (citation omitted) (internal quotation marks omitted).

potential defendant, Rule 202 is already the broadest pre-suit discovery authority in the country.[31] If a Rule 202 court need not have personal jurisdiction over a potential defendant, the rule could be used by anyone in the world to investigate anyone else in the world against whom suit could be brought within the court's subject-matter jurisdiction. The reach of the court's power to compel testimony would be limited only by its grasp over witnesses. This was never contemplated in the procedures leading to Rule 202, from 1848 to 1999, nor was it the intent of Rule 202.

A trial court's discretion under the rule cannot be the solution. While a court certainly has discretion to limit Rule 202 discovery, it must exercise that discretion with reference to guiding rules and principles.[32] If a court need not have personal jurisdiction over the potential defendant, there is no limiting principle to guide a decision to allow or deny discovery with respect to some defendants and not others.

The burden is on the plaintiff in an action to plead allegations showing personal jurisdiction over the defendant.[33] The same burden should be on a potential plaintiff under Rule 202. We recognize that this burden may be heavier in a case like this, in which the potential defendant's

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[31] *See* Hoffman, *supra* note 8, at 241 ("By express rule, Texas authorizes the broadest form of presuit discovery for private parties."); Jeffrey Liang, Note, *Reverse Erie and Texas Rule 202: The Federal Implications of Texas Pre-Suit Discovery*, 89 TEX. L. REV. 1491, 1492-1493 (2011) ("While the federal courts and most state courts allow for some pre-suit discovery, only Texas grants broad power to investigate potential claims.").

[32] *E.g.*, *Low v. Henry*, 221 S.W.3d 609, 619-620 (Tex. 2007) ("A trial court abuses its discretion when it acts without reference to any guiding rules or principles . . . .").

[33] *E.g.*, *Kelly v. General Interior Const., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010) ("We have consistently held that the plaintiff bears the initial burden to plead sufficient allegations to bring the nonresident defendant within the reach of Texas's long-arm statute.").

identity is unknown and may even be impossible to ascertain. But even so, Rule 202 does not guarantee access to information for every petitioner who claims to need it.

There was a time when Texas courts were so welcoming of litigation unrelated to the State that even the United States Supreme Court was forced to acknowledge: "it is possible that Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else".[34] Since then the Legislature has firmly disclaimed that objective.[35] We will not interpret Rule 202 to make Texas the world's inspector general.

* * * * *

We conclude that the trial court's order dated July 15, 2011, exceeded its authority under Rule 202. We conditionally grant Doe's petition for writ of mandamus, and direct the trial court to vacate its order. We are confident the trial court will comply, and our writ will issue only if it does not.

Nathan L. Hecht
Chief Justice

Opinion delivered: August 29, 2014

[34] *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145 (1988) (internal quotation marks omitted).

[35] *See* TEX. CIV. PRAC. & REM. CODE § 71.051.

IN THE SUPREME COURT OF TEXAS

NO. 13-0073

IN RE JOHN DOE A/K/A "TROOPER", RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE LEHRMANN, joined by JUSTICE JOHNSON, JUSTICE BOYD, and JUSTICE DEVINE, dissenting.

The ever-rising cost of litigation impacts the ability of ordinary citizens to access our courts to pursue justice. Today the Court misinterprets our rules of civil procedure to create a quagmire for persons injured by anonymous Internet bloggers by forcing them to either file potentially fruitless lawsuits in an attempt to determine the identity of the alleged wrongdoer or waive redress. At best, this unnecessarily increases litigation costs for those persons injured by online defamation, while imposing additional burdens on our already overloaded court system. At worst, it deprives injured parties of reparation.

In today's case, involving the permissible scope of pre-suit discovery in Texas, the Court holds that the applicable procedural rule requires that personal jurisdiction be established over an anticipated defendant—even when that defendant's identity is withheld—before such discovery may be granted. And it does so despite the fact that it would be impossible for a court to make the required minimum-contacts determination with respect to a potential party who refuses to reveal the

jurisdictional facts (such as identity and domicile) that form the basis for that decision. This effectively abolishes a cause of action for defamation against a person who claims anonymity, particularly when the defamation occurs online. Because the Court requires a premature and impossible showing, in the process allowing an alleged tortfeasor to hide behind his anonymity regardless of whether the First Amendment allows it, I respectfully dissent.

I.

For all its virtues as a forum for communication, the Internet also presents many dangers. This is particularly true when speech is published anonymously. "[A]nonymity in cyberspace is not just different in degree from anonymity in real space . . . . [I]t is the ability to hide absolutely who one is." Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 876–77 (1996). In many instances, this diminution in accountability results in a proliferation of defamatory speech. Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 821–22 (2004). With the simple touch of a button, an anonymous speaker can disseminate defamatory statements to millions of readers, ruining reputations and sabotaging careers. To make matters worse, in contrast to written statements transmitted in more traditional form, like pamphlets or letters, anonymous online statements—and the people who issue them—are impossible to track without the help of the Internet service provider.

As such, modern technology has made the ability to seek redress for injury due to defamation that much more important, and that much more difficult. In the face of these modern-day realities, today the Court further cripples that ability, effectively extinguishing the claims of those who have the misfortune of being defamed by one who conceals his identity. And it does so irrespective of

whether the alleged defamer's anonymity is protected by the First Amendment. Quite simply, Texas law provides a right of recourse to those injured by defamation. TEX. CONST. art. I, § 13; *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013). That right should not be compromised simply because the defamatory speech occurs anonymously, as is frequently the case online.

II.

In this case, The Reynolds & Reynolds Co. and its CEO Robert Brockman (collectively, Reynolds) sought pre-suit discovery under Texas Rule of Civil Procedure 202. Specifically, Reynolds petitioned the trial court for an order requiring Google to disclose information that would reveal the identity of "the Trooper"—the anonymous blogger that Reynolds and Brockman anticipated suing for defamation, business disparagement, and breach of fiduciary duty. The petition complained of statements on the Trooper's blog that compared Brockman to Bernie Madoff, proclaimed that Brockman "stole from everyone equally," and asserted that Brockman had a reputation for being "a crook" in his community.

Rule 202 provides that a petition for an order authorizing a deposition upon written questions for use in an anticipated suit must "be filed in a proper court of any county: (1) where venue of the anticipated suit may lie, if suit is anticipated; or (2) where the witness resides, if no suit is yet anticipated." TEX. R. CIV. P. 202.2(b). Reynolds filed the petition in Harris County, which qualifies as a county "where venue of the anticipated suit may lie" in light of the verified allegations that Brockman resided there. TEX. CIV. PRAC. & REM. CODE § 15.017 (providing that a defamation suit may be filed "in the county in which the plaintiff resided at the time of the accrual of the cause of action"). However, the Court holds that Reynolds failed to file the Rule 202 petition in a "proper

court" because the petition lacked allegations showing the trial court had personal jurisdiction over the anonymous Trooper.[1]

As an initial matter, I question whether personal jurisdiction over an anticipated defendant is ever a prerequisite to obtaining pre-suit discovery. The rule itself makes no mention of personal jurisdiction, which stands to reason given that the rule permits discovery even when the petitioner is so uncertain about the nature of his claim that he does not yet anticipate suit. This conclusion is consistent with the constitutional underpinnings of personal jurisdiction. From its very inception, the doctrine of personal jurisdiction has considered the due process implications of imposing binding judgment on a nonresident defendant. *See Pennoyer v. Neff*, 95 U.S. 714, 726 (1878). In the U.S. Supreme Court cases that have followed *Pennoyer*, the protection provided by the personal jurisdiction requirement has always been predicated on a defendant's facing the prospect of a binding judgment.[2] Put another way, the Fourteenth Amendment requires a plaintiff to litigate the difficult and complex question of personal jurisdiction—and protects a defendant from the burdens of litigating in a distant forum—only when the defendant may be subject to a final judgment. Before a defendant is put in that degree of peril, the question of personal jurisdiction has no place.

Significantly, even if the phrase "proper court" in Rule 202 contemplates personal jurisdiction over the anticipated defendant as a general matter, imposing this requirement when that

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[1] There is no dispute that Texas courts have personal jurisdiction over Google, the entity from which the discovery is sought.

[2] *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Kulko v. Superior Court of Cal.*, 436 U.S. 84 (1978); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hess v. Pawloski*, 274 U.S. 352 (1927).

person chooses to remain anonymous undermines its rationale. In requiring courts to establish personal jurisdiction over potential defendants before signing a discovery order, the very purpose of which is to enable an individual to determine the identity of the person to be sued, the Court turns the rule on its head. In light of the rule's purposes, one of which is to permit a potential plaintiff to investigate her claim before filing suit, this construction is untenable.

Moreover, at its core, this holding effectively bars redress when the injury is the result of online activity. It is difficult at best to sue and serve citation on an anonymous "John Doe" defendant. This difficulty is magnified when the defendant is an online blogger whose identity is virtually impossible to uncover absent a procedural rule to allow for such disclosure. While it is conceivable that an injured party could file a lawsuit against "John Doe" and subpoena the nonparty Internet service provider to uncover the tortfeasor's identity, such a process is cumbersome, costly, inefficient, and possibly fruitless. It is particularly problematic in Texas given that, as the Court recognizes, the plaintiff bears the initial burden of pleading allegations sufficient to show personal jurisdiction over the defendant. ___ S.W.3d at ___ (citing *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010)). And it is simply unnecessary, as a rule exists for this exact purpose. *See In re Does 1 & 2*, 337 S.W.3d 862, 864–65 (Tex. 2011) (holding that the trial court abused its discretion in failing to make the required findings under Rule 202 before ordering an Internet service provider to disclose the identity of an anticipated defendant).

The Court's understanding of Rule 202 subverts not only the purpose of pre-suit discovery, but the entire concept of personal jurisdiction. A court's exercise of personal jurisdiction over a party is predicated on an analysis of his connections with the forum state. *Kelly*, 301 S.W.3d at 655.

However, a court cannot conduct a minimum-contacts analysis while wearing a blindfold; when a party chooses to remain anonymous, a court is powerless to evaluate his connection to the forum state. Several federal district courts have noted as much, in the context of copyright infringement cases, when denying motions to quash subpoenas issued to Internet service providers to ascertain the identity of anonymous defendants. *See, e.g.*, *AF Holdings, LLC v. Does 1–162*, No. 11-23036-Civ., 2012 WL 488217, at *4 (S.D. Fla. Feb. 14, 2012) (noting that Doe Defendant's personal jurisdiction arguments were "premature," as the court was "without all of the information necessary to evaluate any personal jurisdiction challenges, in no small part because this Doe Defendant and others are anonymous—a problem to which the instant discovery is specifically addressed").[3] I agree with these courts that the question of personal jurisdiction is premature–and impossible to answer–when it is directed at an anonymous individual.

III.

The Court concludes that interpreting Rule 202 not to require personal jurisdiction would "make Texas the world's inspector general." ___ S.W.3d at ___. I disagree. In the first place, I am unpersuaded that Texas will be inundated by parties seeking the discovery of anonymous individuals simply because Internet hosts may be served with Rule 202 petitions in our State. The Court does not cite, and I have not found, any authority from another state requiring a trial court to establish personal jurisdiction over an anonymous party before compelling revelation of his identity from

[3] *See also, e.g.*, *Bloomberg, L.P. v. Does 1–4*, No. 13 Civ. 01787(LGS), 2013 WL 4780036, at *4 (S.D.N.Y. June 26, 2013) (personal jurisdiction ruling would be "premature" absent identity of Doe defendants); *First Time Videos, LLC v. Does 1–76*, 276 F.R.D. 254, 259 (N.D. Ill. Aug. 16, 2011) (same); *Call of the Wild Movie, LLC v. Does 1–1,062*, 770 F. Supp. 2d 332, 345–48 (D.D.C. March 22, 2011) (same).

another source. In order for Texas to become a haven for those seeking pre-suit discovery of anonymous individuals, it must first become more attractive to petitioners than other states. We have not been presented with compelling evidence that this is the case. Indeed, some states that allow pre-suit discovery expressly recognize it as a mechanism to uncover the identity of an anticipated party. *See* OHIO CIV. R. 34(D)(3) (allowing pre-suit discovery that "is necessary to ascertain the identity of a potential adverse party"); *see also In re Cohen*, 887 N.Y.S.2d 424 (Sup. Ct. 2009) (holding that petitioner was entitled to "pre-action disclosure of information as to the identity of [an] [a]nonymous [b]logger" because she had "sufficiently established the merits of her proposed cause of action for defamation . . . and that the information sought [was] material and necessary to identify the potential defendant").

Second, the Court ignores the provisions of Rule 202 that operate more generally to prevent global discovery in Texas. The Court considers a situation in which no party asserts a constitutional right to anonymity and all parties have been identified: "[s]uppose a plaintiff sues an Alaska resident in Texas, the case is dismissed for want of personal jurisdiction, and undaunted, the plaintiff undertakes discovery in Texas under Rule 202 for what may eventually be a suit in Alaska." ___ S.W.3d at __. A trial court would likely abuse its discretion in granting the petition, not because it lacks jurisdiction over the Alaska resident, but because it would not work a failure or delay of justice to deny a petition when the litigation the parties contemplate will be conducted in a distant forum. TEX. R. CIV. P. 202.4(a)(1). Moreover, the benefit of allowing a petitioner to compel the deposition of the resident of a distant state would not outweigh the burden and expense of that procedure when the lawsuit does not concern Texas. TEX. R. CIV. P. 202.4(a)(2). In the very different case at bar,

the petitioner, who is a Texas resident, seeks to depose Google, a corporation with a Texas office, to ascertain the identity of an unknown anticipated defendant. It is not unreasonable to conclude that a trial court should deny the former petition and grant the latter.

Finally, the Court's holding does not reduce or circumscribe pre-suit discovery of anonymous parties in Texas. Instead, it is the end of such discovery. Again, when a party chooses to conceal his identity, he prevents the trial court from conducting a minimum-contacts analysis to determine whether it may exercise personal jurisdiction over him. I would not permit a party who issues defamatory speech to hide behind the Constitution to foreclose a lawsuit by remaining anonymous—not when that same document provides a recourse for such speech. TEX. CONST. art. I, §§ 8, 13. The plain language of the rule does not compel that result, and I would not adopt it.[4]

Further, any First Amendment right to anonymity the Trooper may have is protected irrespective of the personal jurisdiction issue.[5] Other jurisdictions have formulated varying standards governing the propriety of discovering the identity of anonymous defendants from Internet service providers in ongoing defamation litigation. Of those standards, the most lenient requires that a party seeking to uncover an anonymous individual's identity show only "a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed." *In*

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[4] The minimum-contacts requirements have nothing to do with protecting anonymity, but rather are intended to relieve defendants of the burdens associated with being forced to defend lawsuits in distant states. *See, e.g., CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996).

[5] I note that the U.S. Supreme Court has declined to locate in the First Amendment the broad right of an individual speaker to conceal his identity. Instead, laws requiring the revelation of a speaker's identity are considered, for First Amendment purposes, in conjunction with the nature of the speech being burdened. *See, e.g., Watchtower Bible & Track Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166–68 (2002) (religious speech); *Talley v. California*, 362 U.S. 60, 64 (1960) (political speech).

re Subpoena Duces Tecum to Am. Online, Inc., No. 40570, 2000 WL 1210372, at *8, 52 Va. Cir. 26 (2000), *rev'd on other grounds sub nom.*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001). At the opposite end of the spectrum, the most stringent standard requires (1) that the party seeking such discovery produce evidence sufficient to support a prima facie case on each element of its cause of action, and (2) that the court balance "the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001). The Supreme Court of Delaware has adopted a modified version of the *Dendrite* test, requiring the seeking party to produce evidence sufficient to support a prima facie case on those elements of its claim within its control. *See Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005).

The parties in this case dispute which, if any, of these standards should apply in the context of pre-suit discovery of an anonymous speaker's identity under Rule 202. *See* TEX. R. CIV. P. 202.4(a)(1) (providing that a trial court "must order a [pre-suit] deposition to be taken if, but only if, it finds that . . . allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in [the] anticipated suit"). Regardless of which standard is adopted, the findings required by Rule 202 to order pre-suit discovery will necessarily take First Amendment concerns into account.

IV.

I would hold that a trial court need not establish personal jurisdiction over an anticipated defendant in order to authorize pre-suit discovery. At the very least, I would not require the trial

court to do the impossible and establish personal jurisdiction over an anonymous potential defendant as a condition precedent to ordering pre-suit disclosure of his identity. Because the Court erroneously holds that the trial court abused its discretion in ordering discovery under Rule 202 based on its lack of personal jurisdiction over the Trooper, I respectfully dissent.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0084

HOUSTON UNLIMITED, INC. METAL PROCESSING, PETITIONER,

v.

MEL ACRES RANCH, RESPONDENT

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

Argued December 5, 2013

JUSTICE BOYD delivered the opinion of the Court.

JUSTICE BROWN did not participate in the decision.

In this case, the owner of land that was contaminated by a neighbor seeks to recover for loss of the land's market value based on "stigma" that remained after the contamination subsided. Although some federal and other states' courts have recognized a legal right to recover stigma damages, we have never addressed the issue. We decline to do so here, however, because even if we recognized such a right, the landowner's evidence of lost market value in this case is not legally sufficient to support the trial court's judgment. We must therefore reverse and render a take-nothing judgment in the defendant's favor.

I.
Background

Mel Acres Ranch owns a 155-acre tract of undeveloped ranchland off Highway 290 in Chappell Hill, Texas. Across the highway, Houston Unlimited, Inc. operates a metal processing facility. Rainwater flows from the area around the metal processing facility through a culvert under

the highway and into a large stock tank on the ranch. In late 2007, a rancher who was leasing the ranch complained that his calves had experienced a number of birth defects and deaths. The rancher's associate reported that he had seen a Houston Unlimited employee "dumping" contents of a large drum into the culvert and that pipes were discharging materials from Houston Unlimited's facility. Mel Acres hired an environmental consultant to test the area for contaminants. These tests revealed the presence of arsenic, chromium, copper, nickel, and zinc exceeding "state action levels"[1] in water in the culvert, and the presence of copper exceeding state action levels in the water in the stock tank.

In light of these results, Mel Acres filed a complaint with the Texas Commission on Environmental Quality. Commission inspectors soon made an unannounced visit to Houston Unlimited's facility and took their own soil and water samples. In the area near the culvert behind the facility, water samples revealed the presence of chromium, copper, lead, nickel, and zinc exceeding state action levels and a "corrosive and hazardous" pH level, and soil samples revealed the presence of aluminum and chromium exceeding state action levels. From the culvert between Houston Unlimited's property and Highway 290, water samples revealed chromium, copper, aluminum, and zinc in excess of state action levels, and soil samples revealed aluminum in excess of state action levels. Water samples from the stock tank on Mel Acre's ranch revealed the presence of copper in excess of state action levels.

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[1] The parties use the term "state action level" to refer to the level of the presence of a contaminant above which the state, through the Texas Commission on Environmental Quality, will require an owner or operator of a facility to take "corrective action." *See, e.g.*, *E-Z Mart Stores, Inc. v. Ronald Holland's A-Plus Transmission & Automotive, Inc.*, 358 S.W.3d 665, 669 (Tex. App.—San Antonio 2011, pet. denied). The Commission's regulations define this as the level that, "in the opinion of the agency," is "harmful to human health and safety or the environment." 30 TEX. ADM. CODE § 334.504(b). These levels are "determined by the agency," which "may issue additional directives should the corrective action activities prove to not be effective in reducing the contaminant levels at a sufficient rate." *Id.* § 334.504(c), (d).

The Commission's inspectors discovered during their visit that Houston Unlimited was in violation of several regulations governing its discharge of hazardous waste[2] and concluded that it had committed an unauthorized discharge of industrial hazardous waste that had affected Mel Acres' property. Houston Unlimited's general manager admitted to the inspectors that Houston Unlimited had dumped barrels of spent blast media (a substance used to clean metal and prepare it for further treatment) on the ground behind its facility for twenty-five years. The Commission formally cited Houston Unlimited for failing to prevent the discharge of industrial hazardous waste into or adjacent to waters of the state, ordered it to cease all discharge activity and initiate clean-up activities, and ordered it to perform an Affected Property Assessment Report regarding Mel Acres' ranch. The Commission also pursued an enforcement action in which it later assessed a fine against Houston Unlimited.

After the inspectors' visit, Houston Unlimited stopped dumping spent materials behind the facility, constructed a berm to prevent contaminated water from flowing onto the ranch, and took other steps to bring its facility into compliance. In the process, it discovered two pipe leaks in its processing system, which it admits could have caused contaminated water to flow into the ranch's stock tank. It replaced the two pipes and installed a secondary containment mechanism to protect against future leaks. It also hired a consulting company to perform the required Affected Property Assessment Report. This consultant found no constituents exceeding state action levels in the

[2] Houston Unlimited was registered with the Commission and permitted to generate certain levels of hazardous waste, but environmental regulations placed requirements and restrictions on the handling and disposal of the waste. The Commission determined that Houston Unlimited was in violation because it failed to (1) have a storm water permit; (2) implement a Storm Water Prevention Pollution Plan to regulate materials that might emanate from the facility via rainwater; (3) maintain updated registration information; (4) implement a Source Reduction and Waste Minimization Plan; and (5) maintain the required employee-training program for disposal of hazardous wastes. The Commission also noted that the property was lacking a required berm or other structure to prevent water containing various processing materials from flowing off-site.

water sample from the stock tank but did find chromium and nickel exceeding state action levels in sediment samples.[3] The consultant concluded that there was no evidence that Houston Unlimited's activities had any ongoing adverse impact on water quality in the stock tank. Using these test results, Houston Unlimited submitted an Affected Property Assessment Report to the Commission, followed by an Ecological Risk Assessment. The Commission approved the Ecological Risk Assessment but had not approved the Affected Property Assessment Report as of the date of trial.

Mel Acres hired its own environmental consultant, who took water and sediment samples and found that the water in the stock tank contained pH, aluminum, and iron exceeding state action levels, and detected the presence of other constituents not exceeding state action levels. The parties and their consultants disputed whether Houston Unlimited was responsible for the presence of the constituents found in excess of state action levels and what, if any, ongoing ecological impact they had and will have on the ranch. Mel Acres' consultant concluded in its report, and reiterated at trial, that the stock tank remained "adversely affected," that the ranch has been "devastated" as a "functioning property," and that Houston Unlimited's conduct has limited the ranch's future use. Houston Unlimited's consultant, by contrast, concluded and testified that water draining from the processing facility did not cause the elevated levels of pH, iron, and aluminum found in the stock tank.

Mel Acres sued Houston Unlimited for nuisance, trespass, and negligence. As damages, it did not seek to recover any remediation costs, but instead sought only a loss of the fair market value of the entire 155-acre ranch. The trial court's charge asked the jury to determine whether

[3] Houston Unlimited's consultants tested for the constituents Houston Unlimited identified as used in their processing and the constituents that the Commission had found in its samples.

Houston Unlimited had created a "permanent nuisance," and whether Houston Unlimited had committed a trespass causing "permanent injury." The negligence and damages questions made no reference to any "permanent" conduct, occurrence, injury, or damages. The jury found that Houston Unlimited did not commit trespass causing permanent injury or create a permanent nuisance on the property, but it found Houston Unlimited was negligent and that negligence caused the ranch to lose $349,312.50 of its market value. The trial court entered judgment on the verdict, and the court of appeals affirmed. We granted review.

II.
"Stigma" Damages

To establish its damages in this case, Mel Acres relied on an expert witness who testified that, in her opinion, the ranch had suffered a loss of market value due to stigma resulting from fear, risk, and negative public perceptions. In her opinion, although the contamination from Houston Unlimited's facility had subsided, it had "permanently impacted this market value" and "stigmatized the entire tract," because Mel Acres would have to disclose the history of the contamination in any future sale, and the disclosure would have "a negative effect on the property value, produced by the market's perception of an increased environmental risk due to the contamination." As she put it, when it comes to market value, "[p]erception is everything."

"Stigma damages" essentially constitute "damage to the reputation of the realty." *Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52, 55 (Ky. 2007). They "represent[] the market's perception of the decrease in property value caused by the injury to the property." Jennifer L. Young, *Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty*, 52 S.C. L. REV. 409, 424 (2001). Mel Acres argues that stigma damages continue to exist even after the property has been fully repaired or remediated.

For many years, American courts and commentators have struggled with the issue of

whether and when to allow recovery of stigma damages:

> The variety of claims, along with the often uncertain nature of stigma damage, has led to diverse and often confusing jurisprudence. Struggling with the desire to make the plaintiff whole while awarding only those damages that are proven with reasonable certainty, different jurisdictions have fashioned a variety of rules on which to base the award of stigma damages. While most jurisdictions agree that plaintiffs must experience some physical injury to their property before they may recover stigma damages, jurisdictions are divided on whether the injury must be temporary or permanent.

Id. at 409–10 (citations omitted). In addressing these issues, courts have sought to balance the need to acknowledge the actual loss for which the landowner should be compensated against the reality that the loss is based primarily on public perceptions, which can change quickly or, at least, over time. *Id*. at 410.

This Court has never directly addressed the recoverability of stigma damages. Houston Unlimited contends that we should not allow for stigma damages, and if we do we should at least require that the property sustain a permanent and physical injury. *See, e.g.*, *Bradley v. Armstrong Rubber Co*., 130 F.3d 168, 176 (5th Cir. 1977) ("The requirements of permanent and physical injury to property ensure that this remedy does not open the floodgates of litigation by every property owner who believes that a neighbor's use will injure his property."). Several amici curiae have submitted briefs supporting these arguments.[4]

[4] The Texas Association of Business, joined by the Texas Chemical Council, for example, argues that allowing for the recovery of lost market value in this case "would have a direct negative impact on various public Brownfield programs that are designed to encourage voluntary remediation and development of parcels," and "many impacted properties [will] otherwise lay abandoned and remain of no value to the public, as well as a continuing threat to human health and the environment." The Texas Pipeline Association argues that we should not allow stigma damages in cases involving environmental contamination because allowing recovery in this case will "subject [the industry] to the whim of any landowner able to secure inherently speculative testimony about the future economic effects of temporary conditions that even a regulatory watchdog agrees are abated." The Texas Oil and Gas Association argues that allowing recovery of lost market value in this case would give "injured landowners the best of both worlds: they can pursue lost market value damages that include both past and future harm while arguing for

Generally, we have permitted landowners to recover *either* the lost value of their land if the injury to the land is permanent *or* the cost to repair or remediate the land if the injury is temporary.[5] On at least two occasions, we stated that these two remedies are "mutually exclusive," so a landowner can recover lost fair market *or* the cost to repair or restore and loss of use, but not both. *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004) ("Because the one claim is included in the other, the two claims are mutually exclusive; a landowner cannot recover both in the same action."); *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex. 1978) ("The concepts of temporary and permanent injuries are mutually exclusive and damages for both may not be recovered in the same action.").

But we have also acknowledged that, "[i]n Texas, courts have held that an aggrieved consumer may be able to plead, prove and obtain favorable jury findings establishing both costs to repair and permanent reduction in market value notwithstanding such repairs, as cumulative

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the right to bring future lawsuits . . . ."

[5] *See, e.g.*, *Natural Gas Pipeline Co v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012) (holding in a nuisance case that, "[i]f a nuisance is permanent, a landowner may recover the property's lost market value"); *Bayouth v. Lion Oil Co*., 671 S.W.2d 867, 868 (Tex. 1984) (holding in suit for injury to land caused by salt water migration from oil leases that "[p]ermanent injuries to land give rise to a cause of action for permanent damages, which are normally measured as the difference in the value of the property before and after the injury" while "[t]emporary injuries give rise to temporary damages, which are the amount of damages that accrued during the continuance of the injury covered by the period for which the action is brought."); *Hou. & T.C. R. Co. v. Ellis*, 224 S.W. 471, 471 (Tex. 1920) (holding in suit for fire damage to land that "[t]he measure of damages was the difference in the value of the land because of the injury"); *Trinity & S. Ry. Co. v. Schofield*, 10 S.W. 575, 576–77 (Tex. 1889) (holding in negligence case that "[i]f land is permanently injured by the negligence or wrongful act of another, but the value is not totally destroyed, the owner would be entitled to recover the difference between the actual cash value at the time immediately preceding the injury and the actual cash value immediately after the injury, with legal interest thereon to the time of the trial" but "[i]f land is temporarily but not permanently injured by the negligence or wrongful act of another, the owner would be entitled to recover the amount necessary to repair the injury, and put the land in the condition it was at the time immediately preceding the injury, with interest thereon to the time of the trial."); *Galveston, H & S. A. Ry. Co. v. Horne*, 9 S.W. 440, 442 (Tex. 1888) (holding in negligence suit for fire damage to land that "when the damage to the land is permanent . . . the difference in its value before and that after the fire is to be calculated"); *Fort Worth & D.C. Ry. Co. v. Hogsett*, 4 S.W. 365, 366 (Tex. 1887) (stating that it was "well settled" that "the true measure of damages in case of permanent injury to the soil is the difference between the value of the land immediately before the injury and its value immediately after.").

rather than mutually exclusive measures of damage." *Ludt v. McCollum*, 762 S.W.2d 576, 576 (Tex. 1988). To recover "an award of diminished value . . . in addition to the costs of repair," we explained that the "permanent reduction in value" must "refer[] to that reduction occurring even after repairs are made." *Id.* (citing *Terminix Int'l v. Lucci*, 670 S.W.2d 657, 661 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.)). We held that the claimant in *Ludt*, however, could not recover for diminution in market value because he "failed to submit and obtain a jury finding sufficient to establish the permanent reduction in market value *after repairs*." *Id.* (emphasis added). We acknowledged this rule again in *Parkway Co. v. Woodruff*, in which we explained that "[d]amages for diminution in value and damages for costs of repairs are not always duplicative. Diminution in value does not duplicate the cost of repairs if the diminution is based on a comparison of the original value of the property and the value *after repairs are made*." 901 S.W.2d 434, 441 (Tex. 1995) (citing *Ludt*, 762 S.W.2d at 576).

Relying on our holdings in *Ludt* and *Parkway*, Texas courts of appeals have also recognized a claimant's right to recover both repair costs and the diminution of value remaining after the repairs were completed. *See, e.g.*, *Contreras v. Bennett*, 361 S.W.3d 174, 181 (Tex. App.—El Paso 2011, no pet.); *Blackstock v. Dudley*, 12 S.W.3d 131, 135 (Tex. App.—Amarillo 1999, no pet.).[6]

[6] *See also Pjetrovic v. Home Depot*, 411 S.W.3d 639, 648 n.13 (Tex. App.—Texarkana 2013) (holding that homeowner suing for deceptive trade practices, fraud, negligence, and breach of contract after allegedly defective dishwasher flooded home "may elect to seek damages for the cost of repair, the diminution of value, or even both provided both would not result in double recovery") (citing *Parkway*, 901 S.W.2d at 441); *Royce Homes, L.P. v. Humphrey*, 244 S.W.3d 570, 582 (Tex. App.—Beaumont 2008, pet. denied) (holding homeowner suing for flooding caused by builder of neighbor's house may, "under certain circumstances, . . . recover for both diminution in value and cost of repairs") (citing *Ludt*, 762 S.W.2d at 576); *Perry Homes v. Alwattari*, 33 S.W.3d 376, 386 (Tex. App.—Fort Worth 2000, pet. denied) (holding that "actual damages" recoverable by homeowner suing for deceptive trade practices related to defective foundation "include diminution in market value occurring after repairs") (citing *Ludt*, 762 S.W.2d at 576). Courts of appeals have also acknowledged this rule in cases involving injury to personal property. *E.g.*, *Noteboom v. Farmers Tex. County Mut. Ins. Co*., 406 S.W.3d 381, 385 (Tex. App.—Fort Worth 2013, no pet.) (citing *Parkway*, 901 S.W.2d at 441); *Gunn Infiniti, Inc. v. O'Byrne*, 963 S.W.2d 787, 796 (Tex. App.—San Antonio 1998) (quoting *Parkway*, 901 S.W.2d at 441), *rev'd on other grounds,* 996 S.W.2d 854 (Tex. 1999).

We acknowledged the rationale underlying this rule in *American Manufacturers Mutual Ins. Co. v. Schaefer*, in which we explained that a "repaired vehicle may command a smaller sum in the market than a like vehicle that has never been damaged, and that awarding [the owner] diminished value in addition to repair would go further to make him whole." 124 S.W.3d 154, 162 (Tex. 2003).

We cannot resolve this apparent conflict in this case, however, nor can we decide whether a loss of market value that remains after restoration of a temporary injury may be based solely on stigma damages. The struggle over whether to even allow recovery of stigma damages arises primarily from the "conflicting goals of fully compensating the plaintiff for her injury while only awarding those damages that can be proven with reasonable certainty." Young, *Stigma Damages: Defining the Appropriate Balance*, 52 S.C. L. REV. at 410–11. Even when it is legally possible to recover stigma damages, it is often legally impossible to prove them. Evidence based on "conjecture, guess or speculation" is inadequate to prove stigma damages, not only as to the amount of the lost value but also as to the portion of that amount caused by the defendant's conduct. *Gray v. Southern Facilities, Inc.*, 183 S.E.2d 438, 444 (S.C. 1971). In this case, even if Texas law permits recovery of stigma damages, Mel Acres' evidence was legally insufficient to prove them.

III.
Expert Testimony

Mel Acres attempted to establish its stigma damages through the testimony of its expert witness, Kathy McKinney. McKinney is a licensed real estate appraiser with twenty years' experience in appraising property in Washington County, where the ranch is located. The parties

do not dispute her qualifications to offer expert testimony in this case. The sole dispute is whether her testimony is legally competent to support the jury's damages finding.[7]

McKinney testified that she used the "sales-comparison" approach to appraise the ranch's value. She explained that, under this approach, she would look for properties that had the same "highest and best use"[8] as the appraised property and were similar to the appraised property in location, date of sale, and physical attributes. She would then make adjustments to account for differences between the appraised property and the comparable property, such as their size or location. Using this approach, McKinney determined that the ranch's "unimpaired" value (i.e., its value before the Commission's contamination report) was $2,329,000, based on a comparison of six recent property sales and three property listings in the area. Houston Unlimited does not contest McKinney's methodology or conclusion as to the ranch's unimpaired market value.

McKinney employed a different process, however, to determine the ranch's "impaired" market value (i.e., its value after the date of the Commission's contamination report). She began by looking for other environmentally contaminated properties, but she could not locate any in Washington County, so she searched the general area around the county and located two properties: the Sebastian site and the Sheridan site.[9]

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[7] The damages question in the jury charge asked: "What is the difference between the market value of the real property owned by Mel Acres . . . before the occurrence in question, and the market value of such property after the occurrence in question?" Accompanying this question was an instruction that "market value" means "the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling." The jury answered: $349,312.50.

[8] McKinney testified that the highest and best use for Mel Acres' property is "rural recreational and hold for future investment." Houston Unlimited did not dispute this opinion.

[9] McKinney testified that, in addition to her comparison of these two properties, she also based her opinion of the ranch's "after" value on "the reaction from the people that I talked to, such as the ranchers, the investors, the property owners. I talked to a lot of people." But she did not elaborate on these conversations and made no effort to tie them to her damages calculations.

A. The Sebastian Site

The Sebastian site is a 48-acre tract of land in Grimes County that had previously been part of a larger tract of land owned by International Paper Company. The larger tract of land had been contaminated "a long time ago" and subsequently remediated, but the Sebastian site was not within the contaminated part of the tract. International Paper had sold the site to Herman Sebastian, one of its employees, in 1997. McKinney testified that, although the Sebastian site itself had not been contaminated, it still suffered from "market stigma" because it had been part of a larger tract that had suffered contamination elsewhere, and the stigma attached to the whole property.

Houston Unlimited's damages expert, Rudy Robinson, testified that he had contacted Sebastian, with whom McKinney had not spoken. Sebastian informed Robinson that International Paper sold the property to him as a "sweetheart deal" to compensate him for the early termination of his employment. Sebastian lived on property neighboring the site and had continued to work for International Paper as a contractor, rather than an employee. Because of the "sweetheart" nature of the sale, Robinson testified that the sale was not an arm's-length transaction and thus could not be the basis of a sales comparison. McKinney, by contrast, contended that a "sweetheart deal" could still be an arm's-length transaction.

B. The Sheridan Site

The Sheridan site was part of a 337-acre tract of land in Waller County that had been declared a federal "Superfund site" because of contamination affecting 33 of the acres. The site had been "remediated" by building berms around the 33 acres to contain the contamination within that area. The Sheridan site did not include any of the 33 contaminated acres. McKinney testified that the owner had listed the Sheridan site for sale at a price of $6,500 per acre, the seller had

received a verbal offer for $3,849 per acre, and the site was "currently under contract, and according to the agent, [wa]s supposed to close any day," for a price of $2,900 per acre.

C. The Calculation

McKinney employed a three-step process to reach her opinion on the ranch's lost market value. First, she compared the price that Sebastian paid for his land in 1997 to the sales prices of two uncontaminated but otherwise similar pieces of land that also sold that year. She determined that Sebastian paid "72 to 73 percent less than what other properties were selling for in Grimes County at that time." On this basis, she concluded that the Sebastian site had suffered a 72% diminution in market value, which she attributed to the stigma of the nearby contamination.

Second, McKinney compared the Sheridan site's original asking price of $6,500 per acre to the $3,849 per-acre offer. Although McKinney indicated that the owner did not accept this verbal offer, she did not adjust her damages calculation to use the $2,900 per acre at which the property was "supposed to close any day." Because the $3,849 verbal offer was 41% less than the original asking price, she concluded that the Sheridan site had lost 41% of its market value, which she attributed to the stigma of the nearby contamination.

Based on these two calculations, McKinney concluded that the ranch had suffered a 60% ($1,397,500) loss in market value due to "market stigma." She reasoned:

> The market reflects a decrease in contaminated property, after remediation, between seventy two percent (72%) and an anticipated forty one percent (41%). In the absence of a test well on the appraised site, it is the considered opinion of the appraiser, appraised property has a diminution in market value of sixty percent (60%) as a result of contamination.

Subtracting the $1,397,500 loss in market value from the ranch's unimpaired value of $2,329,000, McKinney calculated the ranch's impaired value to be $931,500.

IV.
Legal Sufficiency of the Damages Evidence

The parties do not dispute that environmental contamination *can* create a stigma that diminishes the market value of land, and Houston Unlimited's expert admitted as much. The issue here, however, is whether Mel Acres submitted legally sufficient evidence that the environmental contamination of the ranch's stock tank *did* diminish the ranch's fair market value and by *how much*. McKinney's testimony is the only evidence on this issue. We must determine whether it is legally competent to support the jury's verdict.

Expert appraisal witnesses are subject to the same relevance and reliability standards that apply to all expert witnesses. *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002). When an expert opinion is admitted into evidence without objection, "it may be considered probative evidence even if the basis for the opinion is unreliable." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009). "But if no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection." *Id.* This is because the evidentiary value of expert testimony is derived from its basis, not from the mere fact that the expert has said it. *See, e.g.*, *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012); *Pollock*, 284 S.W.3d at 816; *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004); *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999).

A. The Sales-Comparison Approach

The sales-comparison approach that McKinney referred to in her testimony is an accepted, and even favored, means for determining the market value of land. *See City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001). Under this approach, "the appraiser finds data for sales of similar property" that are "voluntary," "near in time," "in the vicinity," and "involve

land with similar characteristics." *Id.* The appraiser then uses the prices from the comparison sales, which establish the market value of the similar properties, to determine the market value of the subject property, by adjusting the price upward or downward to account for differences between the properties. *Id.* The sales-comparison approach has most frequently been used to determine the value of land in takings cases. *See id.*[10] In such cases, the value of the land frequently constitutes the amount of the landowner's damages. In a tort case like this one, however, the amount of the landowners' damages depends on other considerations, particularly whether the value of the property changed and whether that change was caused, in whole or part, by the defendant's conduct.

B. McKinney's Approach

McKinney testified that she used a sales-comparison approach to determine Mel Acres' damages. But McKinney's determination of the ranch's impaired market value was not actually based on the sales-comparison approach. *Cf. Kraft*, 77 S.W.3d at 808 ("While using comparable sales to find market value in condemnation proceedings is an approved methodology, Gholson's 'bald assurance' that he was using that widely accepted approach was not sufficient to demonstrate that his opinion was reliable."). She did not look to the sales prices of the Sebastian and Sheridan sites and then determine the ranch's value by adjusting those prices upward or downward to account for differences between the properties. *Cf. Sharboneau*, 48 S.W.3d at 182 (describing the sales-comparison approach). Instead, she first attempted to identify losses in market value that the

[10] The sales-comparison approach has also been used to determine the value of other commodities, such as gas, *see Exxon Corp. v. Middleton*, 613 S.W.2d 240, 246 (Tex. 1981) (using the approach to determine the value of gas in a condemnation proceeding), or to value land in other types of cases, *see Land v. Palo Pinto Appraisal Dist.*, 321 S.W.3d 722, 726 (Tex. App.—Eastland 2010, no pet.) (holding that trial court could rely on sales-comparison approach to determine value of leasehold estates in tax protest and noting that the Tax Code recognized it as an appropriate methodology).

Sheridan and Sebastian sites suffered, calculated as percentages of the unimpaired value, and then opined that the ranch had likewise suffered a similar loss in its proportionate value. She calculated the ranch's impaired value not by comparing it to the values of other similar properties but by reducing its unimpaired value by a percentage based on the diminution percentages she had found for the Sebastian and Sheridan sites.

Although we have found no authorities involving the percentage-reduction approach that McKinney used here, we do not hold that it could never be used to reach a reliable opinion on diminution damages. But the manner in which McKinney used the approach here is fatally flawed for three reasons. First, the data McKinney relied on regarding the Sebastian and Sheridan sites do not support her opinion that those properties lost market value. Second, McKinney's ultimate opinion is cause-dependent—her reasoning can be sound only if the losses she found for the Sebastian and Sheridan sites were, in fact, attributable to market stigma and no other market factors. Yet Mel Acres offered no evidence tending to establish the cause of the Sebastian and Sheridan sites' diminutions in value. Instead, McKinney merely assumed that the diminution in market value she found was (wholly) attributable to the nearby contamination. Third, McKinney failed to account for any differences between the ranch and the Sebastian and Sheridan sites or any differences between the nature of the contamination of the three properties. We conclude that these material shortcomings render McKinney's opinions incompetent to support the judgment.

1. McKinney's Data

This is not a case in which the expert failed to offer any basis for her opinion. McKinney identified the factual basis on which she relied to calculate the loss of the ranch's market value. But the facts on which she relied to calculate the Sheridan site's loss of 41% of its market value do not *actually* support her opinion. Likewise, the facts she relied on to calculate the Sebastian

site's loss of 72% of its market value do not *actually* support that opinion. The view that courts should not look beyond an averment by the expert that the data underlying his or her opinion are the type of data on which experts reasonably rely has long been rejected by this Court and others. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 713 (Tex. 1997). "The underlying data should be independently evaluated in determining if the opinion itself is reliable," *id.*, and "[i]t is incumbent on an expert to connect the data relied on and his or her opinion and to show how that data is valid support for the opinion reached." *Whirlpool Corp. v. Camacho,* 298 S.W.3d 631, 642 (Tex. 2009).

a. The Sheridan Site

To find a diminution in the Sheridan site's value, McKinney relied on: (1) the owner's original offer to sell the property for $2,200,000, and (2) a subsequent verbal offer to purchase the property for $1,300,000. McKinney treated the owner's list price as the property's unimpaired market value and the verbal offer price as the property's impaired market value, and opined that the site suffered a $900,000 (41%) diminution in value attributable to the nearby contamination. These facts do not support McKinney's opinion for three reasons.

First, the owner's original asking price does not, alone, tend to establish the property's market value at the time of listing. Market value is "what a willing buyer under no compulsion to buy will pay to a willing seller under no compulsion to sell." *Cf. French v. Occidental Permian Ltd.*, — S.W.3d —, — (Tex. June 27, 2014). An original list price is some evidence of what a willing seller will accept, but it is not evidence of what a willing buyer will pay. Sellers may list property at a price above the amount they actually expect to receive or may simply overestimate the property's true market value. Second, the verbal offer price does not, alone, tend to establish the property's market value at the time it was made. A verbal offer is some evidence of what a

willing buyer will pay, but it is not, alone, evidence of what a willing seller will accept. *Cf. French*, — S.W.3d at —. Buyers may offer less than the amount they are actually willing to pay, in hopes of acquiring the property for less than it is worth, or they may simply underestimate the value of the property. As a result, the fact that a verbal offer was made on the Sheridan site for less than the original asking price does not tend to prove that it suffered a diminution in market value.

Third, the difference between the asking price and the offer price does not tend to establish a loss attributable to the nearby contamination because both the asking price and the verbal offer occurred after the land near the Sheridan site was contaminated. McKinney's own report indicates that the contamination dates back to at least 1986, while the listing on which McKinney relied for the site's "unimpaired" value was in 2006. Thus, even if the difference between the original list price and the verbal offer did reflect a diminution in value, the data on which this diminution is based are not temporally connected to the contamination some twenty years earlier. It is possible that the original list price reflected the property's pre-contamination price, but there is no evidence that indicates that was the case. When the facts support several possible conclusions, only some of which support the expert's conclusions, the expert must explain to the fact finder why those conclusions are superior based on verifiable evidence, not simply the expert's opinion. *Jelinek*, 328 S.W.3d at 536.

b. The Sebastian Site

McKinney acknowledged that sales of comparable properties are useful only if they result from an arm's-length transaction, and she did not dispute that the Sebastian sale was a "sweetheart deal" intended to compensate Sebastian for early retirement. The evidence on this issue was uncontroverted. Instead, she argued that the sale *could* constitute an arm's length transaction even

though it was a sweetheart deal. She testified, "If it was a sweetheart deal on the part of both parties, it was arm's length." We disagree.

Generally, an arm's-length transaction is one between two unrelated parties with generally equal bargaining power, each acting in its own interest. *See* BLACK'S LAW DICTIONARY 103 (10th ed. 2014) (defining "arm's-length" as "[o]f, relating to, or involving dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship"); *see also* TEX. TAX CODE ANN. § 171.1012(m) ("In this section, 'arm's length' means the standard of conduct under which entities that are not related parties and that have substantially equal bargaining power, each acting in its own interest, would negotiate or carry out a particular transaction."); TEX. OCC. CODE ANN. § 2307.001(1) ("'Arm's length transaction' means the standard of conduct under which two parties having substantially equal bargaining power, each acting in its own interest, would negotiate or carry out a particular transaction.").

Sebastian and International Paper were not entirely unrelated, as they shared an employer-employee (and later, independent contractor) relationship. While an employer and its employee can engage in arm's-length transactions, there is no evidence that occurred here. To the contrary, the only evidence here is that the two parties were not acting solely in their own interests, but instead mutually intended the transaction to be more beneficial to Sebastian. This kind of "sweetheart deal" is not an arm's-length transaction. *See Cherokee Water Co. v. Gregg Cnty. Appraisal Dist.*, 801 S.W.2d 872, 874 (Tex. 1990) ("It is uncontroverted that these are not arm's-length transactions and they have been characterized by the district as 'sweetheart deals.'"); *see also* 389 S.W.3d at 604 (Boyce, J., dissenting) ("This testimony demonstrates that McKinney's opinion is unreliable because she used a sales price produced by a 'sweetheart deal' involving the

Sebastian site to bolster her inclusion of the Sheridan Superfund site as a comparable sale."). Thus, the Sebastian site's 1997 sales price did not, alone, constitute evidence of its fair market value at the time of the sale. As a result, the fact that the Sebastian site sold for 72% less than the price paid for two comparable properties does not tend to prove that it suffered a diminution in market value.

2. McKinney's Assumptions

Courts must "rigorously examine the validity of the facts and assumptions on which [expert] testimony is based[.]"*Camacho*, 298 S.W.3d at 637. If an expert's opinion is unreliable because it is "based on assumed facts that vary from the actual facts," the opinion "is not probative evidence." *Id.*; *see also Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499–500 (Tex. 1995) ("When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment."). This does not mean that an expert's factual assumptions[11] must be uncontested or established as a matter of law. If the evidence conflicts, it is the province of the jury to determine which evidence to credit. *See Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 804 (Tex. 2006). Nor does it mean that parties must prove up every inconsequential assumption on which their expert relies.

But if the record contains no evidence supporting an expert's material factual assumptions, or if such assumptions are contrary to conclusively proven facts, opinion testimony founded on those assumptions is not competent evidence. *See TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 237–40 (Tex. 2010) (distinguishing expert testimony in case from unsupported assumptions relied

[11] We reference here "factual assumptions," meaning assumptions about the facts of the case or the specific data on which the expert relies to reach an opinion in the case. We do not reference the kinds of scientific, mathematical, or other technical assumptions or presumptions that may be regularly and reliably employed in an expert's area of expertise.

on by expert in *Volkswagen*, 159 S.W.3d at 904–06); *Cooper Tire & Rubber*, 204 S.W.3d at 804 ("[I]f an expert's opinion is based on certain assumptions about the facts, we cannot disregard evidence showing those assumptions were unfounded.") (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005)); *see also Williams v. Ill.*, 132 S. Ct. 2221, 2241 (2012) ("[I]f the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact."). A contrary approach would allow parties with the burden of proof on a particular fact (such as causation) to avoid the obligation to put forth evidence by simply instructing their expert to assume the fact in forming their opinions.

McKinney's damages opinion rests on several assumptions and leaps of logic. First, she assumes that the diminutions she found for the Sebastian and Sheridan sites were both 100% attributable to contamination that occurred and had been remediated on nearby land. She then reasons that because those two sites suffered diminutions as a result of remediated contamination, the ranch also suffered a diminution as a result of its remediated contamination and the proportionate amount of that diminution will be more than that suffered by the Sheridan site and less than that suffered by the Sebastian site.

Even if we accept that the Sebastian and Sheridan sites suffered diminutions in their market value, those diminutions are relevant here only if they were attributable to the remediated contamination. But McKinney did not attempt to establish that the remediated contamination near the Sebastian and Sheridan sites caused some or all of the diminution in market value she found, nor did she attempt to rule out other plausible causes. *Cf. Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 840 (Tex. 2010) ("An expert's failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory."); *General Motors*

Corp. v. Iracheta, 161 S.W.3d 462, 470 (Tex. 2005) ("[The expert] eliminated the obvious possibility that fuel or vapors from the tank filler neck ignited only by saying so, offering no other basis for his opinion. Such a bare opinion was not enough."). Instead, McKinney simply assumed that 100% of the asserted diminution in value in both sites was attributable to the remediated contamination. This kind of material assumption, entirely lacking evidentiary support, renders expert opinion testimony unreliable and incompetent to support a judgment. *See TXI Transp.*, 306 S.W.3d at 239–40 (discussing the *Volkswagen* expert's "assumption that the detached wheel remained pocketed in the wheel well throughout a turbulent and high-speed accident sequence," which he failed to "connect his theory to any physical evidence in the case or to any tests or calculations prepared to substantiate his theory"); *see also Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 449 (Tex. 1993) (observing that an expert's assumptions do not constitute evidence).

McKinney seems to have operated under the assumption that all remediated property will suffer market stigma. While the parties agreed that environmental contamination can result in a diminution in property value that remains even after the contamination is remediated, the parties did not agree, and there was no evidence indicating, that this is always the case. Absent such evidence, we cannot assume, without evidence, that *any* (much less all) of the diminution McKinney found for the Sebastian and Sheridan sites was attributable to market stigma. And even if there were such evidence or evidence that contaminated properties always retain some diminution in market value even after remediation, Mel Acres offered no evidence tending to show that *all* of the Sebastian and Sheridan sites' alleged diminutions in value were attributable to stigma or to apportion such diminution among stigma and other possible causes.

The evidence here, in fact, indicates other potential causes of the "diminution" McKinney found. With respect to the Sheridan site, the difference between the original list price and the verbal offer price may reflect the difference between what the seller hoped to get and what a buyer hoped to pay rather than any actual change in the property's market value. And if there was a change in the property's market value, because both the original listing (the "unimpaired" market value) and the verbal offer (the "impaired" market value") occurred after the contamination and its remediation, the impairment of the property's market value cannot, without more, be attributed to the contamination. With respect to the Sebastian site, the only evidence indicates that the difference between its sale price and two other comparable sales prices simply reflected the "sweetheart" nature of the deal.

The record does not conclusively establish any of these alternative plausible causes as the actual cause. But Mel Acres offered no evidence tending to establish that the asserted diminutions were attributable, in whole or in part, to the contamination near the Sheridan and Sebastian properties. Absent any evidentiary basis, McKinney's material assumptions that the diminutions she found were caused by contamination-related stigma that remained after remediation of the property are unsupported and render her opinion incompetent and no evidence. *Cf. Wal-Mart Stores*, 313 S.W.3d at 839–40 (holding that expert's causation opinion lacked evidentiary value when factual basis for opinion was equally consistent with alternative cause); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 911 (Tex. 2004) (noting that expert's causation opinion was based on facts that were "just as consistent with" the expert's opinion of what happened as they were with an alternative course of events).

3. McKinney's Analytical Gaps

Even assuming that the Sebastian site suffered a 72% diminution in value and the Sheridan site suffered a 41% diminution in value, and that the remediated contamination of nearby property caused those losses, McKinney did not show how that data offers valid support for her conclusion that Mel Acres' ranch lost 60% ($1,397,500) of its value or that stigma resulting from Houston Unlimited's conduct caused that loss.

Expert testimony is unreliable if "there is simply too great an analytical gap between the data [relied upon] and the opinion proffered." *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)). An expert must "connect the data relied on and his or her opinion" and "show how that data is valid support for the opinion reached." *Camacho*, 298 S.W.3d at 642 (citing *Pollock*, 284 S.W.3d at 819–20; *Volkswagen*, 159 S.W.3d at 906; *Gammill*, 972 S.W.2d at 726). "We are not required . . . to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect." *Volkswagen*, 159 S.W.3d at 912; *Cooper Tire & Rubber*, 204 S.W.3d at 800–01. "A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence." *Havner*, 953 S.W.2d at 714.

The foundation of the sales-comparison approach is that the appraised property is compared to comparable properties, which justifies an assumption of comparable values, and then adjusted for differences between the properties. *See Sharboneau*, 48 S.W.3d at 182–83. McKinney's approach lacks this foundation. McKinney did not testify that the Sheridan or Sebastian sites were comparable to Mel Acres' property in any aspect other than environmental

contamination of some kind that had been remediated.[12] To the contrary, she testified that the properties did not need to be comparable under her approach because she calculated the lost value as a percentage.

When Mel Acres' attorney asked McKinney if there are "any similarities between Grimes County," where the Sebastian site is located, "and Washington County," where the ranch is located, that "make this a good comp," McKinney responded, "What makes this a good comp is the fact that it is a contamination. There are differences in land value between Washington County and Grimes County, and that's why we want to take percentages." Later, Houston Unlimited's attorney followed up:

> Q. [O]bviously, to make your analysis accurate, you want both your impaired and your unimpaired properties to be as comparable as possible to the property that's the subject of your appraisal, right?
>
> A. It doesn't necessarily — the unimpaired do — the impaired and the unimpaired do not — they have to have a similar highest and best use.
>
> Q. Right.
>
> A. But what you're looking for is a percentage. So no, they don't have to be.
>
> Q. They don't have to be comparable?
>
> A. No.

We have explained, however, that "[t]he comparable sales method fails when the comparison is made to sales that are not, in fact, comparable to the land condemned." *Kraft*, 77 S.W.3d at 808.

Nor did McKinney make adjustments for differences between the ranch and the Sebastian and Sheridan sites. McKinney did not explain whether or why the ranch and the contamination of the stock tank were similar to, or different from, the Sebastian or Sheridan properties and their

[12] As noted below, there was some dispute over whether the Sheridan site had been fully remediated.

contamination in any way that would make it likely to suffer a greater or lesser diminution than either of the other two properties. She did not identify plausible causes for variations in the diminutions and explain how those causes did or did not impact her calculation for the ranch. Although she chose a percentage of loss that was less than the Sheridan site's percentage and more than the Sebastian site's, she did not in any way tie that number to differences between the properties. To the contrary, the record contains no analysis of how McKinney reached the 60% loss for the ranch. The record reveals only that 60% falls somewhere between 41% and 72%, a little above the average of the two (56.5%).

McKinney's failure to account for significant differences between the kind and degree of contamination that the three properties sustained or the nature of the remediation is also significant in the context of this record. The Sheridan site had been part of a federal Superfund site that required extensive remediation. Houston Unlimited presented evidence that the federal government monitored the Sheridan site and placed it on a "national priority list." Robinson explained that the Sheridan site was monitored for thirty years at a cost of $16–17 million, and some constituents at that site were "off the Richter scale when compared to regulatory limits." 389 S.W.3d 583, 599. There was also evidence that the Sheridan site had not been fully remediated and "still contains over 44,000 cubic yards of sludge and contaminated soil."[13]

The metal compounds found at the ranch, by comparison, did not greatly exceed state action levels, and the only remediation the parties have identified are the measures Houston

[13] In her deposition, McKinney agreed that the market would react "in varying degrees" to properties contaminated by different chemicals, depending on the nature of the chemicals, if the contamination had not been remediated.

Unlimited took on its own property to prevent constituents from continuing to migrate onto the ranch. The metal compounds appear to have naturally dissipated after the migration ceased.

Finally, McKinney did not account for contamination that was not attributable to Houston Unlimited's conduct. For example, Mel Acres' own evidence showed iron in excess of state action levels on the ranch, yet there was no evidence linking iron contamination to Houston Unlimited. To the contrary, there was some evidence that other ponds on the ranch, which were beyond the reach of any discharge from Houston Unlimited's facility, also tested positive for excessive iron levels. McKinney testified that she did not attempt to attribute any portion of the diminution in value she had calculated to any actions of Houston Unlimited and made no attempt to calculate the amount of the diminution in value that resulted from activities not related to Houston Unlimited. Nor did any other evidence address this issue.

McKinney's failure to account for differences between the three properties at issue, differences between the nature of the contamination and remediation of the properties, and contamination not attributable to Houston Unlimited, leaves analytical gaps in her reasoning. At least once Houston Unlimited raised these gaps in questioning her, it was necessary for McKinney to provide some logically valid explanation for why she did not need to consider these factors that, facially, appear relevant to her opinion. The only explanation she provided was that differences between the three properties did not matter because she found a "very similar decrease in market value" for the Sebastian and Sheridan sites. But 72% and 41% are not "very similar decrease[s] in market value."[14]

[14] McKinney's calculation of the ranch's decrease in market value was based on the Sebastian and Sheridan sites' decreases, so any similarity between Mel Acres' decrease and the other two is a necessary product of her approach, not independent evidence of any facts.

C. Summary

As we have noted, the parties do not dispute that McKinney is well-qualified to testify as an expert on market value, and we do not doubt that she had difficulty finding other contaminated properties in the general area to compare to Mel Acres' ranch. We recognize that there may be instances in which sufficiently similar properties are not available for comparison, and we have held that comparable sales need not always be in the immediate vicinity of the subject land, so long as they are sufficiently similar to permit a reliable comparison. *Kraft*, 77 S.W.3d at 808 (citing *City of Austin v. Cannizzo*, 153 Tex. 324, 267 S.W.2d 808, 815 (1954)). We have also held that similar does not mean the same, and that differences between the subject property and the comparison properties are acceptable so long as the appraiser is able to adequately account for the differences through price adjustments. *See Sharboneau*, 48 S.W.3d at 182–83. "But if the comparison is so attenuated that the appraiser and the fact-finder cannot make valid adjustments for these differences, a court should refuse to admit the sale as comparable." *Id.* at 182.

We do not hold here that the dissimilarities between the ranch and the Sebastian and Sheridan sites are so great that they could not be accounted for through valid adjustments. McKinney simply did not make or explain any such adjustments. Nor did she otherwise adhere to the sales-comparison approach. As noted above, the sales-comparison analysis has two fundamental considerations: the comparison and accounting for differences. *See id.* at 182–83. McKinney did neither in her reliance on the Sebastian and Sheridan sites. Without that or some other reliable foundation, her opinions cannot constitute evidence sufficient to support the award of damages in this case. *See Justiss*, 397 S.W.3d at 161 (holding that landowner's opinion testimony was conclusory and no evidence even though he demonstrated that he was familiar with market values in the area because he failed to explain the factual basis behind his determination of

the diminution in property value to which he opined); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006) (noting that expert "did no more than set out 'factors' and 'facts' which were consistent with his opinions," then state his conclusion, but the reliability inquiry "does not ask whether the expert's conclusions appear to be correct; it asks whether the methodology and analysis used to reach those conclusions is reliable."); *Gammill*, 972 S.W.2d at 727 (observing that the analytical gap in the expert's analysis "was his failure to show how his observations, assuming they were valid, supported his conclusions that [the passenger] was wearing her seat belt or that it was defective.").

Finally, we acknowledge that the jury in this case apparently found McKinney's testimony to be sufficient, and we do not lightly reject their judgment. Juries are vital to our legal system, in part because they enter the courtroom with valuable real-world experience. Outside of courtrooms, it is not unreasonable to accept an expert's opinions even when the expert offers no facts to support those opinions. But the law requires experts to substantiate their opinions, and for good reasons. Experts who testify on behalf of parties to a lawsuit are subject to biases and potential abuses that are not always present outside the courtroom, and the courtroom itself may afford experts a veneer of credibility not present in other contexts. Legal sufficiency review requires courts to ensure that a jury that relies on an expert's opinion has heard factual evidence that demonstrates that the opinion is not conclusory on its face. *See Volkswagen*, 159 S.W.3d at 912 ("While juries are important to our legal system, they cannot credit as some evidence expert opinions that are not reliable or are conclusory on their face. These principles are consistent with a legal sufficiency review."). Here, McKinney's reliance on insufficient data and unsupported assumptions and the analytical gaps in her analysis render her opinion conclusory and without evidentiary value. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 749–50 (Tex. 2003) (observing that conclusory expert

testimony "is insufficient to create a question of fact"). Because Mel Acres offered no other evidence of the ranch's lost market value or its cause, we must conclude that the evidence is legally insufficient to support the damages awarded in this case.

III.
Conclusion

We hold that Mel Acres failed to present legally sufficient evidence to support its damages. We therefore reverse the court of appeals' judgment and render a take-nothing judgment in favor of Houston Unlimited.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0096

TENET HOSPITALS LIMITED, A TEXAS LIMITED PARTNERSHIP D/B/A PROVIDENCE MEMORIAL HOSPITAL, AND MICHAEL D. COMPTON, M.D., PETITIONERS

v.

ELIZABETH RIVERA, AS NEXT FRIEND FOR M.R., RESPONDENT

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

Argued February 4, 2014

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

JUSTICE LEHRMANN filed a dissenting opinion.

Our Constitution must strike a delicate balance between the pre-existing rights of individuals and the state's need to abridge those rights to achieve important public policy objectives. This appeal raises such questions of balance through a challenge to the statute of repose in the Medical Liability Act. In 2003, the Legislature enacted the Medical Liability Act to lower the escalating cost of medical malpractice insurance premiums and increase access to health care. The Act contains a

statute of repose that operates to bar claims not brought within ten years of the date of the medical treatment.

Here, alleged negligence occurred during the birth of a child in 1996. Under the 2003 repose statute, a suit on this negligence claim must be filed by 2006. In 2004, an attorney for the mother notified the hospital of the minor's claim, but no suit was filed until 2011, five years after the repose statute's deadline. The hospital moved for summary judgment on the ground that the repose statute barred the claim, and the mother responded that the repose statute violates the open courts and retroactivity provisions of the Texas Constitution. We overrule both constitutional challenges.

The open courts challenge fails due to the mother's lack of diligence in filing suit. In this context, an open courts challenge contends that the claimant had an insufficient opportunity to bring suit. It is well-established in our jurisprudence that such open-courts challengers must themselves be diligent in bringing suit. The mother cannot meet this requirement because she was aware of the claim one year into her three-year period to bring the claim but waited over six additional years to file suit. The mother's retroactivity challenge also fails because a compelling public purpose justified the legislation and granted her a three-year grace period to file suit. Because the court of appeals found in the mother's favor on her open courts challenge, we reverse the court of appeals' judgment and render judgment that the plaintiff take nothing.

I. Background

In 1996, Elizabeth Rivera was nine months pregnant with her daughter, M.R., when she visited the emergency room of Providence Hospital[1] with a cough and fever. Dr. Michael Compton assessed Rivera and discharged her. The following day, Rivera noticed decreased fetal movement and returned to the hospital, where M.R. was delivered via emergency C-section. M.R. lacked oxygen and has permanent neurological disabilities. Rivera claims this injury resulted from the hospital and Dr. Compton's failure to properly assess and monitor her and notify her OB/GYN.

Seven years after the medical treatment at issue (in 2003), the Legislature enacted a ten-year statute of repose for the Medical Liability Act, which provides:

> A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 872 (current version at TEX. CIV. PRAC. & REM. CODE § 74.251(b)). Thus, when the repose statute became law, M.R.'s claim needed to be brought within three years to avoid the claim being barred by the statute of repose.[2]

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[1] Providence Hospital is the d/b/a for Tenet Hospitals Limited, LP. The hospital and Dr. Michael Compton are collectively referred to in this opinion as "the hospital."

[2] Neither party discusses the effect of limitations on M.R.'s claim, and we therefore express no opinion on that issue.

In August 2004, Rivera's lawyer sent the hospital the statutorily required notice of a health care liability claim,[3] but only filed suit (on M.R.'s behalf) in March 2011—five years after the repose statute barred the claim and six-and-a-half years after Rivera sent pre-suit notice of the claim. The hospital and Dr. Compton moved for summary judgment based on the statute of repose and the trial court granted the motion. The court of appeals reversed, holding that the statute of repose violated the open courts provision as applied to M.R. 392 S.W.3d 326, 333. We granted the hospital and Dr. Compton's petitions for review.[4]

II. Discussion

Rivera poses open courts and retroactivity challenges to the repose statute as independent bases for affirming the court of appeals. Regarding the open courts challenge, Rivera claims the repose statute is similar to previous statutes of limitations we held to be unconstitutional as applied to minors. Regarding the retroactivity challenge, Rivera contends the repose statute is unconstitutionally retroactive because it extinguished M.R.'s claim before she could reach the age of majority. We address each constitutional challenge in turn. In doing so, we are mindful that we

[3] Under the Medical Liability Act, anyone asserting a health care liability claim must give written notice to the physician or health care provider at least sixty days before filing suit. TEX. CIV. PRAC. & REM. CODE § 74.051(a).

[4] At the petition stage, the Texas Alliance for Patient Access, the Texas Medical Association, the Texas Hospital Association, the American Congress of Obstetricians and Gynecologists, the Texas Children's Hospital, and the Texas Osteopathic Medical Association jointly submitted an amicus brief supporting the hospital.

begin assessing a constitutional challenge with a presumption that the statute is valid[5] and do not defer to lower court constructions of statutes.[6]

The distinction between facial and as-applied challenges also bears mentioning because we consider bother Rivera's challenges to be as-applied challenges. A facial challenge claims that a statute, by its terms, always operates unconstitutionally. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995). By contrast, an as-applied challenge asserts that a statute, while generally constitutional, operates unconstitutionally as to the claimant because of her particular circumstances.[7] *City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 240 (Tex. 2001); *Garcia*, 893 S.W.2d at 518 n.16.

Both of Rivera's constitutional challenges here (open courts and retroactivity) are as-applied challenges. Her open courts challenge does not claim the repose statute operates unconstitutionally as to all persons, and we have previously held open courts applied constitutionally to an adult who could not discover her claim before the repose statute barred it.[8] *Methodist Healthcare Sys., Ltd.,*

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[5] *See Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 146 (Tex. 2010) ("To be sure, courts must be mindful that statutes are not to be set aside lightly."); *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) ("We recognize that '[i]n passing upon the constitutionality of a statute, we begin with a presumption of validity.'" (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968)) (alteration in original)).

[6] *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003).

[7] As we have observed previously, "the line between facial and as-applied challenges is not so well defined that it has some automatic effect." *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex. 2012) (quotation marks omitted); *see also id*. at 617 n.76 (observing that "'courts remain hopelessly befuddled in this area'" (quoting Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 VA. L. REV. 301, 312 (2012))).

[8] Rivera asserts that the repose statute is unconstitutional "as applied to children injured by medical negligence before their eighth birthday." This framing unnecessarily blurs the line between facial and as-applied challenges. Because Rivera contends in neither constitutional challenge that the repose statute always operates unconstitutionally, her challenges are as-applied to her circumstances only.

L.L.P. v. Rankin, 307 S.W.3d 283, 292 (Tex. 2010); *see Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 786 (Tex. 2007) (treating an open courts challenge as an as-applied challenge). Likewise, Rivera's retroactivity challenge is an as-applied challenge because it contends the repose statute is unconstitutionally retroactive as to M.R.'s claim based upon the particular circumstances of her situation. *See Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 147 (Tex. 2010) (treating a retroactivity challenge as an as-applied challenge). With this background in mind, we turn to the substance of Rivera's constitutional challenges.

A. Open Courts

In *Weiner v. Wasson*[9] and *Sax v. Votteler*[10], we held statutes of limitations requiring minors to bring medical malpractice suits by a certain age violated the open courts provision. Rivera argues these decisions compel the conclusion that this repose statute is unconstitutional as applied to M.R., who is also a minor. The hospital primarily counters that, because we upheld this repose statute against an open courts challenge in *Rankin*, we likewise must do so here.[11] We agree with the hospital's conclusion that the repose statute does not violate the open courts provision as applied to M.R., but rely on different reasons.

The open courts provision of the Texas Constitution provides: "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. This requirement "guarantees that a common law

[9] 900 S.W.2d 316 (Tex. 1995).

[10] 648 S.W.2d 661 (Tex. 1983).

[11] 307 S.W.3d 283 (Tex. 2010).

remedy will not be unreasonably abridged." *Garcia*, 893 S.W.2d at 521. This guarantee operates quite differently from a tolling provision. *Yancy*, 236 S.W.3d at 784. Tolling provisions generally defer accrual of a claim until the plaintiff knew, or in the exercise of reasonable diligence should have known, the facts giving rise to the claim. *Id*. (citing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998)). By contrast, "the open courts provision merely gives litigants a reasonable time to discover their injuries and file suit," and courts must determine what constitutes a reasonable time frame. *See id*. In short, an open courts challenge is a due process complaint and requires the party to use due diligence. *Id*. at 785. Procedurally, the party raising the open courts challenge "must raise 'a fact issue establishing that he did not have a reasonable opportunity' to be heard." *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011) (quoting *Yancy*, 236 S.W.3d at 785).

We have interpreted this due diligence requirement three times in the past two decades, and these precedents guide our analysis here. First, in *Shah v. Moss*, Moss sued Shah for negligence in performing eye surgery and neglecting to provide adequate post-surgical treatment. 67 S.W.3d 836, 839 (Tex. 2001). When Shah moved for summary judgment on limitations, Moss asserted that the limitations statute violated the open courts provision. *Id*. at 840–41. Moss knew about the alleged injury at least seventeen months before he filed suit but offered no explanation for his delay. *Id*. at 847. Thus, we concluded that, as a matter of law, Moss failed to file suit within a reasonable time after discovering his injury. *Id*.

Six years after we decided *Shah*, we addressed a case with facts more closely aligned with those presented here. In *Yancy*, Yates suffered cardiac arrest when undergoing a procedure to remove kidney stones. 236 S.W.3d at 780. She was resuscitated but remained comatose after the

procedure. *Id*. Some nineteen months later, Yates's guardian sued two defendants and waited another twenty-two months to sue two additional defendants. *Id*. The additional defendants moved for summary judgment on limitations, to which the guardian raised an open courts challenge. *Id*. Relying on *Shah*, we overruled the open courts challenge because the guardian offered no explanation for waiting twenty-two months after filing her petition to sue the additional defendants. *Id*. at 785. Specifically, we observed that the guardian

> knew of [Yates's] condition and retained a lawyer well within the limitations period. On this record, there is no fact issue establishing that [the guardian] . . . sued within a reasonable time after discovering the alleged wrong. Thus, the open courts provision does not save Yates's time-barred negligence claims.

Id. We acknowledged precedent indicating that a statute requiring an incapacitated plaintiff to give pre-suit notice would "require an impossible thing." *Id*. at 786 (citing *Tinkle v. Henderson*, 730 S.W.2d 163, 167 (Tex. App.—Tyler 1987, writ ref'd)). But we concluded the limitations statute there did not require an impossible thing of Yates, who had a guardian, retained a lawyer, and filed suit within the limitations period. *Id*. We opined that, because the limitations statute was constitutional as applied to Yates, "there is no need to strike it down because it might operate unconstitutionally in another case." *Id*.

Most recently, in *Stockton*, a mother of a minor with a health care liability claim raised an open courts challenge to the Medical Liability Act's 120-day deadline to serve an expert report. 336 S.W.3d at 617–18. There, Stockton was unable to serve the report on a defendant and filed a motion forty days after filing suit to request substituted service for the report. *Id*. at 618. However, Stockton did not alert the trial court to the impending expert report deadline, and the court granted the motion

four months later after requesting additional information. *Id*. at 617. We held that Stockton did not raise a fact issue concerning her due diligence and overruled her open courts challenge. *Id*. at 617–18. Notably, the fact that she was a next friend of her minor child did not prevent this Court from imputing her lack of diligence to her child. *Id*.

In sum, we have found delays of four months,[12] seventeen months,[13] and twenty-two months[14] to constitute a lack of due diligence as a matter of law—such that an open courts challenge must fail at summary judgment. Additionally, a guardian's lack of diligence may operate to bar a legally incompetent person's open courts challenge. *Yancy*, 236 S.W.3d at 785. And a next friend's lack of due diligence may operate to bar a minor child's open courts challenge. *Stockton*, 336 S.W.3d at 617–18.

Here, Rivera acted as the M.R.'s next friend. In 2004, a lawyer for Rivera sent the hospital the statutorily required notice of M.R.'s health care liability claim, but Rivera waited over six-and-a-half years to file suit (represented by the same lawyer). This period of time is fifteen times the four months we found constituted a lack of diligence in *Stockton*,[15] over five times the seventeen months in *Shah*,[16] and almost three times the twenty-two months in *Yancy*.[17] And as in *Stockton*, *Yancy*, and

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[12] *Stockton*, 336 S.W.3d at 617–18.

[13] *Shah*, 67 S.W.3d at 847.

[14] *Yancy*, 236 S.W.3d at 785.

[15] 336 S.W.3d at 617–18.

[16] 67 S.W.3d at 847.

[17] 336 S.W.3d at 785.

Shah, the plaintiff has offered no explanation for her delay in filing suit. Moreover, similar to *Yancy*, the repose statute did not deprive M.R. of her opportunity to be heard because she gave statutory pre-suit notice of her claim two years before the repose statute barred it.[18] *See Yancy*, 236 S.W.3d at 785–86 (concluding that a statute did not deprive a legally incompetent person of her opportunity to be heard because she had a guardian, retained a lawyer, and filed suit against some defendants within the limitations period). Accordingly, on this record, there is no fact issue establishing that Rivera (on M.R.'s behalf) "did not have a reasonable opportunity to discover the alleged wrong and bring suit before the repose statute barred her claim or that she sued within a reasonable time after discovering the alleged wrong." *Id*. at 785. Accordingly, the open courts provision cannot revive M.R.'s time-barred claim. *See id.*

Rivera argues we should not impute any lack of diligence on her part to M.R. But our precedents have required due diligence of a next friend raising an open courts challenge on behalf of a minor in *Stockton*, 336 S.W.3d at 617–18, as well as of the guardian of a legally incompetent person raising an open courts challenge in *Yancy*, 236 S.W.3d at 785–86. Rivera offers us no compelling reason to overturn either decision. And the consistency of these decisions is well-founded. The law, our precedent, and our rules of procedure all treat minors and legally incompetent persons alike as lacking the legal capacity to sue, such that they must appear in court through a legal guardian, a next friend, or a guardian ad litem. *See* TEX. CIV. PRAC. & REM. CODE § 16.001 (classifying persons under 18 years of age and persons of unsound mind as being under a legal

[18] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 872 (current version at TEX. CIV. PRAC. & REM. CODE § 74.251(b)).

disability); TEX. R. CIV. P. 44, 173; *Austin Nursing Center v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005).[19] Indeed, our precedent reveals only one instance discussing minors and incompetent persons differently, and it poignantly observed that minors and legally incompetent persons are treated comparably, but that incompetent persons are deserving of perhaps even greater protections. *Tinkle*, 730 S.W.2d at 166.[20]

We must note the fact that the similar treatment of minors and legally incompetent persons does not necessarily mean next friends or parents and guardians are treated similarly. There are specific procedures for guardians that do not apply to next friends. For example, guardians: are court-appointed,[21] act as fiduciaries on behalf of the legally incompetent person,[22] need not post security for costs in suits brought on behalf of the legally incompetent person,[23] generally must post

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[19] *See also* TEX. HEALTH & SAFETY CODE § 611.004(a)(4) (treating minor's and legally incompetent persons similarly for purposes of disclosing certain confidential information); TEX. LAB. CODE § 403.007 (treating workers' compensation death benefits payable to minors and legally incompetent persons similarly).

[20] *Tinkle*, 730 S.W.2d at 166 ("It is impossible to avoid the analogy between the situation of the child plaintiff in *Sax* and the arguably incompetent plaintiff in this case. Traditionally the interests of minors, incompetents, and other helpless persons are viewed in law as substantially similar, and both the substantive law and the rules of procedure accord them comparable treatment. In many respects, mentally incompetent persons present a more compelling case for legal protection. They are frequently less communicative, more vulnerable and dependent than children. . . . The mentally incompetent are less likely than children to have someone intimately interested in their welfare and inclined to act in their behalf."). We note that the record here describes M.R.'s condition as such that she might need a guardian when she reaches the age of majority. Because the law treats minors and legally incompetent persons similarly, such a change in legal status would not affect our holding.

[21] TEX. EST. CODE § 1001.001 (formerly TEX. PROB. CODE § 602) ("A court may appoint a guardian with full authority over an incapacitated person . . . .").

[22] *Id*. §§ 1053.052 (formerly TEX. PROB. CODE § 622) (discussing guardian's fiduciary capacity), 1105.051 (formerly TEX. PROB. CODE § 700) (establishing oath to faithfully discharge duties to a legally incompetent person).

[23] *Id*. § 1053.052 (formerly TEX. PROB. CODE § 622) ("No security for costs shall be required of a guardian . . . in any suit brought by the guardian . . . in [her] respective fiduciary capacit[y]."). Rule of Civil Procedure 44 grants next friends "the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required."

a bond,[24] and must annually report on the guardianship to the court that appointed them.[25] But if anything, these technical requirements simply bring guardians in line with the powers and duties that parents possess. Unlike a guardian, a parent as next friend need not post a bond until possessing money from a judgment on behalf of a minor.[26] But such disparate treatment is largely attributable to the presumption that fit parents act in the best interest of their children. *See In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007). As a whole, our statutes, rules, and precedent treat guardians and next friends similarly. *See, e.g.*, TEX. R. CIV. P. 44 (granting next friends the same rights as guardians except that they must give security for costs). We see no reason today to depart from our requirement that guardians and next friends use due diligence in bringing suit to sustain an open courts challenge.[27]

Rivera and the hospital both contend that different precedents regarding the reasonableness of statutory limits to common-law recovery should govern our analysis of the open courts challenge. Substantively, our longstanding test for whether a law violates the open courts provision is (1) if the law imposes substitute remedies, whether those remedies are reasonable, or (2) if the law extinguishes remedies, whether such action is a reasonable exercise of the police power. *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955). Rivera contends that under *Weiner* and *Sax*,

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[24] *Id.* §§ 1105.101 (formerly TEX. PROB. CODE § 702), 1105.102 (formerly TEX. PROB. CODE § 702A).

[25] *Id.* § 1163.101 (formerly TEX. PROB. CODE § 743).

[26] TEX. PROP. CODE § 142.002 (formerly TEX. PROB. CODE § 142.002(a)) (providing for next friend to take possession of money recovered from a judgment for the minor only after posting a bond).

[27] For these reasons, we disagree with the court of appeals that any lack of diligence on Rivera's part could not be imputed to M.R. 392 S.W.3d at 334.

requiring a minor to sue through a next friend is unreasonable. The hospital asserts that under *Rankin*, extinguishing the claim altogether if not filed within ten years is a reasonable exercise of the police power. Rivera's assertion that *Sax* and *Weiner* control fails for two reasons. First, we need not assess whether the law was reasonable if the party challenging the law was not diligent. We never reached the question of whether the statute was reasonable as applied to the claimants in *Stockton*, *Yancy*, and *Shah* because the claimants in those cases demonstrated a lack of due diligence. *Stockton*, 336 S.W.3d at 617–18; *Yancy*, 236 S.W.3d at 785; *Shah*, 67 S.W.3d at 847. Second, *Sax* and *Weiner* involved statutes of limitations that expressly applied to minors (that minors must bring health care claims by age twelve in *Sax* and age fourteen in *Weiner*). We held that those statutes were facially unconstitutional. *See Weiner*, 900 S.W.2d at 320 (expressly declining to invalidate statute of limitations for minors on an as-applied basis). By contrast, this statute does not only affect minors, and Rivera's constitutional challenge is necessarily an as-applied attack. Thus, we must consider the circumstances of Rivera's representation of M.R., including the fact that she hired a lawyer to send pre-suit notice of the claim two years before the repose statute barred it.

We likewise disagree with the hospital that *Rankin* controls this case. Had Rivera exercised due diligence and the repose statute still barred her claim, we would then be required to assess the reasonableness of the law. *See Rankin*, 307 S.W.3d at 285 (assessing the reasonableness of the repose statute when the plaintiff's diligence in bringing suit was not at issue). The absence of due diligence means we need not reach this issue.

B. Retroactivity

Rivera also challenges the repose statute as unconstitutionally retroactive because it required M.R. to bring her previously accrued claim before she reached the age of majority. The hospital counters that the repose statute is not unconstitutionally retroactive because it allowed M.R. three years after the statute took effect to bring her claim through her next friend. We agree with the hospital.

A retroactive law is one that extends to matters that occurred in the past. *Robinson*, 335 S.W.3d at 138 ("A retrospective law literally means a law which looks backwards, or on things that are past; or if it be taken to be the same as retroactive, it means to act on things that are past." (quoting *DeCordova v. City of Galveston*, 4 Tex. 470, 475–76 (1849))); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (determining for purposes of retroactivity "whether the new provision attaches new legal consequences to events completed before its enactment."). Here, the parties concede the statute is retroactive as applied to M.R. because it established a date to bar her already-accrued claim.

But not all retroactive statutes are unconstitutional. *Robinson*, 335 S.W.3d at 138. In *Robinson*, we established a three-part test for examining whether retroactive laws are constitutional: "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment." *Id*. at 145. This test acknowledges the heavy presumption against retroactive laws by requiring a compelling public interest to overcome the presumption. *Id*. at 146. But it also

appropriately encompasses the notion that "statutes are not to be set aside lightly." *Id.* We examine each of the three factors in turn with respect to the repose statute.

Regarding the public interest, the statute at issue in *Robinson* was enacted solely to benefit a single company by reducing its liability in asbestos litigation, which we determined constituted only a slight public interest. *Id.* at 146, 150. By contrast, the repose statute here was part of the 2003 Medical Liability Act, which was a comprehensive overhaul of Texas medical malpractice law to "make affordable medical and health care more accessible and available to the citizens of Texas,"[28] and to "do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis."[29] The Legislature conducted hearings and gathered evidence of the increasing costs of malpractice insurance resulting from claims that endured indeterminately. As a result, the Legislature expressly found that a spike in healthcare liability claims was causing a malpractice insurance crisis that adversely affected the provision of healthcare services in Texas.[30] Unlike the statute in *Robinson*, there is no indication the statute here was to benefit only a particular entity; rather, it was aimed at broadening access to health care by lowering malpractice insurance premiums. We previously concluded this public interest was sufficient to overcome a different constitutional challenge to this statute. *Rankin*, 307 S.W.3d at 288 (holding that public interest in lowering malpractice insurance premiums and increasing access to health care by implementing this

[28] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(5), 2003 Tex. Gen. Laws 847, 884–85.

[29] *Id.* § 10.11(b)(3).

[30] *Id*. § 10.11(a).

repose statute was a valid exercise of the police power sufficient to overcome an open courts challenge). It is likewise a compelling public interest with respect to Rivera's retroactivity challenge.

But a compelling public interest does not end the retroactivity inquiry. We must balance that purpose against the nature of the prior right and the extent to which the statute impairs that right. Regarding the nature of the prior right, we held in *Robinson* that the personal injury claim at issue (for mesothelioma) was a mature tort that had a substantial basis in fact due to the discovery in the case. 335 S.W.3d at 148. Here, M.R.'s claim is mature because claims for medical negligence in utero are established causes of action in Texas, *Brown v. Schwarts*, 968 S.W.2d 331, 334 (Tex. 1998), and M.R.'s injury has allegedly come to fruition. But unlike in *Robinson*, the sparse record before us fails to provide any indication of the strength of M.R.'s claim. Thus, though the type of claim M.R. has is clearly established, the strength of her individual claim is unclear.

Finally, we assess the extent to which the repose statute impaired M.R.'s claim. Before 1996, when the injury allegedly occurred, there was no statute of repose for medical negligence claims and a minor had until age twenty to sue before limitations would run (the age of majority plus two years for limitations). *Weiner*, 900 S.W.2d at 318–19. Thus, M.R. reasonably had settled expectations in 1996 that she would have until age twenty to file suit, and the repose statute impaired these settled expectations. But we have long recognized that the impairment of such a right may be lessened when a statute affords a plaintiff a grace period to bring her claim, and we observed in *Robinson* that "a change in the law need not provide a grace period to prevent an impairment of vested rights." 335

S.W.3d at 141. We noted that grace periods of two months to sue,[31] four years to sue,[32] and seven years to resume pumping water[33] had all previously been upheld over retroactivity challenges. *Id.*

We have only upheld constitutional retroactivity challenges four times. In two of those cases, we upheld retroactivity challenges because amendments to statutes of limitations revived claims the previous statutes barred.[34] And in one case, the Legislature extinguished a taxpayer's valid limitations defense to a governmental property tax claim by enacting legislation that prevented taxpayers from raising limitations defenses. *Mellinger v. City of Houston*, 3 S.W. 249, 254–55 (Tex. 1887). Finally, in *Robinson*, the statute operated to extinguish Robinson's mature tort claim against a particular defendant, despite discovery showing a substantial basis in fact for the claim. 335 S.W.3d at 148. When balanced against a statute that contained no findings and affected only one defendant, we concluded the "slight" public interest did not justify the impairment to the claims at issue. *Id.* at 149.

Here, M.R. possessed a three-year grace period from the time the repose statute took effect until it extinguished her claim. We have upheld statutes with shorter grace periods, and we cannot say the three-year grace period M.R. possessed rendered the statute unconstitutional as applied in light of its compelling public interest.

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[31] *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997).

[32] *DeCordova*, 4 Tex. at 470–71.

[33] *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 644 (Tex. 1971).

[34] *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *Wilson v. Work*, 62 S.W.2d 490, 490–91 (Tex. 1933) (per curiam) (original proceeding).

Rivera counters that this grace period is meaningless because M.R. could not sue during the time she was under a legal disability and would have to sue through her next friend. But we cannot ignore that Rivera brings an as-applied challenge. Thus, the inquiry must be Rivera representing M.R.—not parents representing children generally. Two facts in this case compel us to reject Rivera's retroactivity challenge. First, Rivera knew of M.R.'s claim one year into the three-year grace period. She demonstrated that knowledge by sending the statutorily-required notice of M.R.'s claim to the hospital through her lawyer. Thus, Rivera cannot rightfully contend that a three-year grace period unconstitutionally deprived her of the ability to bring M.R.'s claim when she knew of the claim long before the period expired. Second, Rivera actually brought M.R.'s claim, albeit after the repose statute barred it. She brought the claim on M.R.'s behalf while M.R. was still a minor. While one may conceive of a scenario where a parent fails to bring her child's claim due to legal incompetence or a conflict of interest with the child, Rivera's as-applied challenge requires us to consider only her circumstances. *See Weiner*, 900 S.W.2d at 327 (Owen, J., dissenting). There is no indication in the record that Rivera is legally incompetent or possesses a conflict of interest with M.R. And sending pre-suit notice of M.R.'s claim and filing suit on her behalf demonstrates Rivera's capability of representing M.R.

In short, the Legislature's findings in enacting the Medical Liability Act demonstrate its compelling public purpose in lowering the cost of medical malpractice premiums and broadening access to health care. And although the record gives no indication of the strength of M.R.'s claim, the repose statute gave M.R. a three-year grace period to bring her claim. In light of the compelling

public purpose and the three-year grace period, we overrule Rivera's challenge that the statute is unconstitutionally retroactive as applied.

C. Response to the Dissent

The dissent would hold that the repose statute violates the open courts provision and is unconstitutionally retroactive. Regarding the open courts challenge, the dissent correctly observes that the open courts provision requires a "reasonable opportunity" to sue and may not make a remedy contingent on "an impossible condition." __ S.W.3d __, __ (Lehrmann, J., dissenting) (quoting *Stockton*, 336 S.W.3d at 617–18, and *Shah*, 67 S.W.3d at 842). But here, M.R. had three years to sue through Rivera, who hired a lawyer and sent pre-suit notice of the claim two years before the repose statute barred it. The statute afforded M.R. a reasonable opportunity to sue through her parent and did not impose an impossible condition. Thus, we disagree with the dissent that the as-applied challenge prevails.

The dissent also raises two additional arguments regarding the open courts challenge, neither of which is persuasive. First, the dissent contends we have never imputed a parent's due diligence to the minor child she represents. But we did precisely that three years ago in *Stockton*.[35] The dissent claims *Stockton* was different in that the parent there argued the statute was unconstitutional as applied "*to her*" because it was impossible for her to comply with the statutory deadline at issue. __ S.W.3d at __ (Lehrmann, J., dissenting) (quoting *Stockton*, 336 S.W.3d at 612). But in *Stockton*, the parent's failure to use due diligence to comply with the statutory procedure barred her minor

[35] 336 S.W.2d at 612.

child's claim. 336 S.W.3d at 612. Here, the parent's failure to use due diligence to comply with the statute's procedure barred her minor child's claim. There is no legal difference between *Stockton* and this case.

Second, the dissent believes that imputing a guardian's lack of diligence to a ward in *Yancy* is materially different from imputing a parent's lack of diligence to a minor child and warrants a different result. But the dissent cites no authority for that proposition, and for a good reason. We have previously observed that "[t]raditionally the interests of minors, incompetents, and other helpless persons are viewed in law as substantially similar, and both the substantive law and the rules of procedure accord them comparable treatment." *Tinkle*, 730 S.W.2d at 166. We see no reason to treat parents of minor children differently than guardians of wards in this circumstance.

Finally, the dissent concludes that the repose statute is unconstitutionally retroactive as applied to M.R. This conclusion stems from its interpretation of *Weiner* that inquiring into whether a particular parent was incompetent or possessed a conflict of interest is an unworkable standard. *Weiner* did not involve a retroactivity challenge, and retroactivity challenges are, by definition, as-applied constitutional challenges. They examine only the position of the party raising the challenge. The more difficult plight of a different or hypothetical litigant will not save a litigant's as-applied challenge. Or as we observed in *Yancy*, "there is no need to strike [a statute] down because it might operate unconstitutionally in another case." 236 S.W.3d at 786. Our courts have had little difficulty examining the particular circumstances of those raising retroactivity challenges, and we are confident in their ability to continue to do so.

III. Conclusion

In sum, we uphold the Medical Liability Act's ten-year statute of repose against Rivera's as-applied constitutional challenges on open courts and retroactivity grounds. Rivera fails to meet this requirement because she was aware of M.R.'s claim one year into her three-year period to bring the claim but waited over six-and-a-half additional years to file suit. Rivera's retroactivity challenge also fails because a compelling public purpose justified the legislation and granted Rivera a three-year grace period to file suit. Because the court of appeals found in favor of Rivera on her open courts challenge, we reverse the court of appeals' judgment and render judgment that Rivera take nothing.

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Eva M. Guzman
Justice

OPINION DELIVERED: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0096

TENET HOSPITALS LIMITED, A TEXAS LIMITED PARTNERSHIP D/B/A PROVIDENCE MEMORIAL HOSPITAL, AND MICHAEL D. COMPTON, M.D., PETITIONERS

v.

ELIZABETH RIVERA, AS NEXT FRIEND FOR M.R., RESPONDENT

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

JUSTICE LEHRMANN, dissenting.

Statutes of repose present harsh barriers to the administration of justice. Today the Court extends this obstacle to situations involving the most vulnerable amongst us—our children. And it does so under the false notion that all parents can and do adequately protect their children. However, the sad reality is that the needs of too many children—our most valuable resource—are not satisfactorily addressed by their parents. While the Texas Medical Liability Act's repose statute requires a health care liability claim to be brought within ten years of the date medical treatment is provided, we have never held that this statute may properly apply to bar the claims of innocent children. To the contrary, we have consistently held that statutes of limitations that similarly purport to bar a child's claim violate the Texas Constitution.

In the underlying suit, M.R. was injured during childbirth, allegedly as a result of the negligence of the treating physician and hospital. M.R.'s mother, Elizabeth Rivera, filed suit on M.R.'s behalf more than ten years later. M.R. was seven years old when the repose statute took effect. The Court holds today that, as applied to M.R., the statute violates neither the Texas Constitution's open courts provision nor its prohibition against retroactive laws. In so holding, the Court attributes Rivera's apparent lack of diligence to her daughter and concludes that M.R. had a reasonable opportunity to sue through Rivera before the statute took effect. Because this holding contradicts well-settled precedent in which we refused to bar a minor's claim because of the action (or, more accurately, inaction) of a parent, I am compelled to respectfully express my dissent.

I. Open Courts

The Texas Constitution's open courts provision[1] "protects a person from legislative acts that cut off a person's right to sue before there is a reasonable opportunity to discover the wrong and bring suit." *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001). Stated another way, the Legislature may not "mak[e] a remedy by due course of law contingent upon an impossible condition." *Stockton v. Offenbach*, 336 S.W.3d 610, 617–18 (Tex. 2011) (citation and internal quotation marks omitted). A statute violates the open courts provision when a litigant shows (1) he "has a cognizable common law cause of action that is being restricted," and (2) "the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute." *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994) (citation and internal quotation marks omitted). We have also

[1] "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.

noted that a plaintiff is not entitled to relief under the open courts provision "if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong." *Shah*, 67 S.W.3d at 847.

The Court holds that Rivera failed to use due diligence in filing the underlying suit on M.R.'s behalf, thereby foreclosing her open courts challenge to the statute of repose.[2] In my view, attributing Rivera's lack of due diligence to her daughter is both fundamentally unfair and contrary to our decisions in *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), and *Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995).

In *Sax*, we evaluated the two-year statute of limitations on medical malpractice claims contained in a prior version of the Medical Liability Act.[3] 648 S.W.2d at 663. Before that statute was enacted, the limitations period on all tort actions by minors was tolled until two years after they reached the age of majority. *Id.* The challenged statute removed that tolling provision in medical malpractice cases, with the exception that minors under the age of six had until their eighth birthday to file such claims. *Id.* The plaintiffs in *Sax* sued a doctor for malpractice on behalf of their minor daughter more than two years after she was treated, and the defendant argued that the statute of limitations barred their claim. *Id.* We held that the admittedly legitimate purpose of the statute of limitations—generally, to increase the availability of medical practice insurance and, more

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[2] The statute of repose at issue provides that "[a] claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim." TEX. CIV. PRAC. & REM. CODE § 74.251(b).

[3] *See* Act of May 29, 1975, 64th Leg., R.S., ch. 330, § 4, 1975 Tex. Gen. Laws 864, 865 (former TEX. REV. CIV. STAT. art. 582), *repealed by* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 41.03, 1977 Tex. Gen. Laws 2064.

specifically, to limit the length of time insureds are exposed to potential liability—did not justify "the effective abrogation of a child's right to redress." *Id.* at 666–67.

In holding that the statute violated the open courts provision, we expressly considered, and rejected, a parent's ability to sue on behalf of his child as adequately protecting the child's rights. We held:

> If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided by article 5.82, the child is precluded from asserting his cause of action under that statute. Furthermore, the child is precluded from suing his parents on account of their negligence, due to the doctrine of parent-child immunity. The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. *This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided by article 5.82.*

Id. at 667 (emphasis added) (internal citation omitted). We concluded that "[u]nder the facts in [that] case, [the child was] forever precluded from having her day in court to complain of an act of medical malpractice," that "the [L]egislature [had] failed to provide her any adequate substitute to obtain redress," and that former article 5.82 was therefore "unconstitutional as it applie[d] to a minor's cause of action." *Id.*

Twelve years after deciding *Sax*, we reaffirmed the opinion and applied its reasoning in *Weiner*. In that case, we considered an open courts challenge to the statute that replaced article 5.82. 900 S.W.2d at 317–18. Section 10.01 of the Medical Liability and Insurance Improvement Act maintained the two-year statute of limitations for medical malpractice claims contained in article 5.82, but broadened the exception for minors to allow those under the age of twelve until their

fourteenth birthday to file suit. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 10.01, 1977 Tex. Gen. Laws 2039, 2052 (former TEX. REV. CIV. STAT. art. 4590i, § 10.01), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 884. Notwithstanding this "inconsequential" change, we held that "section 10.01, like its predecessor article 5.82, is unconstitutional as applied to minors because it purports to cut off [the minor plaintiff's] cause of action before he reaches majority, an age at which he may lawfully sue on his own behalf." *Weiner*, 900 S.W.2d at 318. In so holding, we confirmed that "*Sax* has become firmly ensconced in Texas jurisprudence." *Id.* at 320.

Our analysis in *Sax* and *Weiner* confirms that a parent's failure to use due diligence in pursuing his minor child's health care liability claim should not and does not foreclose pursuit of that claim. However, the Court concludes that these cases do not control for two reasons, neither of which is persuasive. First, the Court notes that in *Sax* and *Weiner* we evaluated the reasonableness of the statute in question, while the issue here is the diligence of the party challenging the law. ___ S.W.3d at ___. But the basis of our holding that the statutes of limitations in *Sax* and *Weiner* were unreasonable—and in turn unconstitutional—was that it was "neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action" within the limitations period. *Sax*, 648 S.W.2d at 667; *see also Weiner*, 900 S.W.2d at 320 ("We fail to see any benefit in requiring a minor to show that his or her parent was incompetent or failed to act in the minor's best interests by not pursuing a medical malpractice claim, especially when the very failure of the parent to do so leaves the minor without any legal recourse."). For the same reason, we may not rely on parents to pursue their child's health

care liability claim with due diligence. As in *Sax* and *Weiner*, their failure to do so leaves the minor with no legal recourse.

Second, the Court distinguishes *Sax* and *Weiner* on the grounds that they presented facial open courts challenges to the statutes at issue, while the underlying case presents an as-applied challenge that must take into account "the circumstances of Rivera's representation of M.R." ___ S.W.3d at ___. I disagree. In *Sax* and *Weiner*, the plaintiffs contended, and we held, that the statutes at issue were unconstitutional as applied to minors whose claims were cut off before they reached the age of majority and had the legal capacity to sue. *See Sax*, 648 S.W.2d at 667 (holding article 5.82 unconstitutional "as it applies to a minor's cause of action"); *Weiner*, 900 S.W.2d at 318 (holding section 10.01 "unconstitutional as applied to minors"). Similarly, in this case Rivera challenges the constitutionality of the Medical Liability Act's statute of repose as applied to minor plaintiffs whose claims are cut off before they reach the age of majority. *See Adams v. Gottwald*, 179 S.W.3d 101, 102 (Tex. App.—San Antonio 2005, pet. denied) (noting that the plaintiffs challenged the constitutionality of the Medical Liability Act's statute of limitations "on its face as applied to all minors," not "as applied to [the minor at issue] and her circumstances").

The Court also relies on three distinguishable cases in which we rejected open courts challenges based on a lack of due diligence. *Shah* provides no guidance because it involved a plaintiff who failed to use due diligence in asserting his own claim. 67 S.W.3d at 846–47. The Court also relies on *Stockton*, in which a parent sued on behalf of her minor child and challenged the Medical Liability Act's expert-report requirement, with which she had failed to comply. 336 S.W.3d at 612. The parent argued that the statute was "unconstitutional as applied *to her* because it was

impossible for her to comply with its deadline." *Id.* (emphasis added). The parent did not argue that her failures should not extinguish her child's claim, and we did not address the issue.

Finally, the Court relies on *Yancy v. United Surgical Partners International, Inc.*, in which the guardian of an incapacitated adult filed health care liability claims on behalf of her ward against some defendants within the limitations period, but against others after the limitations period had expired. 236 S.W.3d 778, 780 (Tex. 2007). We held that the guardian's lack of diligence in pursuing claims against the latter defendants precluded the open courts provision from saving the ward's time-barred claims. *Id.* at 785. The Court applies this reasoning to a parent's lack of diligence in pursuing a minor child's claims; I would not. The Court recognizes the strict legal procedures applicable to guardians, such as the fact that they are court-appointed, act as fiduciaries on behalf of their wards, must post a bond, and must report annually to the court. ___ S.W.3d at ___. These statutory requirements are significant and do more than simply "bring guardians in line with the powers and duties that parents possess." *Id.* at ___. They also help minimize the possibility that guardians "may be ignorant, lethargic, or lack concern," the very concern that led us in *Sax* to reject the presumption that parents will act diligently in pursuing claims on their child's behalf. 648 S.W.2d at 667.

For these reasons, I would not extend *Yancy*'s reasoning to the underlying case. Confining *Yancy* to the situation in which a court-appointed guardian fails to act with due diligence reconciles that case with *Sax* and *Weiner*, and properly recognizes the significant differences between such guardians and parents acting as next friends. I would hold that, under *Sax* and *Weiner*, an open

courts challenge to the Medical Liability Act's statute of repose brought by or on behalf of a minor may not be foreclosed by a parent's lack of diligence in bringing the suit.

I would further hold that *Sax* and *Weiner* compel a holding that the Medical Liability Act's ten-year statute of repose violates the open courts provision as applied to minors like M.R. because (1) she has a cognizable common law cause of action that is being restricted, and (2) the restriction is unreasonable when balanced against the statute's purpose. *See id.* at 666. As noted above, in those cases we held that the Act's statute of limitations was unconstitutional as applied to a minor's cause of action that the statute "purports to cut off . . . before [the minor] reaches majority." *Weiner*, 900 S.W.2d at 318; *see also Sax*, 648 S.W.2d at 667. To the extent the Act's statute of repose leads to the same result, it too violates the open courts provision.

The hospital in this case contends that our opinion in *Methodist Healthcare System of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283 (Tex. 2010), which also involved an open courts challenge to the Act's statute of repose, forecloses Rivera's claim. In *Rankin*, the plaintiff presented evidence that she did not know and could not have reasonably discovered prior to the repose period's expiration that a surgical sponge had been left inside her during surgery. *Id.* at 285. Rejecting the plaintiff's open courts challenge, we held that the statute of repose was a reasonable exercise of the Legislature's police power, noting that "the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions." *Id.* at 286, 290.

Although *Rankin* involved the Medical Liability Act's statute of repose, while *Sax* and *Weiner* involved the Act's statute of limitations, I would hold that *Sax* and *Weiner*, rather than

Rankin, control the outcome of this case. First, the statutes of limitations we considered in *Sax* and *Weiner*, as applied to minors, had the effect of a repose statute in that they removed the tolling provision otherwise applicable to minors, at least once the minors reached a certain age (six in *Sax*; twelve in *Weiner*). As to such plaintiffs, the statutes served as a "definitive cut-off" just as statutes of repose do. *Id.* at 288. And the purpose underlying the Medical Liability Act that was passed in 2003 as part of House Bill 4, which contains the applicable statute of repose, is the same as that underlying the statutes that were at issue in *Sax* and *Weiner*: to limit the length of time malpractice insureds are exposed to potential liability in order to increase the availability of medical practice insurance and affordable health care. *See id.* at 287; *Sax*, 648 S.W.2d at 666. While this purpose remains legitimate, it does not alter the analyses or the conclusions reached in *Sax* and *Weiner*.

Finally, in *Rankin* we found it significant that allowing a constitutional exception to the statute of repose for undiscoverable injuries "means never-ending exposure to liability, which in turn injects actuarial uncertainty into the insurance market [that] wholly undermines the purpose of House Bill 4 and of statutes of repose generally: to declare a no-exceptions cut-off point and grant a substantive right to be free of liability." 307 S.W.3d at 291. This concern is unfounded when the basis of the open courts violation is that minors' claims will be foreclosed before they reach the age of majority. A malpractice insured's exposure is not "never-ending" in this context; a definite "cut-off point" exists at which the insured will "be free of liability." *Id.*

"Under the facts in this case, [M.R.] is forever precluded from having her day in court to complain of an act of medical malpractice." *Sax*, 648 S.W.2d at 667. Because I cannot conclude that this results from a reasonable use of the police power, I depart from the Court and would hold

that the Medical Liability Act's ten-year statute of repose violates Article I, Section 13 of the Texas Constitution as applied to minors.

II. Retroactivity

As the Court notes, M.R.'s malpractice claim accrued in 1996, and the ten-year statute of repose went into effect in 2003. Prior to the repose statute's enactment, a minor had until the age of twenty to assert a health care liability claim. *Weiner*, 900 S.W.2d at 321. After its enactment, a minor had no more than ten years from the date of medical treatment. In a case like M.R.'s, the statute's effect is to cut off a minor's previously accrued claim before she has the legal capacity to sue. The Court concludes that the repose statute, while retroactive as applied to M.R., is not unconstitutionally so. I disagree.

A retroactive law is presumed unconstitutional,[4] requiring "a compelling public interest to overcome" that presumption. *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 146 (Tex. 2010). In *Robinson*, we developed a three-factor test to utilize in evaluating a retroactive law. *Id.* at 145. Under that test, we consider: "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment." *Id.*

I do not disagree with the Court's analysis of the first factor. We have already recognized that the Legislature's purpose in limiting the length of exposure to medical malpractice cases is a legitimate one. *Rankin*, 307 S.W.3d at 287–88; *Sax*, 648 S.W.2d at 667. As to the second factor,

[4] "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16.

the Court recognizes that M.R.'s claim for medical negligence in utero is an "established cause[] of action in Texas." ___ S.W.3d at ___. Because these factors weigh in opposing directions, the third factor is the crux of the Court's conclusion. As to that factor, the Court holds that the extent of the impairment to M.R.'s rights is significantly lessened by the fact that she had a three-year grace period following the statute's enactment to pursue her claim before the repose period expired, despite the fact that she could not do so on her own behalf. *Id.* at ___. Because there is evidence that Rivera knew of the claim but failed to timely assert it, and finding "no indication in the record that Rivera is legally incompetent or possesses a conflict of interest with [M.R.]," the Court finds this grace period persuasive. *Id.* at ___.

This conclusion is at odds with our recognition in *Weiner* that a parent's failure to sue on behalf of a minor affects neither the tolling of the limitations period nor the constitutionality of the Medical Liability Act's statute of limitations under the open courts provision. 900 S.W.2d at 318–19. We criticized as "unworkable" a standard that "would inquire whether the minor's parent was 'incompetent' or had a 'conflict of interest' that prevented the parent from acting in the minor's best interests." *Id.* at 320. For the same reason a parent's right to take action on his child's behalf is irrelevant to an open courts challenge, it has no bearing on the extent of a retroactive statute's impairment of a minor's rights. In other words, while Rivera had a three-year grace period to assert M.R.'s claims, M.R. herself had no grace period at all because the statute of repose absolutely extinguished her negligence claim before she was legally capable of asserting it. I would therefore hold that the presumption against the statute's constitutionality was not overcome.

III. Conclusion

However legitimate a statute's purpose, the Legislature may not abrogate a child's established common law cause of action before that child reaches the age of majority. The Medical Liability Act's statute of repose does exactly that in this case, violating the Texas Constitution's open courts guarantee as well as its prohibition against retroactive laws. Because the Court holds otherwise, I respectfully dissent.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0103

KING FISHER MARINE SERVICE, L.P., PETITIONER,

v.

JOSE H. TAMEZ, RESPONDENT

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

Argued December 5, 2013

JUSTICE BROWN delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE LEHRMANN, and JUSTICE BOYD joined.

JUSTICE GUZMAN filed a dissenting opinion, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, and JUSTICE DEVINE joined.

In this case we consider whether a trial court must entertain charge objections up to the time it charges the jury or whether it acts within its discretion in setting an earlier deadline. We also consider whether sufficient evidence supported the jury's finding that an injured seaman was following a specific order and was therefore excepted from contributory negligence. The court of appeals concluded the trial court acted within its discretion in refusing to hear a last-minute charge objection and that sufficient evidence supported the jury's specific-order finding. For the reasons below, we affirm.

I

Jose Tamez was working as a welder on board the *Leonard M. Fisher*, a dredging vessel operated by King Fisher Marine Service, L.P., when he injured his left arm helping two crew members lift a large and heavy socket-wrench assembly. The assembly, which consists of a long shaft inserted into the edge of a large socket, is used to loosen and tighten a nut that secures a "cutterhead" to the ship. The cutterhead extends from the ship to the floor of the channel that is being dredged. The crew must periodically unattach and reattach the cutterhead to accommodate extensions that enable it to reach the desired depth. Attaching or unattaching the cutterhead requires the assistance of several crew members. Following the attachment, a crew member welds a cap over the nut to hold it in place.

The crew was in the process of reattaching the cutterhead when Tamez was injured lifting the socket while two crewmates, Captain Jorge Cordova and Deck Captain Ricardo Delgado, lifted the shaft. The three men were the only witnesses to the incident. Delgado testified he remembered essentially nothing, leaving Tamez and Cordova to offer their respective accounts of what happened.

Tamez testified he had finished cutting a cable near the cutterhead and was carrying his welding torch when he walked around the cutterhead to find Cordova and Delgado "trying to remove the socket and the shaft with their hands" while the assembly "was almost falling." Tamez testified Cordova "demanded, yelled out for [him] to help them fast because it was going to fall." Tamez further recalled, "I had the torch on the right arm, so I used my left arm to help them." He did not stop to set down his torch, Tamez said, "[b]ecause [Cordova] yelled. It was to do it fast."

Cordova agreed he ordered Tamez to assist, but testified he and Delgado had not attempted to lift the assembly before he called on Tamez to help, at which time the three men lifted the assembly together only after Tamez was "in position." Cordova testified he and Delgado would not have attempted to lift the socket without Tamez because they needed Tamez, the welder, to weld the cap over the nut once it was in place. Cordova further testified that he twice asked Tamez if he was ready to lift and that Tamez was not holding his welding torch at the time. Lifting the assembly with one hand, Cordova testified, would be impossible.

Tamez successfully removed the socket but later reported he was hurt in the process. He sued King Fisher under the Jones Act, 46 U.S.C. § 31014, arguing he was injured working under a specific order to lift equipment that the crew should have lifted with mechanical assistance or with additional manpower. Under maritime law, a "specific order" is one in which the seaman is ordered to do a specific task in a specific manner or is ordered to do a task that can be accomplished in only one way. *Weeks Marine, Inc. v. Garza*, 371 S.W.3d 157, 166–67 (Tex. 2012). When a seaman is carrying out a specific order, his damages may not be reduced by a finding of contributory negligence. *Id.* at 166. King Fisher denied Tamez was working under a specific order and argued he was contributorily negligent. The jury found Tamez was working under a specific order to lift the socket and awarded him $420,000, but also found him 50% at fault for his injuries. Based on the jury's specific-order finding, however, the trial court did not reduce Tamez's award.

On appeal, King Fisher argued the evidence was insufficient to support the jury's specific-order finding and that the trial court abused its discretion in refusing the specific-order definition that King Fisher proposed adding to the jury charge. The court of appeals concluded both that there was

sufficient evidence to support the specific-order finding and that the trial court did not abuse its discretion in refusing the proposed definition as untimely. Before this Court, King Fisher reurges its argument that the trial court was bound to entertain its last-minute charge objection. In addition, King Fisher argues the court of appeals erred in its sufficiency review by relying on Ninth Circuit precedent to expand the narrow specific-orders exception beyond the boundaries this Court previously recognized in *Garza*.

II

A

We first address whether the trial court erred in refusing to consider for inclusion in the jury charge King Fisher's proposed definition of a specific order. King Fisher's request came the morning after the formal charge conference and minutes before the trial court would read the charge to the jury. Upon receiving King Fisher's objection to the charge and proposed definition, the trial court asked Tamez's counsel whether he had seen the offer. Counsel acknowledged seeing it but maintained he had not had enough time to verify that it was "the proper instruction in substantially correct form." The trial court then refused the instruction "mainly because it's not timely," adding that "we needed to have all this stuff done and in by yesterday."

When King Fisher's counsel protested that he was entitled under the Rules of Civil Procedure to lodge his objection, the trial court responded: "And that may be the rules, but my ruling to you was, everything needed to be in beforehand, and yesterday was the charge conference, and therefore, it needed to be done before the charge conference, not, you know, two minutes before I'm bringing in the jury." Indeed, as King Fisher's counsel finished making his objections to the charge at the

formal charge conference the previous afternoon, the trial court warned the parties: "[T]omorrow when we come in, I'm not going to mess with this any further . . . . [W]hen you leave, you better be very happy with it, or unhappy, but satisfied that we got everything in that reflects my ruling." The parties apparently understood the seriousness of this warning; when King Fisher's counsel offered the specific-order definition the next morning, he conceded his understanding "from the discussions yesterday that all [King Fisher's new] objections will be overruled." He added: "I apologize for not making [the objections] yesterday, and I appreciate the Court's ruling on them before the charge is read."

Nevertheless, King Fisher argues the trial court abused its discretion in refusing its proposed definition as untimely. According to King Fisher, both Rule 272 of the Rules of Civil Procedure and our precedent in *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235 (Tex. 1992), provide that King Fisher's objection was timely and preserved error on appeal. The court of appeals disagreed, concluding that the trial court afforded King Fisher ample opportunity to present its proposed instruction and that refusing the instruction on the morning the charge was to be read was not an abuse of discretion. *King Fisher Marine Serv., L.P. v. Tamez*, No. 13-10-00425-CV, 2012 WL 1964567, at *6 (Tex. App.—Corpus Christi May 31, 2012, pet. granted) (mem. op.).

B

We review *de novo* any question regarding the proper interpretation of Rule 272. *See Long v. Castle Tex. Prod. Ltd. P'ship*, 426 S.W.3d 73, 78 (Tex. 2014). A trial court's rejection of a

proposed definition is reviewed for abuse of discretion. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000).

King Fisher argues that Rule 272 of the Rules of Civil Procedure mandates that a trial court accept objections to the charge up to the moment it is read to the jury and that trial courts have no discretion to alter this deadline. The trial court's only discretion in the matter, King Fisher maintains, is its latitude in determining when it will charge the jury, which in turn sets a concomitant deadline for objections to the charge.

Tamez, on the other hand, argues the trial court's discretion allowed it to set an earlier deadline for charge objections and that Rule 272 demands only that the trial court afford the parties a "reasonable time" to "examine and present objections" to the charge. The trial court gave King Fisher sufficient time to review the charge and make objections, Tamez argues, and the trial court acted within its discretion in refusing to consider King Fisher's objection, made just minutes before the trial court was to read the charge.

C

Trial courts have "inherent power to control the disposition of cases 'with economy of time and effort for itself, for counsel, and for litigants.'" *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001) (per curiam) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Accordingly, the "'discretion vested in the trial court over the conduct of a trial is great.'" *Id.* (quoting *Schroeder v. Brandon*, 172 S.W.2d 488, 491 (Tex. 1943)). This discretion empowers a trial court to fulfill "a duty to schedule its cases in such a manner as to expeditiously dispose of them." *Clanton v. Clark*, 639 S.W.2d 929, 930 (Tex. 1982).

Nevertheless, King Fisher argues Rule 272 prohibits trial courts from establishing a deadline for charge objections earlier than the reading of the charge to the jury. Rule 272 provides in pertinent part:

> The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived.

Tex. R. Civ. P. 272.

The rule provides that a trial court may not consider any objections made after the charge is read to the jury. But it does not follow that a trial court is obligated to consider *every* objection made before the charge is read to the jury. Instead, the plain language of the rule sets an outside limit for charge objections. Tamez correctly argues that objecting before the charge is read to the jury is a necessary, but not always sufficient, step toward having the trial court review the merits of the objection.

Rule 272 mandates trial courts to afford the parties a "reasonable time" to inspect the charge and present objections outside the presence of the jury. Nothing in the rule prohibits a trial court from setting a deadline for charge objections that may expire before it charges the jury as long as the deadline affords the parties a "reasonable time" to inspect and object to the charge. Rule 272's reliance on reasonableness invites, rather than restricts, trial-court discretion. Accordingly, while the rule strictly prohibits objections after the charge is read, it affords trial courts latitude in addressing

objections made before. And it is not surprising that many trial courts would prefer to avoid the confusion and scheduling difficulties that would arise if objections were allowed up to the moment the court plans to charge the jury.

D

Those courts of appeals which have encountered charge-objection deadlines all have one thing in common—none has questioned trial courts' authority to set such a deadline. Rather, in each case the inquiry focused on the reasonableness of the time allowed to review and object to the charge, which is exactly what the plain language of Rule 272 contemplates.

The earliest case in which a charge-objection deadline was at issue is *Federal Underwriters Exchange v. Tubbe*, 180 S.W.2d 473 (Tex. Civ. App.—Amarillo 1944), *rev'd on other grounds*, 143 Tex. 266 (1944). There, the trial court handed a portion of its charge to the parties during trial and the remainder after the close of evidence. *Tubbe,* 180 S.W.2d at 477. The parties were given an hour and a half to review and object to the charge. *Id.* One of the parties objected to the short period of time. *Id.* The court of appeals ultimately did not evaluate the reasonableness of the time allotted because it concluded the appellant failed to show any harm. *Id.* But the court of appeals never questioned the trial court's authority to set a deadline. Rather, citing Rule 272, the court of appeals noted that "[t]he time allowed attorneys to examine the court's charge and prepare exceptions and objections thereto is discretionary with the trial judge, who should fix a reasonable time under all the circumstances." *Id.*

The Amarillo court of appeals again encountered a charge-objection deadline in *Hargrove v. Texas Employers' Insurance Association*, 332 S.W.2d 121 (Tex. Civ. App.—Amarillo 1959, no

writ). After the close of evidence, the trial court presented the parties with the court's charge, and the parties lodged objections. *Hargrove*, 332 S.W.2d at 122–23. The trial court made a revised charge available for the parties the same day and told them further objections were due by 9:00 the following morning. *Id.* The plaintiff missed the deadline and did not object until the trial court convened the following morning and began charging the jury. *Id.* at 123. The court of appeals held the plaintiff waived complaint by failing to object before the trial court began charging the jury. *Id.* But it is noteworthy that no one argued the trial court's deadline was unreasonable. Instead, the court of appeals articulated the same understanding of Rule 272 as it had offered in *Tubbe*. *Id.*

In *Austin State Hospital v. Kitchen*, the trial court held an "initial charge conference," received objections, and then recessed for lunch. 903 S.W.2d 83, 89–90 (Tex. App.—Austin 1995, no writ). One of the parties returned from lunch with an additional objection, which the trial court overruled because it "came too late or should be overruled on the merits." *Id.* at 90. After concluding that the objecting party had preserved error under *Payne*, the court of appeals reviewed the trial court's decision for abuse of discretion. *Id.* at 93. The court of appeals concluded that because the trial court did not set a deadline in advance and did not rely solely on a "procedural technicality" in overruling the objection, the ruling was made on the merits of the objection. *Id.* Importantly, the court of appeals never held or suggested the trial court did not have authority to set a deadline for charge objections, only that it had not actually done so.

In *Deaton v. United Mobile Networks, L.P.*, the trial court conducted a nearly four-hour charge conference, during which the court combined portions of the parties' proposed charges and announced the court's charge would be submitted the following day. *See* 926 S.W.2d 756, 765 (Tex.

App.—Texarkana 1996), *aff'd in part, rev'd in part on other grounds*, 939 S.W.2d 146 (Tex. 1997). Counsel requested additional time to review the charge, and the trial court, after bemoaning counsel's "interminable and repetitious complaints," offered the parties an additional hour for review. *Id.* Claiming an additional hour was not enough, the Deatons' counsel declined the offer, and the trial court concluded the charge conference. *Id.* The court of appeals rejected any suggestion the trial court lacked authority to set a charge-objection deadline, noting instead that "[c]ounsel has directed this [c]ourt to no authority suggesting that the trial court erred by setting an ending time for objections." *Id.* Instead, the court of appeals properly limited its inquiry to whether the time allowed was reasonable and concluded it was.

Just a year later, the Texarkana court of appeals encountered another charge-objection deadline in *Bekins Moving & Storage Co. v. Williams*, 947 S.W.2d 568 (Tex. App.—Texarkana 1997, no writ). There, the court of appeals concluded the trial court did not abuse its discretion by giving counsel only thirty minutes to examine a charge before taking objections when most of the charge "had been in counsel's possession for four days and which had only been changed to consolidate some damage issues." *Id.* at 575–76. Once again, the court of appeals evaluated the reasonableness of the time given the parties but never questioned the trial court's authority to set a deadline in the first place.

Although none of these cases is on all fours with this case or binding upon this Court, they demonstrate that while several courts of appeals have encountered charge-objection deadlines, none has balked at the trial court's authority to impose them. Instead, each has simply reviewed whether the trial court gave the parties what Rule 272 requires—a "reasonable time" to review and object to

the charge. Rule 272's plain language has led to the courts of appeals' consistent analysis in this regard. We likewise conclude Rule 272 plainly grants trial courts authority to set a deadline for charge objections that falls before the reading of the charge to the jury. When such a deadline is set, we ask only whether a reasonable time was allowed to review and object to the charge.

E

Although King Fisher did not meet the trial court's charge-objection deadline, it did preserve error under Rule 272's requirement to object before the jury was charged and under the standard we set forward in *Payne.* 838 S.W.2d at 241. There is no question the trial court was aware of King Fisher's complaint before the jury was charged and ruled on it. Error was preserved, and the only remaining issue is whether the trial court's charge-objection deadline resulted in an unreasonable amount of time for the parties to review and object to the charge.

We find the time afforded was reasonable. King Fisher knew well in advance of trial that the specific-orders exception would be an issue in the jury charge. Tamez filed with the trial court eighteen days before trial a proposed jury charge including a specific-order question, putting King Fisher on notice that Tamez would push to have the question included. King Fisher responded with a "trial memorandum" six days later, arguing that the specific-orders exception did not apply.

Four days into trial the trial court held what the parties describe in their briefing as an informal charge conference. At that time, Tamez's counsel told the court the specific-order question was a significant point of disagreement between the parties. The trial court urged the parties to work together that evening to resolve charge issues in anticipation of a formal charge conference the next day.

At 9:05 the next morning, Tamez filed an amended proposed jury charge. After evidence closed shortly after noon, Tamez's counsel informed the trial court his new proposed charge contained modifications the parties agreed to the previous evening. The trial court apparently had not yet seen the new proposed charge and instructed the parties to return that afternoon for the formal charge conference. The record suggests the parties likely spent some of the intervening time working on the charge with the trial court off the record. At any rate, it is clear the trial court added the specific-order question to the charge before the formal charge conference began.

At the formal charge conference, King Fisher lodged three objections to the specific-order question, but never proposed a definition. The formal charge conference lasted nearly an hour, and near its conclusion the trial court admonished the parties that all objections should be made before the conference ended and that the trial court would not revisit the charge the next morning. Importantly, the trial court never set a deadline for the formal charge conference to end, nor did it limit the time the parties had to review its charge. It simply required the parties to make all their objections at the formal charge conference, and it did not end the formal charge conference until the parties had exhausted their objections. The parties were not under pressure to lodge objections by a time certain, nor was the formal charge conference adjourned under protest from either party.

Because the specific-orders exception was an issue between the parties in this case well before trial, the trial court's inclusion of a specific-order question in its charge could not have taken King Fisher by surprise. Even if the parties received the court's charge immediately before the formal charge conference, King Fisher does not argue anything in the charge departed from the trial court's prior rulings or that the trial court did anything more than capture what the parties had

already discussed and knew was coming. The parties knew the first order of business when the trial court reconvened the next morning was to charge the jury. Yet King Fisher did not offer its proposed definition until just before the trial court was to bring in the jury. Under these facts, the trial court provided the parties a "reasonable time" to review and object to the charge, and acted within its discretion in refusing as untimely King Fisher's proposed definition.

Though we hold the trial court did not abuse its discretion, we do not necessarily endorse its decision. Trial courts can and should encourage adherence to their deadlines. Keeping a trial on schedule benefits everyone involved—trial courts benefit from the ability to manage the demands presented by their overall docket, jurors benefit from a managed, efficient trial that minimizes what already is an imposition on their daily lives, and parties and their counsel benefit from the equity that follows clear expectations. Nevertheless, these interests should be balanced with a trial judge's ultimate duty to provide the jury with a legally correct charge.

This Court has previously observed that "[o]ne of the main purposes of Rule 272 is to enable the trial court to submit a proper charge to the jury and to have the prior benefit of counsel's objections so as to correct any errors that might otherwise occur." *Mo. Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973). We also have recognized that the preparation of the charge comes "at that very difficult point of the trial between the close of the evidence and summation" and often forces counsel to navigate "complex, intricate, sometimes contradictory, unpredictable rules, just when counsel is contemplating the last words he or she will say to the jury." *Payne*, 838 S.W.2d at 240. Even the most skilled and experienced counsel will sometimes miss valid charge objections during informal and formal charge conferences. An objection that may seem obvious to an appellate

court perusing a cold record may occur to battle-weary trial counsel only when the fog of war has lifted after a long day in the courtroom, or simply after a decent night's sleep. Trial courts should therefore make every effort to entertain on the merits a charge objection brought in good faith after conclusion of the formal charge conference but before the charge is read to the jury.

In this case, there is no evidence King Fisher raised its last-minute objection in bad faith or that its objection was groundless or intended only to delay the proceedings. The trial court presumably could have entertained the objection at issue with minimal delay to the day's proceedings. In refusing to do so, the trial court potentially risked placing its own schedule above the integrity of the charge.

But we decline to fashion a rule constraining all trial courts based on the facts of this case. A mandate for trial courts to entertain objections lodged at any time up until the charge is read to the jury is at odds with the discretion built into the plain language of Rule 272. Moreover, it is not sound policy. The rule King Fisher proposes essentially would put attorneys in charge of the trial in the time between the formal charge conference and the reading of the charge to the jury. Under such a paradigm, counsel may not take the formal charge conference seriously or prepare studiously knowing the court is powerless to refuse objections made after the charge conference is over. Moreover, such a rule would cripple the trial court's ability to prevent intentional or unnecessary delay caused by objections brought after the formal charge conference.

These concerns are not merely speculative. In *Deaton*, the trial court complained of counsel's "interminable and repetitious" objections after laboring through a nearly four-hour charge conference. 926 S.W.2d at 765. When counsel requested additional time, the trial court offered

another hour. *Id.* Counsel declined, saying it was inadequate. *Id.* So the trial court ended the charge conference, only to have counsel appear the next morning with an additional forty pages of objections and proposed additional charges. *Id.* Under the rule King Fisher advocates, a trial court facing a similar situation must consider each objection on the merits, regardless of the frivolity of the objections or any delay they add to the trial.

To summarize, we hold that Rule 272 affords trial courts the discretion to set a deadline for charge objections that precedes the reading of the charge to the jury as long as a reasonable amount of time is afforded for counsel to examine and object to the charge. We agree with the court of appeals that the trial court provided a reasonable amount of time in this case. Accordingly, we affirm the court of appeals' determination that the trial court did not abuse its discretion in refusing King Fisher's last-minute objection and proposed definition for the specific-order question.

III

Finally, we consider King Fisher's argument that insufficient evidence supported the jury's finding that Tamez was following a specific order when he was injured. Ordinarily, any damages recoverable by an injured seaman are reduced on a percentage basis by a jury's finding that the seaman's negligence contributed to his damages. *Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 302 (5th Cir. 2008). However, under admiralty law, recovery may not be reduced by contributory negligence if the seaman was responding to a specific order. *Garza*, 371 S.W.3d at 166.

King Fisher argues that the court of appeals relied upon a Ninth Circuit expansion of the specific-orders exception to conclude that sufficient evidence supported the jury's finding. In *Simeonoff v. Hiner*, the Ninth Circuit enlarged the specific-orders exception to cover a seaman who

responds to a general order in a perceived emergency situation, reasoning that "[a] seaman cannot safely pause to assess the dangers of responding to an urgent, general call for help from a superior." 249 F.3d 883, 890–91 (9th Cir. 2001).

However, the court of appeals' holding does not rest on the *Simeonoff* expansion. The court of appeals cites *Simeonoff* only once for the foundational proposition that "[i]n maritime law, comparative negligence bars an injured party from recovering damages sustained as a result of his own fault." *King Fisher*, 2012 WL 1964567, at *3 (citing *Simeonoff*, 249 F.3d at 889–90). The court of appeals never mentions the expansion *Simeonoff* created, nor did it apply *Simeonoff* to the facts of this case.

This Court expressly declined to consider the *Simeonoff* expansion under the facts presented in *Garza*. 371 S.W.3d at 167 n.13. And because there is sufficient evidence to support the jury's specific-order finding in this case even without help from the *Simeonoff* expansion, we will not consider it here. Accordingly, we limit our sufficiency review to the standard we articulated in *Garza*—the specific-orders exception "applies only when the seaman is ordered to do a specific task in a specific manner or is ordered to do a task that can be accomplished in only one way." *Garza*, 371 S.W.3d at 167. A seaman receives a specific order when his "only options are either to complete the task or disobey the order." *Id.* In conducting a sufficiency review in Jones Act cases, we are required to set aside our traditional legal-sufficiency standard in favor of one that vests the jury "with complete discretion on factual issues." *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998) (citing *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506–07 (1957)). Once an appellate court determines that some evidence about which reasonable minds could differ supports the verdict, the

appellate court's review is complete. *Id.* (citing *Tex. & Pac. Ry. Co. v. Roberts*, 481 S.W.2d 798, 800 (Tex. 1972)).

In *Garza*, a supervisor instructed Garza to retrieve some tools. *Garza*, 371 S.W.3d at 167. Garza testified there was only one route to the tools and, while walking there, the supervisor released a steel friction bar that hit Garza in the head from behind. *Id*. We held the jury could have concluded that the only way Garza could have avoided danger was to disobey his supervisor. *Id*. at 167.

King Fisher focuses on Tamez's testimony that, while still holding his welding torch, he lifted the socket using only his left arm. Because setting down the torch and lifting with both hands was an option available to Tamez, King Fisher argues he was not following a specific order. But Tamez's was not the only account of the accident. Cordova, one of the three witnesses to the accident, denied he and Delgado were struggling with the assembly before Tamez was ordered to help. Rather, Cordova testified all three men were in position and lifted the assembly together after Cordova twice asked Tamez whether he was ready to lift. Tamez was not holding his welding torch and lifted with both hands, Cordova testified. Cordova further testified there was "no way" Tamez would be able to lift the assembly with one hand.

Under Cordova's version of the events, he gave Tamez an order to lift the assembly that could be performed in only one way—lifting with both hands—which Cordova testified Tamez did. Based on Cordova's testimony, the jury could have determined that the only two options before Tamez was to lift the assembly with both hands (as doing so with one hand would be impossible) or disobey the order. Cordova's testimony furnishes "some evidence about which reasonable minds

could differ." *See Ellis*, 971 S.W.2d at 406. Accordingly, sufficient evidence supported the jury's specific-order finding.

* * *

Having concluded the trial court did not abuse its discretion in refusing to consider King Fisher's requested specific-order definition and that there was sufficient evidence to support the jury's specific-order finding, we reject both of King Fisher's arguments and affirm the judgment of the court of appeals.

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Jeffrey V. Brown
Justice

OPINION DELIVERED: August 29, 2014

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NO. 13-0103

KING FISHER MARINE SERVICE, L.P., PETITIONER,

v.

JOSE H. TAMEZ, RESPONDENT

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

JUSTICE GUZMAN, joined by CHIEF JUSTICE HECHT, JUSTICE GREEN, and JUSTICE DEVINE, dissenting.

For almost 100 years, our rules have expressly allowed a party to lodge objections to the charge before the trial court reads the charge to the jury. Unsurprisingly, we previously observed that Texas Rule of Civil Procedure 272 "requires a party to object to the charge . . . before the court reads the charge to the jury."[1] Equally unsurprising is the fact that before this case, no party had asked this Court if Rule 272 means what it says or if we stand by our prior observation. Yet today, the Court reverses course and discards the Rule's brightline approach in favor of a system riddled with uncertainty and potential for abuse. In addition to conflicting with the plain language of the Rule and our prior interpretation, the Court's interpretation is at odds with our principle of liberally interpreting rules of procedure in order to resolve cases on the merits instead of relying on procedural technicalities.

[1] *In re J.F.C.*, 96 S.W.3d 256, 305 (Tex. 2002).

The petitioner here complied with the Rule and our prior interpretation of it by objecting shortly before the trial court read the charge—only to have the trial court reject the objection as untimely. In affirming this ruling, the Court today elevates adjudication on procedural technicalities above adjudication on the merits, despite both our longstanding preference to the contrary and the plain language of the Rule. I respectfully dissent.

I. Background

Jose Tamez sued his employer King Fisher Marine Service after he was injured on board a company vessel. Tamez alleged he was injured while following a "specific order," a maritime doctrine absolving a sailor of his contributory negligence. __ S.W.3d __, __. At trial, King Fisher objected to the court's charge, which failed to define what constitutes a specific order, and tendered a proposed definition. The trial court refused King Fisher's tender, "mainly because it's not timely" and reprovingly noted "we needed to have all this stuff done and in by yesterday." Counsel for King Fisher countered: "I would respectfully disagree as to the timing. All I have to do is get it in before the charge is read, under the rules . . . ." The court replied, "that may be the rules, but my ruling to you was, everything needed to be in beforehand, and yesterday was the charge conference, and therefore, it needed to be done before the charge conference, not, you know, two minutes before I'm bringing in the jury." This colloquy provides the context for the important interpretation issue we address today. Namely, may a trial court elevate docket management above the express language of Rule 272 by denying an objection to the jury charge solely because the attorney raised the objection after the charge conference but before the court read the charge to the jury?

II. Discussion

The Court correctly holds that King Fisher preserved error for appeal and there is some evidence that Tamez followed specific orders. The Court's interpretation of Rule of Civil Procedure 272, however, is at odds with our longstanding principle of liberally interpreting the rules of procedure, the plain language of Rule 272, our prior interpretation of the Rule, the dominant interpretation in the courts of appeals, the history of the Rule, and the application of similar rules in other jurisdictions. Accordingly, I join Parts I, II.A–B, and III of the Court's opinion, but respectfully dissent from its interpretation of Rule 272 and the judgment.

A. Standard of Review

We review a trial court's decision to refuse instructions for abuse of discretion. An abuse of discretion is a decision that is arbitrary, unreasonable, or made without reference to guiding legal rules. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). A trial court has no discretion in determining what the law is or applying the law to the facts. *Huie v. DeShazo*, 922 S.W.2d 920, 927 (Tex. 1996). Had the trial court considered the merits of King Fisher's proposed instruction and refused it, that ruling would be cloaked with at least a patina of discretion, and we would only set it aside if it was arbitrary or made without reference to guiding rules. *Honeycutt*, 24 S.W.3d at 360. But here, the trial court determined the objection was untimely, which subjects its interpretation of Rule 272 to de novo review.

As an initial matter, I note we have long favored liberal interpretation of the rules to ensure substantive adjudication. Our systems of justice have a "deep-rooted historic tradition that everyone

should have his own day in court."[2] Texas Rule of Civil Procedure 1 embodies this principle by emphasizing that "[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." TEX. R. CIV. P. 1. Toward that end, "these rules shall be given a liberal construction" to balance the need for equitable adjudication against the desire for expedience.[3] *Id.* We have continually adhered to this principle.[4] And we have applied it to liberally interpret a number of rules of civil and appellate procedure.[5] In conducting our de novo review, we once again adhere to this principle by protecting the rights of litigants to have their disputes adjudicated on the merits.

B. Rule 272

The plain language of Rule 272 allows parties to object to the jury charge before the court reads the charge to the jury. The Rule provides:

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[2] *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

[3] *Cf. Higgins v. Randall Cnty. Sheriff's Office*, 257 S.W.3d 684, 688 (Tex. 2008) ("[W]e have long interpreted the Rules of Appellate Procedure liberally in favor of preserving appellate rights.").

[4] *See, e.g.*, *In re R.D.*, 304 S.W.3d 368, 370 (Tex. 2010) ("Where practical, the rules of civil procedure are to be given a liberal construction in order to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law."); *El Paso Cent. Appraisal Dist. v. Montrose Partners*, 754 S.W.2d 797, 799 (Tex. 1988) ("Rules of Civil Procedure are to be given liberal construction.").

[5] *See, e.g.*, *Woods Exploration & Prod. Co., Inc. v. Arkla Equip. Co.*, 528 S.W.2d 568, 570 (liberally interpreting Rule 430); *Plains Growers, Inc. v. Jordan*, 519 S.W.2d 633 (Tex. 1974) (liberally interpreting Rule 330(b)); *Gotham Ins. Co. v. Warren E & P, Inc.*, __ S.W.3d __, __ (Tex. 2013) (liberally interpreting the right to cross-appeal under Rule of Appellate Procedure 25.1); *City of Austin v. Whittington*, 384 S.W.3d 766, 789 (Tex. 2012) (same); *see also Higgins*, 257 S.W.3d at 688 (relying on a liberal interpretation of the Rules of Appellate procedure to hold a procedurally incomplete affidavit adequate to fulfill the fundamental purpose of Rule 20.1); *Rep. Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) (liberally interpreting Rule of Appellate Procedure 38.1(h) to preserve an appellant's right to appeal despite a procedural error); *Kunstoplast of Am., Inc. v. Formosa Plastics Corp.*, 937 S.W.2d 455, 456 (Tex. 1996) (liberally interpreting Rule of Appellate Procedure 40(a)(1) to preserve an appellant's right to appeal).

> The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, *which objections shall in every instance be presented to the court* in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, *before the charge is read to the jury*. *All objections not so presented shall be considered as waived*. . . .

TEX. R. CIV. P. 272 (emphases added).

Rule 272 plainly imposes two constraints. The first is that parties must object before the court reads the charge to the jury. *Id.* The second is that trial courts must allow parties a reasonable amount of time to object (*i.e.*, the trial court must not give the parties the charge for the first time as the jury is entering). *Id*. On the only previous occasion this Court interpreted Rule 272, the Court rightly observed that it "requires a party to object to the charge . . . before the court reads the charge to the jury." *In re J.F.C.*, 96 S.W.3d 256, 305 (Tex. 2002). This observation merely reaffirms the plain meaning of the Rule.

Today, however, the Court interprets Rule 272 as imposing a reasonableness test, with the before-the-charge requirement setting an "outside limit" on when the trial court may set the charge conference and when objections must be raised. The Court's interpretation inverts these two constraints by imposing the reasonable-time requirement on the *party* (it must object within a reasonable time) and the before-the-charge requirement on the *court* (it must schedule the charge conference at a time sufficiently before the court reads the charge). This interpretation not only distorts the plain language of Rule 272, it conflicts with our interpretation in *J.F.C.*

Moreover, the Court's interpretation today is in tension with lower court interpretations. Our appellate courts have largely articulated the correct interpretation of Rule 272, typically relying on our guidance in *State Department of Highways and Public Transportation v. Payne.* In that case, we held "[t]here should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." 838 S.W.2d 235, 241 (Tex. 1992). Under *Payne*, an objection lodged after the charge conference—but before the court reads the charge—still allows the trial court to correct its potential error. Citing *Payne*, a number of our courts of appeals have correctly articulated that under Rule 272, a party waives its complaint by failing to object before the court reads the charge to the jury.[6] Under the Court's interpretation today, these cases would have stated that a party waives

[6] *See, e.g.*, *Willie v. Comm'n for Lawyer Discipline*, No. 01-11-00433-CV, 2014 WL 586226, at *3 (Tex. App.—Houston [1st Dist.] Feb. 13, 2014, no pet.) ("In order to preserve a complaint regarding the court's charge, a party must specifically object to the charge before it is read to the jury (either orally or in writing) and obtain a ruling on the objection." (citing *Payne*, 838 S.W.2d at 241)); *Bobbora v. Unitrin Ins. Serv.*, 255 S.W.3d 331, 337 (Tex. App.—Dallas 2008, no pet.) ("If the party does not present the objection to the court before the court reads the charge to the jury, he waives his objection."); *In re N.A.L. & N.R.L.*, No. 04-13-00159-CV, 2013 WL 4500633, at *2 (Tex. App.—San Antonio Aug. 21, 2013, no pet.) ("In deciding if a party has preserved error in the jury charge, we determine 'whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.'" (quoting *Payne*, 838 S.W.2d at 241)); *In re Estate of May*, No. 09-10-00024-CV, 2011 WL 497068, at *1 (Tex. App.—Beaumont Feb. 10, 2011, pet. denied) ("Rule 272 of the Texas Rules of Civil Procedure requires that a party object to the court's charge, either orally or in writing, before the charge is read to the jury." (citing *Payne*, 838 S.W.2d at 241)).

its complaint by failing to object *during the charge conference*.[7] The secondary literature tends to reflect the predominant court of appeals interpretation as well.[8]

The Court's interpretation is also in tension with the history of the Rule. Rule 272 has always required courts to give parties a "reasonable time" to examine the proposed charge and object. TEX. R. CIV. P. 272; VERNON'S ANN. REV. CIV. ST. art. 2185. Initially, the Rule required trial courts to prepare the charge after the conclusion of the evidence.[9] VERNON'S ANN. REV. CIV.

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[7] The Court indicates that several courts of appeals have not "balked at the trial court's authority to impose" charge-objection deadlines. __ S.W.3d at __ (citing *Bekins Moving & Storage Co. v. Williams*, 947 S.W.2d 568, 575–76 (Tex. App.—Texarkana 1997, no writ); *Deaton v. United Mobile Networks, L.P.*, 926 S.W.2d 756, 765 (Tex. App.—Texarkana 1996), *aff'd in part, rev'd in part on other grounds*, 939 S.W.2d 146 (Tex. 1997); *Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 93 (Tex. App.—Austin 1995, no writ); *Hargrove v. Tex. Emp'rs Ins. Ass'n*, 332 S.W.2d 121, 122–23 (Tex. App.—Amarillo 1959, no writ); *Fed. Underwriters Exch. v. Tubbe*, 180 S.W.2d 473, 477 (Tex. App.—Amarillo 1944), *rev'd on other grounds*, 183 S.W.2d 121 (Tex. 1944). But none of these cases involved a situation in which the trial court solely rejected as untimely an objection submitted before the trial court read the charge to the jury, thereby truncating the time afforded parties to lodge objections. *See Bekins*, 947 S.W.2d at 575–76; *Kitchen*, 903 S.W.2d at 93; *Deaton*, 926 S.W.2d at 765; *Hargrove*, 332 S.W.2d at 123; *Tubbe*, 180 S.W.2d at 477. Moreover, the *Kitchen* court interpreted the statute in a manner that undercuts the Court's holding. In *Kitchen*, the trial court refused an objection submitted before it read the charge both because it deemed the objection untimely *and* unavailing on substantive grounds. 903 S.W.2d at 93. Citing this Court's precedent, the court of appeals concluded that a party preserves error by raising an objection in time for the trial court to correct its error. *Id*. The *Kitchen* court proceeded to assess the merits of the objection, reversed, and remanded for a retrial because the objection was proper and should have been sustained. *Id*. at 93–94. Had the *Kitchen* court interpreted Rule 272 as the Court does today, it would simply have held the instruction was untimely.

[8] *See, e.g.*, William G. "Bud" Arnot, III & David Fowler Johnson, *Current Trends in Texas Charge Practice: Preservation of Error and Broad-Form Use*, 38 ST. MARY'S L.J. 371, 383 (2007) ("A party must raise its objections before the charge is read to the jury."); David E. Keltner & Melinda R. Burke, *Protecting the Record for Appeal: A Reference Guide in Texas Civil Cases*, 17 ST. MARY'S L.J. 273, 349 (1986) ("After the charge is prepared, but before it is delivered to the jury, the judge must give the parties an opportunity to examine and present objections to the court's charge . . . objections to the court's charge may . . . be dictated to the court reporter in the presence of the judge and opposing counsel prior to submission of the charge to the jury."); William D. Ellerman, *Crafting the Jury Charge*, in STATE BAR OF TEXAS, HANDLING YOUR FIRST JURY TRIAL, at 4 (2012) ("Absent rare exceptions, the attorneys must make their formal objections and requests for submission before the trial court reads the charge to the jury.") (citing TEX. R. CIV. P. 272)).

[9] That statutory predecessor to Rule 272 provided:

> The charge . . . shall be prepared *after the evidence has been concluded* and shall be submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine and present objections thereto, which objections shall in every instance be presented to the

ST. art. 2185. Understandably, it has always been necessary to afford parties a reasonable amount of time after reviewing the proposed charge to object. Otherwise, a trial court could potentially leave the parties with no meaningful opportunity between the close of evidence and the reading of the charge. The only material difference reflected in the current Rule is that it omits the requirement that the court prepare the charge after the conclusion of the evidence. TEX. R. CIV. P. 272.

This history of the Rule reflects that the reasonable-time requirement and the before-the-charge requirement have distinct purposes. For example, if a court prepares the charge two minutes before reading it to the jury and the parties fail to object in time, the court has likely violated the reasonable-time requirement.[10] Appealing such a ruling would involve a determination of whether the trial court abused its discretion by establishing an unreasonable amount of time to object to the charge. To modify the example, if the court instead prepares the charge the day before reading it to the jury and refuses an objection lodged shortly before the charge is read solely due to the objection's timing, the party has complied with the before-the-charge requirement. Appealing this ruling would involve a determination of whether the trial court abused its discretion in refusing the objection based solely on its timing. Thus, under Rule 272, an objection made before the court reads the charge to the jury is timely; and as the above example demonstrates, an untimely objection might be due to the court establishing an unreasonable amount of time to review and object to the charge.

> court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived.

VERNON'S ANN. REV. CIV. ST. art. 2185, at 588–89 (1925) (emphasis added), *available at* http://www.sll.texas.gov/assets/ pdf/historical-codes/1925/1925civ11.pdf.

[10] Of course, two minutes may well be reasonable if the parties previously submitted identical proposed charges, which the court's charge followed.

Rule 272's allowance of objections before the court reads the charge largely corresponds with the plain language of the applicable federal rule. Federal Rule of Civil Procedure 51 regards an objection as timely if a party objects before the district court instructs the jury or, alternatively, if the party lacked notice but objects promptly after receiving that notice. FED. R. CIV. P. 51(c)(2). All objections must be made at these times, or will be considered waived.[11] *See Jimenez v. Wood Cnty., Tex.*, 660 F.3d 841, 845 (5th Cir. 2011) (en banc). As one observer noted, "the thrust of Rule 51 is directed toward the actual awareness of the trial judge of possible errors, and not to technical niceties."[12] Similarly, New York's relevant rule of civil procedure allows counsel to object to a jury charge up until "the jury retires to consider its verdict." N.Y. C.P.L.R. 4110-b.[13]

The Court justifies its interpretation of Rule 272 partly by declaring that trial courts must have discretion to manage their own dockets, and it raises the specter of parties bombarding courts with a fusillade of untimely objections. But the Court's fear is unwarranted due to the iterative process of refining the charge, as demonstrated by Texas case law.

Structurally speaking, the typical docket control process focuses the parties and the court on the charge early on, and parties will likely have valid reasons for the occasional defect they might

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[11] *See also* FEDERAL PROCEDURE, LAWYERS EDITION, § 77:307 (2014) ("The general rule of FED. R. CIV. P. 51 is that objections after the jury has begun its deliberation are untimely."); PHILLIP KOLCZYNSKI, PREPARING FOR TRIAL IN FEDERAL COURT § 12:08 (2012) ("Generally, failure to object before the instructions are given waives the right to appeal the error.").

[12] Annotation, *Construction and Application of Provision of Rule 51 of Federal Rules of Civil Procedure Requiring Party Objecting to Instructions or Failure to Give Instructions to Jury, to State "Distinctly the Matter to Which He Objects and the Grounds for Objections,"* 35 A.L.R. Fed. 727, § 2[a] (1977).

[13] *See Fitzpatrick & Weller, Inc. v. Miller*, 802 N.Y.S.2d 292, 293 (N.Y. App., 4th Dep't 2005) ("Where, as here, the charge is not fundamentally flawed, plaintiff's failure to object to the charge at trial and before the jury retire[d] precludes [our] review of plaintiff's contention." (quotation marks omitted) (alterations in original)).

discover after the charge conference. Lawyers routinely outline their case by drafting a charge early in the proceeding, which can offer a roadmap for use in discovery and dispositive motions.[14] As one commentator has observed, the utility and necessity of having the charge throughout the proceeding makes it "the playbook for the entire case," not merely the end game.[15] Trial courts routinely require parties to submit proposed charges at or before the pre-trial conference. And they routinely hold informal charge conferences during trial to further refine what the court's charge will be. The formal charge conference is where the parties make their requests and objections on the record. As we have previously explained, the formal charge conference ordinarily comes "at that very difficult point of trial between the close of evidence and summation" where counsel is "in peril of losing appellate rights." *Payne*, 838 S.W.2d at 240.[16] Given that trial courts have wisely followed this iterative process, it is no surprise that few objections remain to be raised after the formal charge conference.[17] Those objections that are levied after the formal charge conference but before the charge is read to the jury may arise for a litany of unanticipated reasons, such as a newly issued case, an element inadvertently omitted or made necessary because an issue was tried by consent, or simply a more thorough or objective understanding of the charge once the fog of war has temporarily dissipated.

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[14] *See Ellerman*, *supra* note 8, at 1.

[15] *Id*.

[16] As one commentator has elaborated, "[p]reparation of the jury charge, and preservation of charge errors, presents a minefield of issues including when to object to a submission, when to request a submission, how to properly link questions, and how to avoid inconsistent jury findings." *Id*.

[17] Moreover, few parties would willingly risk incurring the ire of the presiding judge by lobbing a host of objections after the charge conference and as the jury is walking in. In fact, doing so would surely jeopardize the interests of the client.

In practice, Texas cases have demonstrated that this iterative charge process diminishes the number of post-conference objections and reduces the threat of strategic sabotage produced by purposefully withholding a critical objection until the eleventh hour. The Court has only found one case where a party raised a host of post-conference objections. And there, the trial court nonetheless ruled on a number of them, and the appellants failed to show harm from the refusal to rule on the remaining objections. *See Deaton*, 926 S.W.2d at 765. Other cases confirm that when eleventh hour objections do occur, they are likely to have such merit that they are pivotal to the case. The court of appeals in *Austin State Hospital v. Kitchen* reversed and remanded for a retrial because the underlying objection raised shortly before the court read the charge was meritorious. 903 S.W.2d 83, 93 (Tex. App.—Austin 1995, no writ). And here, despite the fact that King Fisher was well aware that Rule 272 allowed it to raise objections before the court read the charge to the jury,[18] it only raised one of its multiple objections after the charge conference. And the focus of the entire appeal in this case has been on the specific orders question at issue in that objection.

I agree wholeheartedly that trial courts must be able to manage their dockets,[19] but their inherent ability to do so should not come at the expense of the parties' right to adjudication on the merits—nor should it alter the plain language of Rule 272.

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[18] King Fisher's counsel informed the trial court, "[a]ll I have to do is get [the objection] in before the charge is read, under the rules . . . ."

[19] *See* __ S.W.3d at __ (quoting *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001) (per curiam)).

C. Reversible Error

Having concluded the trial court erred in interpreting Rule 272 and rejecting King Fisher's objection and proposed definition as untimely, it should be noted that the trial court's judgment could only be reversed if the charge error was harmful, meaning it probably caused the rendition of an improper verdict. TEX. R. APP. P. 61.1(a). The parties' briefing here fully addresses the timing of the specific order objection but does not discuss whether the failure to include the proposed instruction likely caused the rendition of an improper judgment. Accordingly, I would remand for the court of appeals to consider whether the trial court's error in refusing King Fisher's timely charge objection was harmful.

IV. Conclusion

Jury trials are by their very nature multi-faceted, complex and fast-moving endeavors. There, perhaps more so than at any other phase in a lawsuit, it is critical to have consistent and brightline rules that ensure the parties fully understand how to preserve error. Undeniably, brightline rules necessarily implicate a balancing between efficiently managing dockets and juror resources and protecting the parties' right to have their cases adjudicated on the merits. Rule 272 already provides litigants with a brightline rule for timely submitting objections to a proposed jury charge: object before the court reads the charge. This unambiguous deadline appropriately provides all parties—plaintiffs and defendants alike—with clarity at a point in the trial in which the stakes are high and the pressure is acute, and it rewards the effort invested in the trial with a disposition on the merits. Promoting the adjudication of cases on the merits rather than on technicalities has long been

a goal of this Court. Because the Court today departs from this overriding principle in straying from the plain language of Rule 272, I respectfully dissent.

Eva M. Guzman
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0116

BRYAN JAMES DANET AND WILLIAM TODD KRANZ , PETITIONERS,

v.

JESSICA BHAN, RESPONDENT

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

PER CURIAM

This case concerns the custody of a child. After a jury trial, the trial court entered an order appointing the child's foster care providers as the child's sole managing conservators. The court of appeals reversed on no evidence grounds and appointed the child's mother as his sole managing conservator. We find there is some evidence to support the jury's verdict, so we reverse the court of appeals' judgment and remand the case for that court to review the factual sufficiency of the evidence.

On March 31, 2006, the Texas Department of Family and Protective Services (DFPS) removed the child from the custody of his mother, Jessica Bhan, and placed him in the foster care of Bryan Danet and Todd Kranz. The child, who was seven months old at that time, has remained

with Danet and Kranz ever since. The record establishes that they have performed well as foster parents and that the child, who is now eight years old, has bonded with them.

At the trial of this case in August 2010, Bhan testified that on the morning of March 31, 2006, she decided to escape from her abusive boyfriend and take her child with her. The child had previously been diagnosed with "thrush," a yeast infection, which, Bhan explained, caused a severe diaper rash. To treat the thrush, she packed two antibiotics the child's pediatrician had prescribed. Because her boyfriend had hidden her driver's license, Bhan had to "go through half the house" to find it and left the house "messy." She then took the child with her to a bus stop, planning to take a bus to her mother's house in Wisconsin. However, her boyfriend found her at the bus stop, confronted her, and took the child from her. Bhan then called for emergency assistance, and a police officer eventually arrived at the house. Her boyfriend and the child were already at the house. After questioning the couple and observing the living conditions, the police officer took the child away in his patrol car. Bhan explained that because the officer had taken the child away, she did not have time to feed him or apply his thrush medication.

Kranz testified at trial that the child had a "very severe diaper rash" when he was first placed in foster care, and he appeared as if he had been "starving." Although the police told Bhan that she could go pick up her child and continue to Wisconsin, Bhan did not do so. She testified at trial that she was too "hysterical" to go pick him up. Instead, she spent the weekend in a hotel room using cocaine with an ex-inmate she had just met. When she attended a court hearing the following Monday, the court ordered her to submit to a narcotics test, which came back positive. She also submitted an affidavit in which she mistakenly named the boyfriend as the child's father. She

believed this to be true at the time, however, the boyfriend was later determined not to be the father. The child was not returned to Bhan at the hearing. After the hearing, Bhan moved to Wisconsin to live with her mother.

In June 2006, DFPS informed Bhan that it intended to terminate her parental rights and arrange for an "unrelated adoption." Bhan then returned to Houston for a second hearing, at which the court ordered her to complete a family service plan. Bhan understood that she could regain custody of the child if she satisfactorily complied with the plan. About a month later, Bhan was arrested for disturbing the peace after fighting with her boyfriend in a parking lot. Later that summer, Bhan returned to live with her abusive boyfriend. She attended parenting courses, underwent a psychological evaluation, and stayed two nights at an "in-patient drug facility," as the family service plan required. After one of her visits with the child, however, Bhan and her boyfriend were both arrested for, and later convicted of, shoplifting. Shortly thereafter, Bhan gave birth to another son, and this same boyfriend seriously assaulted her in the hospital following the birth of that child. At the time of trial in August 2010, this boyfriend was incarcerated.

After DFPS decided not to seek termination of Bhan's parental rights, Danet and Kranz filed this suit in October 2007, seeking appointment as the child's joint managing conservators. Bhan filed a counterclaim asking the court to appoint her as the child's sole managing conservator. In May 2009, the parties agreed to an order appointing Kranz and Danet as temporary managing conservators during the pendency of these court proceedings.

At trial, Kranz testified that Bhan was routinely late for her scheduled appointments and behaved carelessly with her son. He testified that, on one occasion, she was late for a visit at the

Houston Children's Museum, and when she did arrive, she sneaked past the reception desk to avoid paying an entrance fee. On another occasion, Bhan failed to call the child for three weeks because she had "decided to go to New Orleans," where she was eventually stranded.

Danet testified that during Bhan's infrequent visits, the child would "get[ ] very scared and [cry] at night." Although Kranz and Danet encouraged Bhan to call the child and scheduled regular telephone calls, sometimes they "would come home for the phone call and then she wouldn't call at all." In the six months prior to trial, the child repeatedly complained that he did not want to talk with Bhan. Nevertheless, Danet explained that if he and Kranz were to be appointed managing conservators, they would still encourage the child to remain in contact with Bhan.

In her testimony, Bhan admitted to a history of arrests in Massachusetts on charges relating to heroin and in Wisconsin for marijuana possession and battery. She also admitted that she had used cocaine in 2006 when she was pregnant with her younger son, causing her to fail a court-ordered narcotics test. She further admitted that in July 2007, she was scheduled to fly to Houston for a visit with the child, but the airline would not allow her on the plane because she was intoxicated.

Bhan explained that if she were awarded custody of the child, she would take him back to Wisconsin and continue to live with her mother, who has physical disabilities. She noted that her family could not come to Houston to visit the child because her mother had health problems. She claimed that she did not visit the child as often as permitted in part because Kranz and Danet were not cooperative with her. She asserted that they were "alienating" and "isolating" her from the child. She further explained that the financial burden of traveling, and the time that it took to raise her second son, made regular visits to Houston difficult. Although the court's visitation schedule

allowed her to visit the child monthly, she visited him only twice, on average, in each of the years since the child was placed in foster care.

After the trial in August 2010, the trial court appointed Danet and Kranz as the child's sole managing conservators. In November 2012, the court of appeals reversed and awarded Bhan managing conservatorship, sustaining Bhan's no-evidence challenge. Pending appeal to this Court, the parties agreed to an order appointing Danet and Kranz as possessory conservators.

Texas law requires that, "in determining the issues of conservatorship and possession of and access to the child," "[t]he best interest of the child shall always be the primary consideration of the court." TEX. FAM. CODE 153.002. The law establishes a preference in favor of a child's parents, however, providing that courts "shall" appoint the child's parent or parents as the child's sole managing conservator, "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 . . . ." *Id*. § 153.131(a). The issue in this case is whether the record contains any evidence to support the jury's conclusion that Danet and Kranze overcame this presumption.

In relevant part, the jury charge contained the following statements regarding the parental presumption:

> The biological parent shall be appointed sole managing conservator, in preference to a non-parent, unless appointment of the biological parent would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development.
>
> "Significantly Impair" means the non-parent must affirmatively prove by a preponderance of the evidence through specific actions or omissions of the

> parent that demonstrate that an award of custody to the parent would result in physical or emotional harm to the child.

Since neither party objected to the instruction, we are bound to review the evidence in light of the instruction actually given. *See, e.g.*, *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001). A jury verdict in a custody determination case is binding on the trial court if the evidence supports it. TEX. FAM. CODE § 105.002(c). The jury's decision is entitled to substantial deference on appeal and is subject to ordinary evidentiary sufficiency review. *In re J.A.J.*, 243 S.W.3d 611, 616 n.5 (Tex. 2007) ("Jury findings underlying a conservatorship appointment are subject to ordinary legal and factual sufficiency review.").

Although the jury found in this case that Bhan's appointment as the child's conservator would significantly impair the child's physical health or emotional development, the court of appeals concluded that the evidence was legally insufficient to support that finding. We will sustain a legal-sufficiency or no-evidence challenge, if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

The court of appeals acknowledged that the evidence would support a finding that Bhan had engaged in parental misconduct during the early months of the child's life, but held that there was no evidence to establish that past misconduct was sufficiently linked to her present fitness to be the

child's custodian at the time of trial. The court held that Danet and Kranz did not present any evidence that Bhan's past drug use, misdemeanor criminal history, or domestic violence constituted ongoing problems or were part of a more recent pattern of behavior. Therefore, the court reasoned, the jury could not have reasonably inferred that Bhan's more remote conduct implicated her parental fitness at the time of trial, such that her appointment would significantly impair the child's physical health or emotional development. Thus, the court of appeals held that Danet and Kranz failed to prove "specific actions or omissions" on Bhan's part to override the parental presumption.[1] We disagree.

Evidence of Bhan's specific actions and omissions support the jury's finding that appointment of Bhan as custodian would substantially impair the child's physical health or emotional development. This evidence includes Bhan's conduct in the more distant past, two or three years before the August 2010 trial, such as her drug use, criminal record, failure to provide stability in the home, and abandonment of the child. But it also includes evidence of Bhan's more recent conduct prior to trial, such as her failures to visit the child, her inconsistent communication with the child, and her misconduct, such as "sneaking" into the Houston Children's Museum. We also consider the evidence that the child has bonded with Danet and Kranz in a stable environment and the emotional harm that could result from the child's separation from those who have cared for him most of his life, noting that the child was placed in foster care and has remained there because of Bhan's actions and omissions. We conclude that this evidence, taken together, constitutes some evidence that, as of the

[1] Although the statute does not require evidence of "specific actions or omissions" resulting in significant impairment, the jury charge did, and "[t]he sufficiency of the evidence must be measured by the jury charge when, as here, there has been no objection to it." *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005).

August 2010 trial date, Bhan's pattern of behavior demonstrated that placement of the child in Bhan's custody would significantly impair the child's physical health or emotional development.

We make no judgment today as to the exact length of time required to ameliorate a history of bad conduct, nor do we suggest that the removal of a child from a long-term stable environment would, in itself, be sufficient to establish that a change in custody would substantially impair the child's physical health or emotional development. These questions are purely contextual and are subject to the good judgment of the fact-finder at trial. We simply hold that the evidence in the record in this case—which includes evidence of misconduct in the more distant past, evidence of more recent misconduct, and evidence of the stability of the child's current placement—together constitutes some evidence to support the jury's verdict. Accordingly, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment. *See* TEX. R. APP. P. 59.1. Because the court of appeals did not reach the question of whether the evidence is factually (as opposed to legally) sufficient to support the verdict, we remand the case to the court of appeals for factual sufficiency review.

OPINION DELIVERED: June 27, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0122

VENTURE COTTON COOPERATIVE AND NOBLE AMERICAS CORP., PETITIONERS,

v.

SHELBY ALAN FREEMAN, ET AL., RESPONDENTS

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

Argued January 9, 2014

JUSTICE DEVINE delivered the opinion of the Court.

Two groups of cotton farmers sue to rescind contracts in which they agreed to sell cotton through a cooperative marketing pool. The farmers allege that they were fraudulently induced to join the cooperative and seek damages, declaratory relief, and attorney's fees under various statutes. Because the agreements provide for arbitration of all disputes under the Federal Arbitration Act, 9 U.S.C §§ 1-16, the cotton cooperative moved to stay the litigation and compel arbitration. This appeal is from the trial court's interlocutory order, denying those motions. *See* TEX. CIV. PRAC. &

REM. CODE § 51.016 (permitting interlocutory appeals of orders denying arbitration under the FAA).[1]

The trial court has concluded that the parties' agreement to arbitrate should not be enforced because it is unconscionable, and the court of appeals has affirmed the trial court's order denying arbitration. 395 S.W.3d 272, 275-76 (Tex. App.–Eastland 2013). The court of appeals reasons that the arbitration agreement is unconscionable because it prevents the farmers from pursuing the statutory remedies and attorney's fees alleged in their pleadings. *Id*. at 277. We conclude that this limitation of statutory remedies is insufficient to defeat arbitration under the FAA and accordingly reverse the court of appeals' judgment. We conclude further that, because the court has not fully considered the parties' arguments on the issue of unconscionability, the case should be remanded to the court of appeals.

I. Background

Venture Cotton Cooperative is a cotton cooperative-marketing association, incorporated in Texas, and managed by Noble Americas Corp., a foreign corporation. In 2010, Venture operated a pool for the exclusive sale and marketing of its members' cotton production. Venture promoted this pool through various cotton-gin companies, which arranged meetings with local farmers. Venture would explain the pool's terms and solicit membership at these meetings. One such meeting was arranged by Ocho Gin Company in Seminole, Texas.

[1] 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) (noting that our jurisdiction over the interlocutory appeal depends on a dissent or decisional conflict); *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 988 S.W.2d 731, 733 (Tex. 1998) (per curiam) (same).

Farmers, who agreed to join the 2010 pool, signed Venture's Membership and Marketing Agreement and other related documents. These documents asked each farmer to designate the acreage committed to the pool and to estimate the production Venture might expect to market. After the meeting in Seminole, Venture left copies of these documents with Ocho for farmers to execute, should they decide to join the cooperative. Several farmers decided to join the pool.

During the growing season, the price of cotton rose significantly. By harvest, Venture had become concerned that members of the pool might be tempted to sell their committed production on the open market. This concern blossomed into a dispute with some member-farmers over the quantity of cotton committed to the pool and ultimately led to a lawsuit by Alan Freeman and Perry Brewer, two prominent cotton farmers in Gaines County, Texas.[2]

In their lawsuit, Freeman and Brewer asserted claims for fraud, negligent misrepresentation, breach of fiduciary duty, mutual mistake, civil conspiracy and violations of the Texas Consumer Protection—Deceptive Trade Practices Act, and the Texas Free Enterprise and Antitrust Act of 1983. Freeman and Brewer also sought declaratory and injunctive relief and attorney's fees under Civil Practice and Remedies Code section 38.001. Shortly after filing this suit, another group of farmers filed a second suit against Venture and the other defendants in Gaines County, asserting similar claims.[3]

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[2] The lawsuit was styled *Alan and Christine Freeman d/b/a Alan Freeman Farms, J.V., and Perry and Kathy Brewer d/b/a PDB Joint Venture v. Venture Cotton Cooperative, Noble Americas, Corp., Ocho Gin Co. and Ocho Management Corp.*

[3] The second lawsuit was styled *Roger Neitsch, Gregory Upton, Wayne Upton, Anderson Upton, Jud Cheuvront d/b/a L&ME, Inc. and JDC Farms, Max McGuire, Raymond McPherson, Abe Froese d/b/a BAC Farms, Gerardo Froese d/b/a Gerardo Froese Farms, George P. Froese d/b/a George P. Froese Farms, Neil Enns, David Bergen, Bradley Peters, Peter Neustaeter Jr., Wilhelm Friesen, Cornelius Banman, Gerard Neustaeter, Peter Friesen, Heinrich Friesen,*

Venture generally denied the allegations in both suits and moved to stay the litigation and compel arbitration under the United States Arbitration Act (also known as the Federal Arbitration Act or FAA). 9 U.S.C §§ 1-16. The farmers' membership and marketing agreements with the cooperative provided for the arbitration of all disputes under the FAA and the arbitration rules of the American Cotton Shippers Association (ACSA). The arbitration provision referred to the farmers as "producers" and provided in pertinent part:

> • All disputes will be resolved pursuant to binding arbitration pursuant to the arbitration rules of the American Cotton Shippers Association.
>
> • The site of the arbitration shall be either Houston, Texas, or Memphis, Tennessee, as chosen by Venture, unless otherwise directed by the arbitrator(s).
>
> • The cotton sold herein is purchased for shipment out of state of origin in interstate or foreign commerce.
>
> • Any court having or claiming jurisdiction, whether state or federal, shall apply the substantive provisions of the United States Arbitration Act . . . .
>
> • In the event of a breach of this Agreement by Producer, Producer agrees to pay all arbitration and court costs, if any, and the reasonable attorney's fees and litigation and arbitration expenses of Venture.

The farmers opposed Venture's motions, asserting a number of reasons why the arbitration agreement was unconscionable and should not be enforced. The trial court scheduled an evidentiary hearing.

At this hearing, Freeman and Brewer testified about their decisions to join the pool. According to their testimony, they had a question about "overages" a few days after Venture's

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Abe S. Peters, Isaak T. Fehr, Jacob Peters, Abe Loewen, Isaak Wiebe, Ben Neudorf, and Rudolph Peters v. Venture Cotton Cooperative, Noble Americas, Corp., Ocho Gin Co. and Ocho Management Corp.

marketing presentation. "Overages" refers to cotton produced on designated land in excess of the estimate given by a farmer at the time of land's commitment to the pool. Freeman and Brewer's question, which they directed to Ocho, was whether overages were included in the pool under Venture's contracts. An Ocho representative called Venture with this question and allegedly learned that the disposition of overages was at the farmer's discretion, that is, the farmer could elect to sell overages under the agreement or not.

Venture denies making any such representations. It also argues that its contract clearly calls for the commitment of acres, not bales, making overages subject to the agreement. In any event, Freeman and Brewer maintain that they signed with the cooperative after being led to believe that they would control overages.

After considering the parties' pleadings, motions, responses, and briefs, as well as evidence presented at the hearing, the trial court refused to stay the litigation or compel arbitration, finding the arbitration agreements unconscionable. Findings of fact and conclusions of law were requested and filed, but these findings and conclusions shed no light on the court's reasoning.[4]

Venture filed interlocutory appeals in both cases, and the court of appeals consolidated them for decision. *See* TEX. CIV. PRAC. & REM. CODE § 51.016 (permitting interlocutory appeals of orders denying arbitration under the FAA). Agreeing that the arbitration agreements were unconscionable, the court affirmed the trial court's order denying Venture's motion to compel. 395 S.W.3d at 275-76. The court reasoned that the agreements were unconscionable in two respects: (1)

[4] The trial court's finding of fact stated: "The arbitration clause sought to be enforced is unconscionable." Its conclusion of law stated: "The arbitration clause sought to be enforced is unenforceable because it is unconscionable."

they forced the farmers "to forego substantive rights and remedies afforded by statute," *id*. at 275, and (2) they were one-sided because they allowed Venture to recover its attorney's fees, if the farmers breached the contract, but did not provide reciprocal rights to the farmers, *id*. at 276.

II. The FAA and State Law

Although the Federal Arbitration Act preempts state law that conflicts with its objectives, *Southland Corp. v. Keating,* 465 U.S. 1, 10-17 (1984), state law remains relevant to declare an arbitration agreement itself unenforceable on "such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2 (the saving clause). "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, ___, 131 S. Ct. 1740, 1746 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). In determining the arbitration agreement's validity then, a court may not construe the agreement differently from how it would construe contracts generally under state law, nor may a court rely on the uniqueness of an arbitration agreement as a basis for a state-law holding that enforcement would be unconscionable. *Perry v. Thomas*, 482 U.S. 483, 492 (1987). But if the circumstances would render any contract unconscionable under Texas law, they are appropriate to invalidate the agreement to arbitrate as well. *In re Poly-America*, 262 S.W.3d 337, 348 (Tex. 2008).

Special state rules for interpreting arbitration agreements cannot coexist with the FAA because Congress intended the act as its response to a "longstanding judicial hostility to arbitration

agreements." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000). Under the FAA, an agreement to arbitrate that is valid under general state law principles and involves interstate commerce is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. A party seeking to compel arbitration under the FAA, however, must establish that the dispute falls within the scope of an existing agreement to arbitrate. *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011). Upon such proof, the burden shifts to the party opposing arbitration to raise an affirmative defense to the agreement's enforcement. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). The FAA thus requires a court to make at least a threshold determination of arbitrability—that the dispute is subject to an enforceable agreement to arbitrate—before enforcing the arbitration agreement by compelling arbitration or staying litigation. 9 U.S.C. §§ 3-4.[5]

A. Unconscionability

The farmers do not dispute that their claims are covered by the agreements with Venture and subject to arbitration under the FAA, if their arbitration agreement itself is valid and enforceable. They contend, of course, that it cannot be enforced because the agreement is one-sided and grossly unfair in several respects. Unambiguous contracts, however, are presumed to reflect the intent of the contracting parties and are generally enforced as written "regardless of whether one or more of the parties contracted wisely or foolishly, or created a hardship for himself." *Wooten Props., Inc. v. Smith*, 368 S.W.2d 707, 709 (Tex. Civ. App.–El Paso 1963, writ ref'd). Texas courts therefore

[5] Under FAA § 3, when a party moves to stay litigation pending arbitration, the court shall grant the motion "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3. Section 4 requires a court to grant a motion to compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." *Id.* § 4.

do not ordinarily inquire into the reasons for the contract or the relative fairness of its terms. *El Paso Field Services, L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 810-11 (Tex. 2012) (observing that a court's role "is not to protect parties from their own agreements"). But this notion that parties are free to negotiate their own bargains conflicts with the equally compelling notion that grossly unfair bargains should not be enforced. 49 DAVID R. DOW & CRAIG SMYSER, TEXAS PRACTICE SERIES: CONTRACT LAW § 3.9 (2005). Unconscionable bargains are therefore an exception to the freedom that generally pervades contract law.

Unconscionability, however, is not easily defined. The term defies a precise legal definition because "it is not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula." 27 STEPHEN COCHRAN, TEXAS PRACTICE SERIES: CONSUMER RIGHTS AND REMEDIES § 4.2 at 394 (3d ed. 2002); *see also* 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-3 at 294 (5th ed. 2006). Although difficult to define, the defense has a long history. One of the earliest decisions to apply the defense described an unconscionable contract as one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100, 2 Ves. Sr. 125, 155 (1751); *see also Saunders v. Guinn*, 1 S.W.2d 363, 366 (Tex. Civ. App.–Eastland 1927, writ ref'd) (noting this "definition"); *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 896 (Tex. 1991) (Mauzy, J. concurring and quoting *Janssen*). Modern uniform laws add context to the defense but again do not attempt to define it.

The Uniform Commercial Code provides that a court should afford the parties a reasonable opportunity to present evidence as to a contract's commercial setting, purpose and effect to aid the

court in evaluating the defense. TEX. BUS. & COMM. CODE § 2.302(b); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. a (stating that unconscionability determinations are made in "light of [a contract's] setting, purpose, and effect"). Under the UCC, an unconscionability defense is a question of law that involves a highly fact-specific inquiry into the circumstances of the bargain, such as the commercial atmosphere in which the agreement was made, the alternatives available to the parties at the time and their ability to bargain, any illegality or public-policy concerns, and the agreement's oppressive or shocking nature. 49 TEXAS PRACTICE SERIES: CONTRACT LAW § 3.11.

In the court of appeals, the cotton farmers argued that the arbitration agreement was unconscionable in several respects. They complained that the American Cotton Shippers Association (ACSA) Arbitration Rules, adopted by the agreement, were one-sided and designed to foster arbitrator bias and that the rules' summary procedures further denied them adequate discovery and preparation time. They also contended that the arbitration was too expensive and that its prospective cost would prevent them from vindicating their rights in the arbitral forum. Finally, they argued that the agreement and ACSA rules violated the state's public policy by illegally eliminating their statutory right to attorney's fees and other remedies under the Texas Consumer Protection—Deceptive Trade Practices Act (DTPA).

B. Invalidity

The court of appeals' decision focuses solely on this last argument, concluding that the arbitration agreement is unconscionable because it forces the farmers "to forego substantive rights and remedies afforded by statute." 395 S.W.3d at 275. The court's application of public policy here is premised on our decision in *In re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008). There, we

indicated that it would be unconscionable for an arbitration agreement to mandate arbitration of a statutory claim and at the same time eliminate the rights and remedies afforded by the statute. *Id.* at 349. The court of appeals concludes that such a possibility exists here because the arbitration agreement applies to "all disputes," while the ACSA Arbitration Rules, incorporated into the parties' agreement, foreclose the farmers' statutory claims for attorney's fees and enhanced damages under the DTPA. Specifically, section 8(k) of the ACSA rules limits the arbitral award "to the monetary damages arising out of the failure of either party to perform its obligations pursuant to the contract as determined by the Arbitration Committee and shall not include attorney's fees unless provided for in the contract."

When parties agree to arbitrate a statutory claim, "a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Thus, in *Poly-America*, we observed that arbitration agreements typically function simply as forum-selection clauses rather than statutory waivers and generalized that "[a]n arbitration agreement covering statutory claims is valid so long as 'the arbitration agreement does not waive substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights.'" *Poly-America*, 262 S.W.3d at 352 (quoting *In re Halliburton*, 80 S.W.3d at 572).

An asserted waiver of the anti-retaliation provisions of the Workers' Compensation Act was at issue in *Poly-America*. The employee in that case sued his employer, seeking statutory remedies of reinstatement and punitive damages after being allegedly terminated for filing a workers'

compensation claim. *Id*. at 345. Because the employee had agreed to arbitrate all disputes under the FAA, the trial court granted the employer's motion to compel arbitration. *Id.* at 344.

The employee sought mandamus relief from this order, arguing that the arbitration agreement was unconscionable because it eliminated his rights and remedies under the Workers Compensation Act. *Id*. at 352, 359. We agreed. *Id*. at 353, 360. After reviewing the statutory remedies at issue, we held the anti-retaliation provisions to be "a non-waivable legislative system" necessary to the Act's function. *Id*. at 352. We further concluded that their elimination under the arbitration agreement undermined a key purpose of the Workers' Compensation Act, was contrary to public policy, and could not be enforced. *Id*. at 353. We did not, however, hold the arbitration agreement invalid. Instead, we severed the offending limitation from the agreement and permitted the arbitration to proceed. *See id.* at 344 (noting that severance was proper because the limitation of statutory remedies was "not integral to the parties' overall intended purpose to arbitrate").

In contrast to *Poly-America*'s anti-retaliation provision, the DTPA remedies at issue here can be contractually waived. TEX. BUS. & COM. CODE § 17.42. The DTPA provides detailed instructions on how to accomplish this. *See id.* (detailing requirements for a valid waiver). Among other requirements, the waiver must be "conspicuous and in bold-face type of at least 10 points in size," identified by a specific heading indicating the waiver, and include language substantially similar to the form the statute provides. *Id*. § 17.42(c)(1), (2) and (3). The contracts here do not comply with the statutory requirements. We accordingly agree with the court of appeals that any implied waiver under ACSA Rule 8(k), which likewise does not conform to the DTPA's requirements, is contrary to public policy and therefore invalid.

C. Severability

Venture argues, however, that even if ACSA Rule 8(k) and the arbitration clause are deemed unconscionable and incapable of limiting the farmers' statutory rights under the DTPA, the court of appeals nevertheless erred when it refused to sever the offending rule and require arbitration under the remainder of the agreement. Venture submits that the unconscionability defense, which is codified in the Texas Business and Commerce Code and applicable to the cotton sales at issue here, allows courts to consider severance whenever they are confronted with an unconscionable contract term. TEX. BUS. & COM. CODE § 2.302. Similarly, the Restatement provides that "[w]here a term rather than the entire contract is unconscionable, the appropriate remedy is ordinarily to deny effect to the unconscionable term." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g.

The court of appeals concludes, however, that Venture waived its right to enforce the remainder of the arbitration clause by not asking the trial court to sever the offending limitation of statutory remedies. 395 S.W.3d at 277. But this is an interlocutory appeal, and the case remains pending in the trial court. We are therefore unsure about what Venture has waived. If the court merely means to suggest that Venture waived the right to complain about severance in this interlocutory appeal, the waiver argument serves only to delay a decision in the case. Conservation of time and resources recommend that we consider the issue now because nothing prevents Venture from urging severance in the trial court and, if denied, from renewing its complaint in yet another interlocutory appeal.

In *Poly-America* we noted that "[a]n illegal or unconscionable provision of a contract may generally be severed so long as it does not constitute the essential purpose of the agreement." *Poly-*

America, 262 S.W.3d at 360. In determining an agreement's essential purpose, the issue is "whether or not parties would have entered into the agreement absent the unenforceable provisions." *Id*. Quite clearly, the arbitration agreement's essential purpose here was to provide for a speedy and efficient resolution of disputes to ensure timely performance under the contract. The agreement's collateral effect on statutory rights and remedies appears to be a peripheral concern to this essential purpose. We accordingly conclude that the court of appeals erred in declining to sever the objectionable limitation on the farmers' statutory rights.

D. Attorney's Fees

In addition to the agreement's unconscionable limitation on potential statutory rights, the court of appeals concludes that the arbitration agreement is also unconscionably one-sided because it provides for only Venture to recover attorney's fees. 395 S.W.3d at 276. The court's opinion further indicates that this provision together with an ACSA rule, limiting the award of attorney's fees to those expressed in the contract, violates the farmers' statutory right to attorney's fees under Civil Practice and Remedies Code section 38.001.

That section provides, in relevant part, that "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract." TEX. CIV. PRAC. & REM. CODE 38.001. The court of appeals ultimately decides, however, that the arbitration agreement fails effectively to waive the farmers' rights under section 38.001 because the agreement and ACSA rules do not reference the statute or otherwise specifically inform the farmers of the intended waiver of such rights. *See* 395

S.W.3d at 276 (concluding that waiver of these statutory rights cannot occur absent specific notice and reference to § 38.001).

Venture, on the other hand, argues that whether the agreement waives these rights is irrelevant because the statute simply does not apply to the farmers' circumstances. The statute does not apply, according to Venture, because the farmers seek to cancel the contract rather than recover under its terms. In short, Venture contends that the farmers' pleadings do not assert contractual rights and therefore do no invoke a right to attorney's fees under section 38.001.

The farmers respond that they have pled a breach of contact claim. Their pleadings are not clear on the subject, but even were we to recognize some deficiency in the present pleadings, the result would be merely to postpone the issue, much the same as the court of appeals has done with the severance question. The appeal is interlocutory, and the farmers are free to amend their pleadings to clarify the matter. For purposes of this appeal then, we accept that the farmers intended to plead an alternative breach of contract claim, as they assert. We conclude, however, that neither the contract's attorney's fee provision nor its effect on attorney's fees under section 38.001 is sufficient to invalidate the arbitration agreement as unconscionable.

Parties are generally free to contract for attorney's fees as they see fit. *Intercontinental Group P'ship v. KB Home Lone Star L.P.,* 295 S.W.3d 650, 653 (Tex. 2009). Thus, a contract that expressly provides for one party's attorney's fees, but not another's, is not unconscionable per se. Although perhaps relevant to a broader inquiry into contractual oppression or an imbalance in bargaining power, the attorney's fee provision here is not, standing alone, decisive proof of an unconscionable bargain. Moreover, the court of appeals itself concludes that the arbitration

agreement did not waive the farmers' statutory right to attorney's fees under section 38.001 and so its relevancy to the court's unconscionability analysis is unclear.

In *Olshan*, we observed that the "crucial inquiry" in determining unconscionability was "whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, a forum where the litigant can effectively vindicate his or her rights." *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 894 (Tex. 2010). That inquiry is not satisfied by speculation but by specific proof in the particular case of the arbitral forum's inadequacy. *Id*. at 896. If speculation about possible harm was insufficient to establish unconscionability in *Olshan*, then clearly the court's determination here that no harm has been done will not suffice. *See* 395 S.W.3d at 276 (concluding that arbitration agreement did not waive cotton farmers' right to attorney's fees under section 38.001).

In *Olshan*, we cautioned that courts "should be wary of setting the bar for holding arbitration clauses unconscionable too low" as that would undermine the "liberal federal policy favoring arbitration agreements." *Olshan*, 328 S.W.3d at 893. Courts should also use care not to intrude upon arbitral jurisdiction under the guise of an unconscionability defense.

Questions of waiver, illegality, remedies, and attorney's fees often relate to the broader, container contract, rather than the separable agreement to arbitrate, and, as such, are matters entrusted to the arbitrators.[6] And, when authority over the matter is unclear, "a strong federal

[6] Professor Rau explains:

> Suppose that the issue–"whether the plaintiff can recover statutory damages or attorneys' fees"–*is treated as one more claim or dispute within the scope of the arbitration clause*; suppose further that in pursuing this inquiry the decisionmaker is presented with some more precise questions:
> . For openers, is the contractual limitation of remedies properly interpreted as a "waiver" by the

presumption" favors arbitration. *Poly-America*, 262 S.W.3d at 348. Thus, the United States Supreme Court has indicated that arbitration provisions should not be held unconscionable based on speculation about their potential effect. *See PacifiCare Health Sys., Inc. v. Book,* 538 U.S. 401, 407 n.2 (2003) (noting that "the preliminary question [of] whether the remedial limitations at issue . . . prohibit[ed] an award of RICO treble damages [was] not a question of arbitrability").

In *PacifiCare*, several physicians filed suit against managed healthcare organizations, including PacifiCare and UnitedHealth, alleging breach of contract, unjust enrichment, and violations of several federal and state statutes, including RICO. *Id.* at 402. Because the arbitration agreements prohibited awarding punitive damages, the physicians argued that arbitration would prevent them from obtaining "meaningful relief" under RICO's treble-damages provision. *Id.* at 403. The lower courts agreed, holding the arbitration clauses to be unenforceable with respect to the RICO claims. *Id*.

> plaintiff of the recovery otherwise made available by statute?
>
> . If so, is the plaintiff able to waive this recovery? More precisely: Are, say, "sophisticated groups of doctors" who contract with a managed care company the sort of plaintiffs who in these circumstances need the protection of an unwaivable rule? For commercial parties in high-stakes cases, the appropriate trade-off between litigation and informal justice may sometimes take the form of choosing a more intensive form of judicial review; an alternative bargain might call for reducing the risk of excessive damage awards.
>
> . And in any event, is it sensible to address either of these concerns in the form of an interim decision preceding the merits? Might they not instead be the focus of attention at a later point–once the predicate of liability has been established, and an appropriate remedy needs to be crafted?
>
> Framed in this way, all these questions begin very much to look as if they belonged *to the realms of interpretation and appreciation of context*–that is, to the matters of substance that have been routinely entrusted to arbitrators.

Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 65-66 (2003) (emphasis in original) (footnotes omitted).

The Supreme Court reversed and remanded, concluding that it was "premature" to conclude that the contractual ban on punitive damages acted as a bar to statutory damages and that the arbitrator should decide the issue as an initial matter. *Id*. at 404. The Court thus deferred consideration of whether public policy might taint the arbitration agreement's enforceability until the award-enforcement stage, but implicit in the Court's analysis was the notion that the arbitration clause was prima facie enforceable, notwithstanding the contractual prohibition on punitive damages.

In summary, we conclude that a contract that fails to provide reciprocal rights to attorney's fees is not unconscionable per se. We further disagree with the court of appeals' opinion to the extent it uses the contract's "one-sided" attorney's fees provision as an independent reason to hold the arbitration agreement unconscionable. *See* 395 S.W.3d at 276.

III. Unaddressed Arguments

Although the court of appeals' refusal to compel arbitration in this case rests solely on public-policy grounds, unconscionability typically involves a broader inquiry, and, indeed, the farmers presented a broader case in the trial court. In addition to their complaint about the agreement's limitation of remedies, the farmers contended they could not effectively vindicate their rights through arbitration because of arbitrator bias, the lack of adequate discovery under the arbitration's summary procedures, the exorbitant cost of the arbitration itself, and other inequities in the arbitral process. The court of appeals did not consider these additional concerns once it determined the arbitration agreement to be "substantively unconscionable" because it prevented the farmers from pursuing statutory remedies. *See* 395 S.W.3d at 277 (concluding that the court did not

need to consider "remaining arguments attacking appellees' other substantive unconscionability and procedural unconscionability defenses").

Texas courts usually analyze unconscionability issues "in light of a variety of factors, which aim to prevent oppression and unfair surprise . . ." *Poly-America,* 262 S.W.3d at 348. Unconscionability determinations are not isolated inquiries but rather are made in "light of [a contract's] setting, purpose, and effect." RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. a. Thus, in *Olshan* we observed that a court should consider "the parties' general commercial background and the commercial needs of the particular trade or case" when determining whether "the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *Olshan*, 328 S.W.3d at 892 (quoting *FirstMerit Bank*, 52 S.W.3d at 757).

In the court of appeals, Venture has argued the commercial reasonableness and necessity for the arbitration agreement, while the farmers have emphasized potential abuses and unequal treatment under the arbitral process. In this Court, the parties have not briefed or argued these broader concerns. They have instead focused solely on the court of appeals' rationale for affirming the trial court's order. Because the court's public-policy analysis is insufficient to defeat arbitration, the arguments left unaddressed in the court of appeals should be considered as they are "necessary to the final disposition of the appeal." TEX. R. APP. P. 47.1.

* * *

The court of appeals' judgment, affirming the trial court's order denying arbitration, is reversed, and the case is remanded to the court of appeals for consideration of the remaining arguments.

_____
John P. Devine
Justice

Opinion Delivered: June 13, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0156

KEY OPERATING & EQUIPMENT, INC., PETITIONER,

v.

WILL HEGAR AND LOREE HEGAR, RESPONDENTS

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

Argued February 4, 2014

JUSTICE JOHNSON delivered the opinion of the Court.

At issue in this case is whether, when parts of two mineral leases have been pooled but production is from only one lease, the mineral lessee has the right to use a road across the surface of the lease without production in order to access the producing lease. The trial court determined that the lessee does not and granted declaratory and injunctive relief. The court of appeals affirmed. Concluding that the lessee has such a right, we reverse and render.

I. Background

Key Operating and Equipment, Inc., (Key) has operated the Richardson No. 1 well on the sixty-acre Richardson tract since 1987. In 1994 Key acquired oil and gas leases on a 191-acre contiguous tract—the Curbo/Rosenbaum Tract—and reworked the Rosenbaum No. 2, an existing

well on that property. That same year Key built a road on the Curbo/Rosenbaum tract to access both the Richardson No. 1 and the Rosenbaum No. 2. The Rosenbaum No. 2 stopped producing in 2000, and Key's lease on the Curbo/Rosenbaum tract expired. But also in 2000, Key's owners purchased an undivided twelve-and-a-half percent interest in the mineral estate of the Curbo/Rosenbaum Tract, which they promptly leased to Key. The lease gave Key the right to pool the minerals with other property in the immediate vicinity. Key then pooled its leased minerals under ten acres from the Curbo/Rosenbaum tract with its leased minerals under thirty acres from the adjoining Richardson Tract.

In 2002, Will and Loree Hegar bought eighty-five acres of the Curbo/Rosenbaum Tract (the Hegar Tract). Their acreage included the road Key used to access the Richardson No. 1, and they were aware when they bought the tract that Key used the road in its mineral operations.

In 2003 or 2004, the Hegars built a house on their acreage, used the road to access it, and for several years took no action to restrict Key's use of the road. That forbearance stopped when Key drilled the Richardson No. 4 well on the Richardson tract. Following that drilling, traffic on the road increased, prompting the Hegars to file suit claiming that by using the road, Key was trespassing. They sought a declaratory judgment that Key had no legal right to "access or use the surface of the Hegar Tract in order to produce minerals from the Richardson Tract." At trial, the Hegars called a petroleum engineer who testified that the Richardson No. 4 was the only well on the pooled acreage with significant current production; the size of the reservoir from which it produced was three-and-a-half surface acres; the well's drainage area did not reach the Hegars' property; and the well was not draining oil from the Hegars' property.

The trial court enjoined Key from using the part of the road that was on the Hegars' property for any purpose related to producing minerals from the adjoining Richardson Tract. The court entered findings of fact and conclusions of law in support of its order, including findings and conclusions that (1) Key's use of the surface of the Hegar Tract to access the Richardson Tract constituted a trespass, (2) the use of the surface of the Hegar tract was not reasonably necessary to extract minerals from beneath the Hegar Tract, and (3) no minerals were being extracted from beneath the Hegar tract by wells located on the Richardson Tract.

Key appealed. The court of appeals initially reversed, but granted the Hegars' motion for rehearing, withdrew its opinion, and affirmed. 403 S.W. 3d 318. The court held that Key had the right to use the Hegars' surface to produce oil only from beneath the Hegar tract, determined that evidence supported the trial court's finding that Key was only producing oil from the adjacent Richardson Tract, and affirmed the trial court's conclusion that Key had no right to use the Hegars' surface to produce minerals exclusively from the Richardson Tract. *Id.* at 336. The court also held that Key's lease and pooling agreements, which were not part of the Hegars' chain of title, could not contractually expand Key's right to use the Hegars' surface. *Id.* at 326.

Key petitioned this Court for review,[1] arguing that it has the right to use the Hegars' surface estate in producing minerals from any part of the pooled unit. It asserts that the court of appeals erred by relying on the accommodation doctrine and in its application of *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973). Key also claims that the court of appeals incorrectly

[1] The Texas Oil and Gas Association submitted an Amicus Curiae brief in support of Key's petition for review.

assumed that because the record did not contain the original document severing the mineral and surface estates, Key's predecessor did not have the right to pool and Key did not have the right to use the road.

The Hegars first respond that because Key failed to brief its opposition to the Hegars' motion for rehearing in the court of appeals, it waived its current arguments. They also argue that a mineral owner has an implied easement to use the surface of a property *only* if production is from that property, which it is not in this case. As for the absence from the record of the document severing the mineral estate, the Hegars claim that they met their burden of proof to establish they are the exclusive owners of the surface estate and Key did not argue in the lower courts that the missing document would prove its permission to use the road.

II. Discussion

A. Key's Failure to Oppose Rehearing

After the Hegars filed a motion for rehearing, the court of appeals requested a response from Key. Key did not file one. The Hegars assert that the arguments Key raises in this Court should have been briefed in opposition to their motion for rehearing, and the arguments are waived because Key did not do so. We disagree.

An issue raised in this Court must have been assigned as error in the court of appeals if it originated in the trial court. TEX. R. APP. P. 53.2(f). The Hegars do not assert that Key failed to present its issues to the trial court and the court of appeals on original submission there.

Further, the Rules of Appellate Procedure provide that a motion for rehearing is not a prerequisite to filing a petition for review in this Court, nor is it required to preserve error. TEX. R.

APP. P. 49.9; *see Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004) ("A complaint that arises from the court of appeals' judgment itself, however, may be raised either in a motion for rehearing in the court of appeals *or* in a petition for review in this Court." (emphasis added)). The Rules of Appellate Procedure do not require a response to a motion for rehearing on pain of waiving the right to challenge the appellate court's judgment, and neither do we. Key did not waive its right to petition this Court for review of the court of appeals' judgment, so we turn to its arguments on the merits.

B. Key's Use of the Surface

The owner of the dominant mineral estate in a tract has the right to go upon the surface of that land to produce and remove the minerals, and also the incidental rights necessary for that production and removal. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248-49 (Tex. 2013). The mineral lessee's incidental rights include the right to use as much of the surface as is reasonably necessary to produce the minerals. *Id.* at 249.

Key argues that because its production from a tract pooled with others is legally treated as production from each tract within the unit, it has the right to use the surface of any of the units' pooled tracts in its production activities. We agree.

1. Pooling

Mineral lessees of multiple tracts may pool some or all of the tracts by combining them into a single unit, provided pooling is authorized by the leases. *Se. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 170 (Tex. 1999). The policy of Texas is to encourage the recovery of minerals, and the Legislature has made waste in the production of oil and gas unlawful. *See R.R. Comm'n of Tex. v.*

Manziel, 361 S.W.2d 560, 569-70 (Tex. 1962); *see also* TEX. NAT. RES. CODE § 85.045. Pooling is one method to prevent waste. *See* TEX. NAT. RES. CODE § 102.011 (providing that the Railroad Commission may establish a pooled unit in certain circumstances to prevent waste).

Both the Curbo/Rosenbaum and Richardson leases permit pooling.[2] The Curbo/Rosenbaum lease provides that Key has "the right and power to pool or combine the acreage covered by this lease. . . with any other land, lease, or leases in the immediate vicinity thereof." The primary legal consequence of pooling is that "production and operations anywhere on the pooled unit are treated as if they have taken place on each tract within the unit." *Tichacek*, 997 S.W.2d at 170 (citing *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 249 S.W.2d 914, 916 (Tex. 1952)).

2. Title Documents

The court of appeals first considered whether Key had the contractual right to use the road across the Hegars' property by virtue of its lease and pooling agreement. 403 S.W.3d at 325. The court concluded that the Hegars were not bound by the lease or the pooling agreement because those documents were not executed at the time the mineral and surface estates were first severed and, therefore, they were not within the Hegars' chain of title. *Id.* at 326. The court further considered Key's implied surface rights and concluded that those rights did not allow Key to use the road across the Hegar tract. *Id.* at 333.

As related to the title documents, Key argues that the law does not require recording a mineral lease in a surface purchaser's chain of title. However, we need not decide whether the lease

[2] The Richardson lease is not in the record, but the declaration of pooled unit states that both leases grant the right to pool. The Hegars do not argue that the Richardson lease does not grant the right to pool or that the pooling was in bad faith.

was required to be in the Hegars' chain of title in order to bind them. As we explain below, Key's owners, as the mineral owners, and Key, as the mineral lessee, have implied property rights to use the Hegars' surface.

3. Implied Surface Rights

Applying the "primary legal consequence" of pooling to this case—that production anywhere on a pooled unit is treated as production on every tract in the unit—we conclude that once pooling occurred, the pooled parts of the Richardson and Hegar Tracts no longer maintained separate identities insofar as where production from the pooled interests was located. So the legal consequence of production from the pooled part of the Richardson Tract is that it is also production from the pooled part of the Hegar Tract, and the Hegars do not contend that Key did not have the right to use the road to produce minerals from their acreage. Because production from the pooled part of the Richardson Tract was legally also production from the pooled part of the Hegar tract, Key had the right to use the road to access the pooled part of the Richardson tract. *See Prop. Owners of Leisure Land v. Woolf & Magee, Inc.*, 786 S.W.2d 757, 760 (Tex. App.—Tyler 1990, no writ) (holding that an implied surface easement of reasonable usage extended to the surface of tracts that had been pooled with a tract contained a producing well).

The court of appeals recognized that a mineral lessee's implied surface easement extends to the surface of the entire pooled area. 403 S.W.3d at 325. But the court concluded, and the Hegars argue, that Key did not have an implied right to use the Hegars' surface to produce minerals only from another tract, which the evidence showed and the trial court found was the situation here. *Id.* at 331. The court of appeals concluded that Key's surface easement was only implicated when Key

used the road to produce oil from beneath the Hegar Tract. *Id.* This conclusion conflicts with the legal consequence of pooling that production anywhere on the pooled unit and operations incidental to that production are regarded as taking place on each pooled tract.[3] *Tichacek*, 997 S.W.2d at 170.

The Hegars argue that their position is supported by *Robinson v. Robbins Petroleum Corp.*, in which this Court held that a surface tract may not be used for production on adjacent tracts without the surface owner's consent. 501 S.W.2d 865 (Tex. 1973). In *Robinson*, R.O. Robinson owned an eighty-acre surface estate subject to the Wagoner mineral lease. *Id.* at 866. The Wagoner lease included adjacent tracts that had been leased to Robbins Petroleum when the tracts were all owned by the same owners. *Id.* Sometime after Robinson purchased his surface estate, three waterflood units that did not include the Wagoner Lease were formed. *Id.* The well operator began using a former oil well on the Robinson Tract to produce salt water that it then used in the three waterflood units that were not part of the Wagoner Lease. *Id.* This Court held that "Robinson, as owner of the surface, is entitled to protection from uses thereof, without his consent, for the benefit of owners outside of and beyond premises and terms of the Wagoner lease." *Id.* at 868.

The Hegars assert that *Robinson* prohibits a mineral lessee from using one surface to aid operations on another tract. But *Robinson* is distinguishable from the situation here. The minerals under Robinson's surface had not been, and could not be, pooled with tracts where the water was being used. *Id.* at 867 ("Robinson's complaint is against the lower court holding that the operator has the right to take salt water . . . without his consent and without compensation for benefits flowing

[3] The legal consequences of pooling may be challenged by means of a claim that the lessee pooled in bad faith. *See*, *e.g.*, *Tichacek*, 997 S.W.2d at 168-69; *see also Elliott v. Davis*, 553 S.W.2d 223, 224 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.). The Hegars have not asserted such a claim.

to premises *not covered by or authorized to be pooled* by the Wagoner lease." (emphasis added)). And Robinson himself recognized that the lack of pooling was significant, arguing in the court of appeals that he had authority to control use of the water subject to a lessee's water use to assist with production under his tract or "underlying tracts pooled therewith." *Robinson v. Robbins Petroleum Corp.*, 487 S.W.2d 794, 797 (Tex. App.—Tyler 1972), *rev'd* 501 S.W.2d 865 (Tex. 1973). *Robinson* does not control here.

Based on a statement in *Robinson*, the Hegars also argue that because Key's owners never owned a portion of the Hegars' surface estate, their title to the minerals did not empower them to broaden the burdens on the Hegars' surface to benefit adjacent tracts. The statement on which they rely is as follows:

> Robinson took his surface title subject to the Wagoner lease and the implied right of the mineral owner to make reasonable use of the surface to produce certain minerals from the land covered by the Wagoner lease. Nothing in the Wagoner lease or the reservation contained in Robinson's deed authorized the mineral owner to increase the burden on the surface estate for the benefit of additional lands.

Robinson, 501 S.W.2d at 867-68. But the Hegars took their surface title subject to the mineral lease assigned by Key's owners to Key. *See Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 (Tex. 1990) (holding that the right to lease—the executive right—is a right of the mineral estate and is an interest in property, not a product of contract); 1 Ernest E. Smith & Jacqueline Lang Weaver, TEXAS LAW OF OIL AND GAS § 2.1[A][2] ("[T]he owner of a severed surface estate has no right to . . . participate in executing oil and gas leases."). And unlike the lease in *Robinson*, the lease to Key authorized it to pool the acreage with other tracts, which it did and which provision gave rise to Key's right to use the road.

Further, because they owned part of the minerals under the Hegar tract, Key's owners had the right to use the surface of the tract to develop and remove minerals from it, including the right of ingress and egress to do so. *See Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 481 n.1 (Tex. 2011). They also had the right to pool. *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 422-23 (Tex. 2008). Thus Key, through its mineral lease, also had the right of ingress and egress, *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980), and the right to pool. *Tichacek*, 997 S.W.2d at 170. The right of ingress and egress includes the right to ingress and egress over the surface of any pooled acreage for the purpose of producing minerals from any part of the pooled acreage. Accordingly, Key's owners did not increase the burdens on the surface estate by leasing their mineral interest to Key, nor did Key increase the burdens by pooling the Richardson and Curbo/Rosenbaum tract minerals.

C. Accommodation Doctrine

Under the accommodation doctrine, a surface owner may obtain relief on a claim that the mineral lessee failed to accommodate an existing surface use by proving that the existing use is precluded or substantially impaired by the mineral lessee and no reasonable alternative method is available to continue the existing use. *Merriman*, 407 S.W.3d at 249.

Key asserts that the accommodation doctrine was not raised in the trial court or the court of appeals, and even if it were, the court of appeals erred by relying on it to hold that Key trespassed on the Hegars' surface estate. The Hegars agree that the doctrine was not raised below and is not properly before us.

Because it was not raised in the trial court, the accommodation doctrine as related to Key's use of the Hegar Tract's surface was not properly before the court of appeals and we need not determine whether it was correctly applied. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006) ("Except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties.").

V. Conclusion

Key has the right to use the road across the pooled Hegar Tract for production of minerals from all the acreage with which it is pooled. We reverse the court of appeals' judgment and render judgment for Key accordingly.

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Phil Johnson
Justice

OPINION DELIVERED: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0158

FORD MOTOR COMPANY, PETITIONER,

v.

EZEQUIEL CASTILLO, INDIVIDUALLY, MARIA DE LOS ANGELES CASTILLO, INDIVIDUALLY AND AS NEXT FRIEND FOR A. C. AND E. C., AND ROSA SILVIA MARTINEZ, INDIVIDUALLY, RESPONDENTS

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

PER CURIAM

At issue in this appeal is the legal sufficiency of circumstantial evidence. A jury determined that a settlement agreement was procured by fraud, and the trial court rendered judgment setting the agreement aside. The court of appeals, however, reversed that judgment, holding the circumstantial evidence of fraud in the case legally insufficient. *Castillo v. Ford Motor Co.*, 2013 WL 268986 (Tex. App.—Corpus Christi–Edinburg, January 24, 2013, pet. filed). We conclude that the circumstantial evidence in this case is legally sufficient and accordingly reverse the court of appeals' judgment and reinstate the trial court's.

In 2004, Ezequiel Castillo and other occupants of his Ford Explorer sued Ford Motor Company for injuries sustained in a roll-over accident. The plaintiffs asserted design defects in the

Explorer's roof and in its handling or stability. The products-liability trial lasted approximately four weeks. The case was submitted to the jury on a Friday, late in the afternoon. The jury charge included separate liability questions on the two alleged design defects. A damages question was conditioned on an affirmative answer to one or both of the liability questions.

Cynthia Cruz Cortez, a member of the jury, was very interested in being selected foreperson, and the other jurors acquiesced. The jury was dismissed for the weekend less than an hour after deliberations began. The jury resumed deliberations the following Monday morning.

Within two hours, eleven of the twelve jurors had decided the first liability question in Ford's favor. Cortez was the only juror voting against Ford, but she eventually relented, making the first question a unanimous decision. By the end of Monday's deliberations, eight jurors had decided the second question in Ford's favor. Cortez was one of two jurors who voted against Ford, and two jurors remained undecided.

On Tuesday morning, Cortez failed to return for deliberations. According to other jurors and trial counsel for Ford, Presiding Judge Abel C. Limas[1] informed everybody that Cortez had been in the hospital all night with a sick child. Judge Limas dismissed the jurors for the day and announced that deliberations would resume the following morning.

After the recess was announced, Mark Cantu, one of Castillo's attorneys, called Pete Tassie, Ford's managing counsel, in Michigan to discuss settlement. The two had discussed settlement over

[1] Judge Limas is currently serving a 72-month sentence in federal prison for taking bribes from attorneys in exchange for favorable rulings. *Former Judge Abel Limas Gets 72 Months in Prison for Taking Bribes*, FBI.GOV (August 21, 2013), http://www.fbi.gov/sanantonio/press-releases/2013/former-judge-abel-limas-gets-72-months-in-prison-for-taking-bribes.

several months, but Cantu had refused to budge from his $15 million demand, which Tassie viewed as unreasonable. This day, however, Cantu asked for $8 million to settle, and later reduced his demand to $4 million. Tassie countered with an offer of $1 million. By the end of the day, the parties were less than $500,000 apart, with Cantu demanding $1.96 million, and Tassie willing to pay $1.5 million.

Tassie recalled from the lengthy negotiations that Cantu repeatedly stated that his demand would increase to $3 million if the jury were to send a note about damages. Tassie, who had ten years of experience negotiating for Ford, including several prior dealings with Cantu, found Cantu's comment odd, not only as to its frequency, but also its specificity. Tassie was accustomed to opposing negotiators stating generally that their demands would increase if certain things were to happen, but had never heard such a specific contingency, let alone one that was repeated several times. At the conclusion of the day's negotiations, Cantu told Tassie he would talk to the judge in the morning and that he could expect the judge to put some pressure on him to settle the case.

The next morning, Tassie called Ford's trial counsel, Eduardo Rodriguez, to update him on the significant progress that had been made in negotiations. Tassie, however, did not hear from the judge or Cantu before the jury began deliberating the next morning. Rodriguez informed Tassie that Cantu was not at the courthouse. Tassie thought this was odd because Cantu had not missed a day during the four week trial. He tried to reach Cantu by phone but was unsuccessful.

About 9 a.m., the jury sent a note to the judge asking for clarification on the burden of proof. Then, about 10:30 a.m., the second note of the day was sent to the judge, inquiring: "What is the maximum amount that can be awarded?" Rodriguez immediately called Tassie in Michigan, and,

without hesitation, Tassie obtained authority from his supervisor to settle the case for $3 million—the amount Cantu had said the day before he would demand if the jury were to ask a question about damages. About this same time, Cantu, who had been unavailable all morning, called Tassie. Cantu initially stated that his demand should be $10 or $15 million, but quickly agreed to settle the case for $3 million.

Tassie called Rodriguez to tell him the case had settled, and, because of the disturbing note, asked Rodriguez to speak with members of the jury. Ford's attorneys were able to talk to eleven of the jurors, but Cortez left the courthouse without speaking to them. Discussing the case with the other jurors, Ford learned that the jury had not been discussing damages before the settlement, and did not know that Cortez had sent the damages note to the judge. Ford subsequently tried to obtain a statement from Cortez but was not successful. Ford did obtain affidavits from most of the other jurors, who repeated what they told Ford on the day the case settled. After completing its investigation, Ford refused to pay the $3 million to Castillo, who then sued Ford for breach of contract.

In its defense to the settlement, Ford asserted fraudulent inducement, unilateral mistake, and mutual mistake. However, Judge Limas prohibited Ford from conducting discovery or offering evidence of the jury's deliberations in the products-liability trial, including the signed affidavits from the jurors. Judge Limas subsequently granted summary judgment, and the court of appeals affirmed. *Ford Motor Co. v. Castillo*, 200 S.W.3d 217 (Tex. App.—Corpus Christi–Edinburg 2006, pet. granted). This Court reversed and remanded to permit Ford to conduct discovery and offer evidence from the jurors in the products-liability suit, because, *inter alia*, the circumstantial evidence indicated

outside influence. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 666 (Tex. 2009) ("Discovery involving jurors will not be appropriate in most cases, but in this case there was more than just a suspicion that something suspect occurred—there was some circumstantial evidence that it did.").

On remand, a new jury heard testimony from, among others, Tassie, Cantu, Rodriguez, and most of the jurors from the products-liability trial, including Cortez. Several of the jurors testified that Cortez kept trying to bring up the damages issue on her own, and sent the note against their specific requests that she not do so. These jurors also testified that all other notes were sent by unanimous agreement. One juror testified that on the morning the case settled—after the day-long recess caused by Cortez's absence—Cortez arrived in a "very happy, very upbeat" mood, and told the other jurors, "This will be settled today."

Unlike the other jurors who testified, Cortez could not recall any of the pertinent details of the trial or the jury deliberations. Notably, Cortez could not recall why she sent the note in question, why exactly she did not show up for the second full day of deliberations, or why she had left the courtroom so quickly after the settlement was announced. Cortez also could not recall her cell phone number or carrier at the time, but signed a release permitting Ford to search for all cell-phone records registered to Cortez during the time of the products-liability trial, using her name, address, and date of birth. After denying that she spoke with any attorneys during the trial, Cortez was asked to explain a phone call on September 21, 2004 to the purported private cell phone of attorney and State Representative Jim Solis.[2] Initially, Cortez explained that her husband probably made the call.

[2] Jim Solis is currently serving a 47-month sentence in federal prison after confessing to his role in Judge Limas' extortion scheme, wherein Solis would operate as a middle man between Judge Limas and the attorneys trying cases in Limas' court. *Former Texas Representative Jim Solis Gets 47 Months in Prison for Limas Extortion Scheme,* FBI.GOV

When other evidence made that explanation unlikely,[3] she speculated that the phone records were those of another Cynthia Cortez.

After hearing all of the evidence, the jury found the settlement agreement invalid because of fraudulent inducement and mutual mistake. The trial court rendered a take-nothing judgment and Castillo appealed. The court of appeals reversed the judgment, concluding that the evidence was legally insufficient to support a jury verdict. *Castillo*, 2013 WL 268986, at *19.

A legal sufficiency challenge will be sustained when the record confirms either: (a) a complete absence 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. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). In a legal sufficiency review, we must view the evidence in the light most favorable to the verdict. *Id.* at 822.

When reviewing all of the evidence in a light favorable to the verdict, "courts must assume jurors made all inferences in favor of their verdict if reasonable minds could, and disregard all other inferences in their legal sufficiency review." *Id.* at 821. When reviewing circumstantial evidence that favors the verdict, we must "view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances." *Id.* at 813-14. If circumstantial evidence, when viewed in

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(August 02, 2013), http://www.fbi.gov/sanantonio/press-releases/2013/former-texas-representative-jim-solis-gets-47-months-in-prison-for-limas-extortion-scheme.

[3] Because Cortez's husband was a high school football coach at the time, Ford pointed out to Cortez that the same number making the purported call to Jim Solis also made five different phone calls between 6:50 and 8:00 p.m. on Friday, September 24. Cortez admitted that, as a high school football coach, her husband should not have been making and receiving phone calls during a game, but explained that he could still do so because he was an assistant coach, who worked from a box, rather than on the sidelines.

light of all the known circumstances, is equally consistent with either of two facts, then neither fact may be inferred. *Id.* at 813-14. But where the circumstantial evidence is not equally consistent with either of two facts, and the inference drawn by the jury is within the "zone of reasonable disagreement," a reviewing court cannot substitute its judgment for that of the trier-of-fact. *Id.* at 822.

To find fraudulent inducement, the jury was instructed that it needed to find evidence of five elements: (1) a material misrepresentation; (2) sent by or at the direction of the plaintiffs or their agents or representatives with knowledge it was false; (3) with the intent that Ford Motor Company rely on the representation; (4) that Ford Motor Company did not know the representation was false and actually and justifiably relied upon the representation; and (5) that Ford Motor Company detrimentally relied on the representation by entering into the settlement agreement. Only the first three elements are in dispute.

On the first element, the jury was instructed that a material misrepresentation is a "false statement of fact." Castillo argues that the note sent by Cortez asked a question, and therefore cannot be a false statement of fact. Although the note does ask a question, statements of fact are clearly implied. A jury note, asking about the maximum amount of damages, implies that the jury is deliberating damages and that it intends to award the maximum amount. It also implies that the note is from the jury collectively. The evidence indicates that neither implication was true. According to the testimony of several jurors, the jury was not actually deliberating damages at the time of Cortez's note, and several jurors specifically told Cortez not to send a note about damages.

Because the note implies material statements that were false, we conclude that some evidence exists of the first element of fraudulent inducement.

On the second element, Ford was required to produce evidence establishing that the note was sent by or at the direction of the plaintiffs or their agents or representatives with knowledge it was false. Ford's theory was that Cantu, as plaintiffs' representative, directed Cortez to send the note.

Castillo argues that this element presents a *Casteel* problem. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). We held in *Casteel* that harmful error will be presumed when a broad-form jury question contains both valid and invalid theories of liability, and the jury's answer fails to specify on which theory it rests. *Id.* at 388. Castillo argues that the doctrine of presumed harm is triggered with this element, because the word "or" requires Ford to present legally sufficient evidence of each possible way the element might be established. The argument misunderstands *Casteel*. *Casteel* issues do not arise in every situation where a jury has more than one legal theory to choose from when answering a single question. Instead, *Casteel* issues arise when one of the choices presented to the jury on a single, indiscernible question is legally invalid. *Id.* at 388–89. Castillo does not argue the legal invalidity of the element and thus *Casteel* does not apply.

As to the sufficiency of the evidence, the court of appeals held that the only evidence supporting the jury's finding on this element was Cantu's statement the night before that his demand would increase to $3 million in the event of a jury note about damages. The court of appeals found this circumstantial evidence too meager to support the verdict because Cantu's statement was "consistent with the custom of plaintiff's attorneys," and was just as likely coincidence as it was knowledge that Cortez would be sending the fraudulent note. *Castillo*, 2013 WL 268986, at *19.

Castillo agrees that the evidence of this element is too meager to support the jury's verdict and amounts to nothing more than mere suspicion or surmise, citing *Joske v. Irvine*, 44 S.W. 1059 (Tex. 1898), and *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925 (Tex. 1993). In *Joske*, the only evidence offered to show that the defendant had "requested or directed" the plaintiff's unlawful arrest was that the defendant had called the police to investigate the whereabouts of his missing property and spoken with officers shortly before the plaintiff was arrested. 44 S.W. at 1063. We held, "[i]t would be against reason to hold that the mere fact that a citizen has called upon the officer of the law to search for and recover his lost or stolen property will authorize the inference that he requested or directed the arrest subsequently made." *Id.* And in *Browning-Ferris*, we held that no evidence showed that the company intentionally interfered with a contract the plaintiff had with the Highway Department, because no proof linked Browning-Ferris to any of the evidence the plaintiff offered. 865 S.W.2d at 927.

The cases are similar to this case only in that they rest almost entirely on circumstantial evidence. Thus, in *Browning-Ferris* we noted that "[b]y its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern." 865 S.W.2d at 927. There was not enough evidence in *Joske* to establish a pattern, and the pattern, if any, in *Browning-Ferris* did not implicate the company. But here, there is enough circumstantial evidence to establish a pattern—a pattern that reasonably implicates Cantu in Cortez's fraudulent scheme to send the note.

Unlike the tortious-interference claim in *Browning-Ferris* or the unlawful arrest in *Joske*, in cases of fraud, "[i]t is not often that any kind of evidence but circumstantial evidence can be

procured." *Thompson v. Shannon*, 9 Tex. 536, 538 (1853). And circumstantial evidence must be evaluated in light of all the known circumstances, not merely in isolation. *City of Keller*, 168 S.W.3d at 813–14.

Contrary to the court of appeals' view, the trial evidence did not establish that Cantu's comments the day before the settlement were customary of plaintiff's attorneys, but rather the opposite. Tassie, who had negotiated for Ford for more than ten years, including several prior dealings with Cantu, had never heard such a specific contingency. Moreover, neither Cantu nor any of the other attorneys involved in the case had ever seen such a jury note before. Yet Cantu's comments forecast such a note and elaborated on the effect it would have on settlement negotiations. But the unusual nature and prescient timing of Cantu's statement is not the only circumstantial evidence supporting the jury's finding.

On the brink of a Ford victory, Cortez precipitated a day-long recess because of some serious illness or injury to one of her two children. At the trial of this case, however, Cortez could not recall the illness or injury that kept her at the hospital all night. The same day, Cantu, who had refused to lower his settlement demand below $15 million during weeks of previous negotiations, became more agreeable, reducing his demand to less than $2 million in just a matter of hours. Moreover, even after the surprising jury note inquiring as to the maximum amount of damages it could award in a case alleging damages of $35 million, Cantu remained agreeable to a settlement of less than ten percent of that amount. Viewing this circumstantial evidence in light of all the surrounding circumstances, the jury could reasonably infer from the evidence that Cortez initiated the recess in order to give Cantu more time to negotiate a settlement before the jury foreclosed that possibility.

The inferences become stronger when the circumstantial evidence raises the inference of fraud, and the parties alleged to have engaged in the fraud fail to offer any proof of their legitimate or honest motives. *Thompson*, 9 Tex. at 538. Here, the explanations offered for Cantu and Cortez's unusual and apparently coordinated conduct were lacking.

For instance, Cortez was unwilling to offer any explanation for her actions. Even when she was summoned to testify, she offered no explanation, claiming instead that she could not remember any of the relevant details of the trial or deliberations. As for Cantu, he denied ever making the prediction about the note, instead admitting that it would have been unreasonable to make such a statement. He further justified his willingness to discount the extremely favorable note, and accept a fraction of his original demand, on fear that one of his expert's testimony might provide Ford a fruitful appellate argument. While this concern possibly explains his settlement preference, it does not explain his willingness to give Ford such an extreme discount of the damages pled. The circumstantial evidence here is some evidence from which the jury could have reasonably inferred collusion between Cortez and Cantu in producing the fraudulent note.

Having found evidence that Cortez colluded with Cantu, who unquestionably knew that jury notes would be shown to Ford's attorneys, we necessarily find evidence of the third element—that Cortez sent the fraudulent note with the intent that Ford rely upon it.

Because the evidence is legally sufficient to support the jury's verdict, and Castillo has not challenged the factual sufficiency of the evidence, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and reinstate the trial court's. TEX. R. APP. P. 59.1.

Opinion Delivered: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0161

IN RE THE STATE BAR OF TEXAS

ON PETITION FOR WRIT OF MANDAMUS

Argued February 6, 2014

JUSTICE DEVINE delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE BROWN joined.

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

A person wrongfully arrested for a crime "is entitled to have all records and files relating to the arrest" expunged, if certain conditions are met. TEX. CODE CRIM. PROC. art. 55.01(a). One such condition is an acquittal. *Id.* art. 55.01(a)(1)(A). The statute thus serves to protect wrongfully-accused people by eradicating their arrest records.

In this original mandamus proceeding, the Commission for Lawyer Discipline complains that a former prosecutor, facing allegations of prosecutorial misconduct, has used an expunction order to block the Commission's prosecution. A district court has refused the Commission access to expunged criminal records for use in the disciplinary proceeding against the former prosecutor and has ordered the Commission to turn over investigative records. The grievance panel in the collateral disciplinary proceeding has construed the district court's actions as a bar to the disciplinary

proceeding and granted the former prosecutor's summary judgment motion. Because we conclude that the expungement order does not bar the Commission from using records from the criminal trial in the grievance proceeding, we conditionally grant the writ.

I

This mandamus relates to a disciplinary proceeding against former prosecutor Jon L. Hall, who allegedly suppressed exculpatory evidence in an aggravated robbery prosecution. The Commission's involvement began in November 2011, when it received a news article about the aggravated robbery trial. The article reported that Joshua Bledsoe was acquitted because the prosecutor suppressed exculpatory evidence.

The Commission began by interviewing, among others familiar with the case, the judge who presided over the trial and the attorney who represented Bledsoe. Shortly thereafter, the Commission anonymously received a partial trial transcript that included discussions between the trial judge and counsel regarding the prosecution's suppression of evidence, including a 911 tape.

In that tape, the robbery victim made statements that she later contradicted during trial. At trial, the victim identified Bledsoe as one of the robbers based partially on his race, but in the 911 call, the same witness claimed that she could not provide any description of the robbers, including race, because they wore masks.

Following its investigation, the Commission commenced a disciplinary action against Hall, the lead prosecutor in the aggravated robbery case, and Vikram Vij, an assistant prosecutor. The Commission subsequently dismissed the action against Vij. Hall elected to have his disciplinary action proceed before a grievance panel rather than in district court.

In answer to the Commission's evidentiary petition, Hall complained that he did not have access to records necessary to his defense because all records from the aggravated robbery case had been expunged. After receiving Hall's answer, the Commission, with Bledsoe's consent, filed a motion in the trial court that had presided over the criminal prosecution and signed the expunction order. The motion sought access to the expunged records for use in the pending disciplinary action. Although Hall had complained about not having access to the criminal-case records, he nevertheless responded to the Commission's motion by urging the trial court to deny access to the expunged records.

The Commission's motion was assigned to a visiting judge, sitting by assignment for the trial court. Following a hearing, the visiting judge concluded that the underlying expunction order precluded the Commission from relying on any of the expunged records and ordered the Commission to turn over all information in its possession related to Bledsoe's arrest, including the partial trial transcript. The order also barred for any purpose "any document or other evidence derived from the underlying criminal case and subject to the District Court's expunction order or derived from the arrest of J.B. and subject to the District Court's expunction order."

Meanwhile, in response to Hall's requests, the grievance panel chair ordered restrictions on the Commission's discovery in the disciplinary action. The order recited that the Commission could not acquire or use any documents or other evidence related to the underlying criminal case and expungement order until the trial court amended the expungement, if it did. Hall subsequently moved to strike the evidentiary petition, to dismiss the disciplinary proceeding, and for summary judgment. The Commission sought a stay so that it could seek relief from the trial court's order.

The grievance panel denied the Commission's stay request and, based on the trial court's order, granted Hall's summary judgment motion.

The Commission has appealed the panel's summary judgment to the Board of Disciplinary Appeals and has sought review of the trial court's order in the court of appeals. The Commission advises that both reviews have been stayed, pending our review of the Commission's petition for writ of mandamus.

The Commission submits that mandamus relief in this Court is appropriate because the court of appeals cannot redress the ultimate consequence of the trial court's order—the dismissal of the Commission's disciplinary action. That dismissal can only be challenged in a separate appeal to the Board of Disciplinary Appeals. The Commission submits that the attendant risk of conflicting appellate decisions that can only be reconciled in this Court suggests the present mandamus as the appropriate remedy. *See, e.g., In re State Bar of Texas*, 113 S.W.3d 730, 732 (Tex. 2003) (concluding that mandamus was the appropriate remedy to correct district court's interference in the regulation of the legal practice). We turn then to that review.

II

Expunction is not a right; it is a statutory privilege. *T.C.R. v. Bell Cnty. Dist. Attorney's Office*, 305 S.W.3d 661, 663 (Tex. App.—Austin 2009, no pet.). The expunction statute is an exception to the established principle that court proceedings and records should be open to the public. *See, e.g., Express-News Corp. v. MacRae*, 787 S.W.2d 451, 452 (Tex. App.—San Antonio 1990, orig. proceeding) (recognizing constitutional right to public trials and presumptively open court records); TEX. CODE CRIM. PROC. art. 1.24 (requiring public trials). The statute is designed

to protect wrongfully-accused people from inquiries about their arrests. *See Ex parte S.C.*, 305 S.W.3d 258, 263-64 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (stating "statute was enacted to prevent the record of a wrongful arrest from negatively impacting a person for the remainder of his life").

The statute provides for a truncated expunction procedure that requires neither filing a petition nor a hearing. TEX. CODE CRIM. PROC. art. 55.02 §1. The truncated procedure commences with a defendant's request for expunction, such as a request made orally on the record by defense counsel. *Id.* The acquitted defendant must provide the trial court with certain information, including a list of all officials and agencies to be named in the expunction order and notified of the expunction proceedings. *Id*. art. 55.02 §§1, 2(b). Within thirty days of acquittal, the trial court is to enter the expunction order, which is prepared and filed by defense counsel or by the prosecutor, if the acquitted defendant is not represented by counsel. *Id*. art. 55.02 §1. The court clerk then sends a certified copy of the expunction order to the Department of Public Safety and to each of the officials and agencies named in the order. *Id*. art. 55.02 §3(c).

"On receipt of the order, each official or agency or other governmental entity named in the order" is required to return to the court all records and files that are subject to the order or, if their return is impracticable, to obliterate all information identifying the acquitted defendant. *Id.* art. 55.02 §5(a)(1). Any of the entities named in the order may appeal the order as in civil cases generally. *Id*. art. 55.02 §3(a). The clerk is directed to destroy the collected files and records in some cases, but the files and records are not destroyed in the case of an acquittal. *Id*. art. 55.02

§5(d). In acquittal cases, the clerk maintains the expunged records and files but generally only the acquitted defendant has access to them. *Id*. art. 55.02 §5(c).

Expunction, however, is not absolute. The statute provides for exceptions, permitting the retention of records and files, if they may be needed in future criminal or civil proceedings. *Id*. art. 55.02 §4. Article 55.02 provides two exceptions for acquittal cases which apply if "(1) the records and files are necessary [to investigate and prosecute] a person other than the person who is the subject of the expunction order; or (2) the state establishes that the records and files are necessary for use in (A) another criminal case . . .; or (B) a civil case, including a civil suit or suit for possession of or access to a child." *Id*. art. 55.02 §4(a-2)(1), (2).

III

Bledsoe was acquitted in the underlying criminal prosecution on June 17, 2011. Despite the statute's directive that the court enter the expunction order "not later than the 30th day after the acquittal," the expunction order was not signed until December 28, 2011. By that time, the Commission's preliminary investigation into prosecutorial misconduct was virtually complete. The Commission, of course, had no direct connection to the criminal prosecution and no apparent knowledge of the expunction proceedings. The expunction order did not name the Commission as a respondent in possession of records to be expunged. Nor did the order make an exception for the Commission to use expunged records in its prosecution.

The Commission filed its Original Evidentiary Petition in the disciplinary proceeding in July 2012. Hall answered in August, complaining that the expunction order handicapped his ability to defend himself. In response, the Commission moved to modify the expunction order in the criminal

trial court. The motion recited that the Commission had recently learned of the order's possible existence but that it had not been served with a certified copy of the order nor been given notice of an expunction hearing. *See* TEX. CODE OF CRIM. PROC. art. 55.02 §3(c). The Commission requested access to records and files in the underlying criminal case for the purpose of prosecuting disciplinary proceedings against third parties.

The trial court denied the request. It further ordered the Commission to turn over any material in its investigation file related to Bledsoe's arrest and broadly ordered the Commission not to use any evidence derived from the underlying criminal case in any manner. This order, signed by the visiting judge on December 11, 2012, is the subject of the Commission's request for mandamus relief.

The Commission argues that the court's order perverts the expunction statute's purpose. It submits that a statute designed to protect an acquitted defendant's reputation has been applied to impede the disciplinary prosecution of the person accused of violating the acquitted defendant's rights. The Commission further notes that the acquitted defendant fully supports the Commission's use of the expunged records in the disciplinary case against the former prosecutor. In fact, the acquitted defendant filed a brief supporting the Commission's mandamus petition in this Court, and his lawyer appeared at oral argument. The Commission concludes that the court's application of the expunction statute is a clear abuse of discretion because it ignores the acquitted defendant's wishes, contravenes the statute's primary purpose, and interferes with the Commission's ability to prosecute the disciplinary action before the grievance panel.

We agree that the court's December 11 order, denying the Commission's request to use expunged records in the disciplinary action, is an abuse of discretion. A person can, in effect, "unexpunge" his records by putting those records at issue in another proceeding. *See, e.g., W.V. v. State*, 669 S.W.2d 376, 378-79 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (holding that retention of files was not necessary to afford protection from potential civil action because expunged records would be held by district clerk and could be retrieved if needed for subsequent proceedings); *see also Thomas v. City of Selma*, 2006 WL 2854405 *3 (W.D. Tex. Oct. 4, 2006) (holding that district clerk must produce arrest records for use in suit based on arrest). Bledsoe has done precisely that, making his arrest and prosecution a matter of public record, by filing a federal lawsuit against Hall and other defendants based on his arrest and prosecution. The Commission advises that Hall filed the full transcript of Bledsoe's trial as a summary judgment exhibit in federal court and that it is publicly available on the Internet. *See Bledsoe v. Galveston Cnty. Dist. Attorney's Office*, No. 4:13-CV-00469, Document 52-2 (S.D. Tex. filed Feb. 21, 2013) (*available at* https://www.pacer.gov).

The Commission argues that if an acquitted defendant can make expunged records public by filing a lawsuit based on his wrongful prosecution, he should likewise be able to make the records public by participating in a grievance proceeding based on the wrongful prosecution. Thus, if Hall can use the expunged records to defend himself in federal court, he can also use them to defend himself in the disciplinary action. And, if Hall has the right to use the expunged records, they should also be available to the Commission. The acquitted defendant supports the Commission's use of the expunged records in the disciplinary case, and we conclude that he has the right to voluntarily waive his expunction rights for this purpose. *In re Expunction of Jones*, 311 S.W.3d 502, 505 (Tex.

App.–El Paso 2009, no pet.) (citing TEX. CODE CRIM. PROC. art. 1.14(a)). We conclude further that the court abused its discretion in disregarding the acquitted defendant's voluntary waiver, particularly in light of the Commission's expressed need for the records to prosecute the disciplinary proceeding.

The expunction statute's purpose is not to eradicate all evidence of wrongful conduct. *See Gomez v. Tex. Educ. Agency*, 354 S.W.3d 905, 917-18 (Tex. App.–San Antonio 2011, pet. denied) (holding that a police officer's eyewitness testimony in a contested case administrative hearing was not barred by an expunction order issued before the hearing, but after the administrative petition); *Ex parte S.C.*, 305 S.W.3d at 266 (holding an expunction order overbroad because it included state securities board's investigation records mentioning S.C.); *Bustamante v. Bexar Cnty. Sheriff's Civil Serv. Comm'n*, 27 S.W.3d 50, 53-54 (Tex. App.–Austin 2000, pet. denied) (concluding that civil service commission did not rely on expunged records or files but on officers' testimony about their personal observations). The statute thus cannot reasonably be construed to apply to all investigative files and records generated by a state agency, like the Commission in this case.

The grievance panel, however, interpreted the visiting judge's order as precluding the Commission from proceeding in the disciplinary action. The Commission argued against that construction and presented evidence independent of the expunged records, including the affidavit from the judge who presided over the criminal trial, but to no avail. The panel chair concluded that there was "no way we can get the evidence" and that "as [the trial court's] order stands, then we have to grant the no-evidence motion for summary judgment."

In barring the Commission's use of any document or other evidence derived from the underlying criminal case, the court construes the expunction statute at odds with the acquitted defendant's interests. A process intended to protect acquitted defendants has been used as a shield against charges of prosecutorial misconduct. Moreover, the court's order fails to consider that an expunction order may except records needed for future investigations and proceedings by a prosecutor or a law enforcement agency. TEX. CODE CRIM. PROC. art. 55.02 §4(a-2). The exception extends not only to criminal matters, but to civil cases as well. *Id*. art. 55.02 §4(a-2)(2)(B). And, as already mentioned, an acquitted defendant who obtains an expunction may subsequently waive the statute's protection. Given the waiver expressed by the acquitted defendant, the relevance of the expunged records to the disciplinary proceeding, and the Commission's expressed need for those records, the trial court abused its discretion by extending the expungement order to the Commission and thereby interfering in the disciplinary proceeding.

An order that directly interferes with the Commission's ability to collect and present evidence is as much a direct interference in the disciplinary process as an order directed to a grievance panel itself. *See State Bar of Tex. v. Jefferson*, 942 S.W.2d 575 (Tex. 1997) (orig. proceeding) (granting mandamus relief against district court that enjoined disciplinary proceedings before a grievance panel); *State v. Sewell*, 487 S.W.2d 716 (Tex. 1972) (orig. proceeding) (same). Because the court's order interferes with the disciplinary process, disrupting the regulatory scheme promulgated by this Court to govern cases of attorney discipline, we conditionally grant relief and direct the trial court to vacate its order of December 11, 2012. We are confident the district court will comply, and the writ will issue only if it does not.

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John P. Devine
Justice

Opinion Delivered: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0161

IN RE THE STATE BAR OF TEXAS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE BOYD, joined by JUSTICE WILLETT, concurring in the judgment.

The Court concludes in this case "that [an] expungement order does not bar the Commission [for Lawyer Discipline] from using records from [a] criminal trial in [a subsequent] grievance proceeding." *Ante* at ___. The Court reaches this conclusion because (1) the defendant in the criminal case "has the right to voluntarily waive his expunction rights" and has done so here, *ante* at ___; (2) the trial court's construction of the expunction statute "contravenes the statute's primary purpose" and is "at odds with the acquitted defendant's interests," *ante* at ___; and (3) the trial court's order "interferes with the disciplinary process, disrupting the regulatory scheme promulgated by this Court to govern cases of attorney discipline," *ante* at ___. In my view, the latter two reasons, even if true, provide an inadequate basis to ignore the unambiguous language of the expunction statute. But I agree with the Court's first reason and therefore concur in the judgment.

Article 1.14 of the Texas Code of Criminal Procedure affirms that a defendant in a criminal prosecution "may waive any rights secured him by law." TEX. CRIM. PROC. CODE art. 1.14(a). Article 55.01 provides a defendant a right to expunction that may be waived. *See, e.g.*, *In re Expunction of Jones*, 311 S.W.3d 502 (Tex. App.—El Paso 2009, no pet.) (holding that a defendant knowingly waived his rights to expunction under article 1.14). The defendant in this case

consented to the Commission's motion for access to the expunged records for use in the pending disciplinary action and has filed a brief in support of the Commission's petition in this Court. Article 55.01 grants a right to the defendant, not the prosecutor, and I agree that in this case the defendant has waived that right.

There is no need in this case for the Court to consider whether the trial court's order "contravenes" the expunction statute's unexpressed purpose or "interferes with the disciplinary process." Because the defendant has waived his rights under the expunction statute, I agree that the trial court abused its discretion by denying the Commission access to the criminal trial record.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0169

IN RE VAISHANGI, INC., ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

JUSTICE BROWN did not participate in the decision.

In this mandamus proceeding, we must decide whether the trial court had jurisdiction to enforce a Rule 11 agreement when the defendant filed a motion to enforce almost one year after the case had been dismissed. We hold that the Rule 11 agreement was not an agreed judgment. Because the trial court's plenary power expired thirty days after the dismissal order, the court lacked power to enforce the agreement. We conditionally grant relief.

The relators, Vaishangi, Inc., Shivangi, Inc., Meena Patel, and Vinayak K. Patel (collectively, Vaishangi), entered into a commercial real estate lien note and related security instruments with Southwestern National Bank to finance a hotel. After disagreement regarding the note, the Bank accelerated the note and began proceedings to foreclose on the hotel property. In response, Vaishangi filed suit for breach of contract and wrongful foreclosure in Harris County. The

parties reached a settlement, memorialized in a handwritten Rule 11 agreement,[1] which the parties and the trial court signed. The agreement provided that Vaishangi "agree[d] to execute" a referenced loan-modification agreement. The Bank filed the Rule 11 agreement with the trial court that same day and attached an unsigned loan-modification agreement. The parties disagree whether Vaishangi had an opportunity to review and approve the referenced loan-modification agreement before the Bank filed the Rule 11 agreement with the court.

Four days later, the trial court signed an agreed order dismissing all claims. The order of dismissal did not incorporate the entire Rule 11 agreement. The parties soon disagreed on the principal amount remaining on the note and the terms of the settlement, ultimately resulting in the

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[1] The handwritten Rule 11 agreement reads as follows:

Rule 11 Agreement
Re: 2010-40753; Vaishangi Inc., Shivangi Inc., Meena Patel,
Vinayak K. Patel v. Southwestern National Bank

The Parties in the above-referenced matter, in resolution of this lawsuit, agree to the following terms:

1. Plaintiffs agree to dismiss their claims against Southwestern National Bank with prejudice;
2. Southwestern National Bank agrees to dismiss its claims against Plaintiffs without prejudice;
3. All parties agree to pay their own attorney's fees and costs;
4. Southwestern National Bank agrees to provide Plaintiffs with a copy of the March 2010 appraisal and related invoice;
5. Plaintiffs agree to execute the modified loan documents attached hereto;
6. All parties agree that Southwestern National Bank is entitled to and may withdraw all funds held in the Court's registry;
7. Plaintiffs agree to have the check from Cramer Johnson Wiggins and Assoc. re-issued payable solely to Southwestern National Bank, and to have said check mailed to Leyh [*sic*] & Payne LLP, 9545 Katy Freeway, Suite 200, Houston, Texas, 77024;
8. The District Clerk is ordered to prepare a check made payable to Southwestern National Bank in the amount of all principal plus interest currently held in the Court's Registry, less any administrative fees. Southwestern National Bank's attorneys can pick up the check on its behalf.
9. All parties agree that all defaults other than payment prior to the date of the modification agreement are settled including the alleged defaults on this loan relating to the La Porte Property;
10. All parties agree that the Settlement Agreement at issue in this lawsuit dated May 27, 2010, is valid and enforceable.

Bank's foreclosure of the hotel property. Vaishangi filed suit in Bexar County for wrongful foreclosure.

In response, the Bank filed a motion to transfer the case to Harris County, the venue of the previously dismissed lawsuit. The Bank also filed a "Motion to Enforce Settlement Agreement" in the Harris County lawsuit, which had been dismissed eleven months prior. Because Vaishangi had not yet executed the loan-modification agreement, the motion to enforce requested that the court order Vaishangi to pay damages, costs, and attorney's fees. Alternatively, the Bank requested that the court order Vaishangi to execute the loan-modification agreement. Vaishangi argued in response that the trial court had no jurisdiction to enforce the Rule 11 agreement because the trial court's plenary power expired thirty days after signing the dismissal order. Vaishangi also argued that a genuine issue of material fact existed regarding the balance owed under the modification agreement that should be resolved by trial.

Without hearing evidence, the Harris County court issued an order granting the Bank's motion to enforce the Rule 11 agreement, awarding the Bank damages and attorney's fees and ordering Vaishangi to execute the modification agreement. Vaishangi filed a petition for writ of mandamus with the Fourteenth Court of Appeals, seeking to set aside the trial court's enforcement order by contending that the trial court lacked jurisdiction. The court of appeals denied relief. ___ S.W.3d ___, ___.

If the Rule 11 agreement is a final judgment, as the Bank argues, the trial court maintains continuing jurisdiction to enforce that judgment. *See* TEX. R. CIV. P. 308 (providing for court enforcement of its judgments and decrees). If, however, the agreement is simply an interlocutory

order, and the dismissal order signed four days later is the court's final judgment, as Vaishangi argues, the trial court was without jurisdiction to enforce the Rule 11 agreement because its plenary power had expired. *See* TEX. R. CIV. P. 329b(d) (providing that a trial court's plenary power runs for thirty days after judgment is signed).

Texas Rule of Civil Procedure 11 provides that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11. We have generally treated Rule 11 agreements as separate and distinct from agreed judgments entered thereon. *See, e.g.*, *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996) (per curiam) (discussing when a court can "render an agreed judgment on the settlement agreement"); *Padilla v. LaFrance*, 907 S.W.2d 454, 462 (Tex. 1995) ("[T]he announcement of the agreement in open court and its notation on the docket cannot give it the force of a judgment." (quoting *Burnaman v. Heaton*, 240 S.W.2d 288, 292 (Tex. 1951))); *Kennedy v. Hyde*, 682 S.W.2d 525, 528 (Tex. 1984) ("[N]otwithstanding a valid Rule 11 agreement, consent must exist at the time an agreed judgment is rendered."). But nothing in the rules of procedure prohibits a Rule 11 agreement from being, itself, an agreed judgment, so long as the agreement meets the requirements for a final judgment. A judgment is final "if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties." *Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012) (quoting *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192–93 (Tex. 2001)); *Able Cabling Servs., Inc. v. Aaron-Carter Elec., Inc.*, 16 S.W.3d 98, 100–01 (Tex. App.—Houston [1st Dist.]

2000, pet. denied). However, a trial court's "approval of a settlement does not necessarily constitute rendition of judgment," because rendition of judgment requires a "present act" to "decide the issues." *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 857–58 (Tex. 1995) (per curiam) (citing *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976)). When parties dictate a settlement agreement on the record (creating an enforceable agreement under Rule 11) and the trial court approves it on the record, such a settlement agreement does not constitute an agreed judgment unless "[t]he words used by the trial court . . . clearly indicate the intent to render judgment at the time the words are expressed." *Id.* at 858.

The Bank argues that fact issues regarding whether the Rule 11 agreement disposed of all claims and all parties preclude us from determining this issue in a mandamus proceeding. *See, e.g.*, *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) ("[A]n appellate court may not deal with disputed areas of fact in a mandamus proceeding."). Although fact issues about the scope and terms of the Rule 11 agreement may remain, those issues do not prevent the Court from determining as a matter of law whether the Rule 11 agreement constitutes an agreed judgment. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (noting that this Court has the power to determine legal questions in a mandamus proceeding). Additionally, we are not precluded from deciding if the trial court exceeded its jurisdiction, as we need not resolve any fact issues to reach that determination. *See In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (per curiam) ("Mandamus is proper if a trial court issues an order beyond its jurisdiction."); *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (refusing to grant mandamus where the resolution of fact disputes was essential to determining if mandamus relief was proper). The Bank's concerns go to the question of whether

the parties agreed to dispose of all claims; the issue before the Court is whether *the trial court* intended to dispose of all claims and all parties through the entry of this agreement, thereby rendering final judgment, at that moment.

The Rule 11 agreement here provides that Vaishangi and the Bank agree to dismiss all claims. Additionally, the agreement states that "[a]ll parties agree that the Settlement Agreement at issue in this lawsuit dated May 27, 2010, is valid and enforceable." Although the trial court signed the agreement, nowhere did the trial court indicate the "intent to render judgment at the time the words [were] expressed." *S & A Rest. Corp.*, 892 S.W.2d at 858. In fact, we note that the Rule 11 agreement contains no decretal language typically seen in a judgment (i.e., "ordered, adjudged, and decreed"), while the dismissal order repeatedly recites the decretal language of "ordered, adjudged, and decreed." The signed agreement may be a binding and enforceable settlement as between the parties, but we cannot conclude that it is a judgment.

Additionally, if the Rule 11 agreement were a final judgment, the dismissal order would have been useless and unnecessary because a trial court can render only one judgment in a case, TEX. R. CIV. P. 301. Thus, the trial court here likely would not have entered the dismissal order had it intended the Rule 11 agreement to be a final judgment. Further, a later judgment supersedes a prior one, *see Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 & n.2 (Tex. 1993), so the dismissal order would have nullified any effect of the Rule 11 agreement as a judgment. The only reasonable conclusion is that the dismissal order is the trial court's final judgment and the Rule 11 agreement is not. *See Stewart v. USA Custom Paint & Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994) ("A properly executed order of dismissal is a judgment.").

While a party can certainly pursue a claim for breach of a settlement agreement even when that settlement agreement is not an agreed judgment, the "[t]he party seeking enforcement of the settlement agreement must pursue a separate claim for breach of contract." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009). When, as here, the trial court's plenary power had expired, a party could not "reinvest the trial court that dismissed the case with jurisdiction to enforce the settlement agreement" by filing a post-judgment motion to enforce the agreement. *Univ. Gen. Hosp., LP v. Siemens Med. Solutions USA, Inc.*, ___ S.W.3d ___, ___ (Tex. App.—Houston [1st Dist.] Feb. 28, 2013, no pet.) (mem. op.). When the trial court nevertheless heard the motion and issued an order enforcing the settlement agreement, the trial court exceeded its jurisdictional authority. *See In re John G. & Marie Stella Kenedy Mem'l Found.*, 315 S.W.3d 519, 522 (Tex. 2010). In these instances, mandamus is proper even without a showing that the relator lacks an adequate remedy on appeal. *See Sw. Bell Tel. Co.*, 35 S.W.3d at 605 ("Mandamus is proper if a trial court issues an order beyond its jurisdiction . . . . Further, because the order was void, the relator need not show it did not have an adequate appellate remedy, and mandamus relief is appropriate." (citing *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998))). Therefore, we conditionally grant the petition for writ of mandamus without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), and direct the trial court to vacate its order granting Southwestern National Bank's motion to enforce the settlement agreement. As we are confident that the trial court will comply, the writ will issue only if the trial court fails to do so.

OPINION DELIVERED: June 6, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0234

GILBERT WHEELER, INC., PETITIONER,

v.

ENBRIDGE PIPELINES (EAST TEXAS), L.P., RESPONDENT

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

Argued February 27, 2014

JUSTICE LEHRMANN delivered the opinion of the Court.

This case presents various issues regarding the proper manner of compensating a landowner for the destruction of trees on his property. As a general rule, when an injury to real property is temporary, the owner is entitled to damages commensurate with the cost of restoring his property, but when an injury to the same property is permanent, the owner is entitled to damages commensurate with the loss in the fair market value to the property as a whole. In today's case, we consider whether this general rule applies when the wrongful conduct causing the injury stems from breach of contract rather than tort. Concluding that it does, we also review a common law exception to this general rule, which under certain circumstances entitles the landowner to damages in keeping with the intrinsic value of the trees that were destroyed. Because we conclude that the exception

properly applies in this case, and hold that any error in the jury charge related to such damages was harmless, we reverse the judgment of the court of appeals and remand the case to that court to address the remaining issues.

I. Facts

The Wheeler family, by way of closely held corporation Gilbert Wheeler, Inc. (Wheeler), owns a 153-acre tract of land in Shelby County called "the Mountain." The property, which the Wheelers use as a family retreat, is heavily wooded and transected by a natural stream. When Enbridge Pipelines, L.P. determined that it needed to construct a pipeline across the property, it engaged INA Field Services to approach Wheeler about obtaining an easement. Wheeler agreed to grant Enbridge a right of way, but insisted that Enbridge install the pipeline by boring underground in order to preserve the trees on the property. Wheeler agreed to a contract that reflected this stipulation in explicit terms. Because this was an unusual provision, Enbridge was required to specifically approve the contract.

Soon after the parties executed the agreement, Enbridge hired a construction company to build the pipeline, but failed to inform the contractors about the provision requiring them to use the boring method to install the pipeline. As a result, in clearing the right of way the construction company cut down several hundred feet of trees and bulldozed the ground. In the process, the workers also channelized the stream that once meandered through the woods.

Wheeler sued Enbridge for breach of contract and trespass. The suit proceeded to a jury trial, and the court charged the jury on both claims. Enbridge objected to the trespass submission, arguing that Wheeler's claims sounded only in contract. Enbridge also requested a question concerning

whether the damage to the Mountain was temporary or permanent, contending that the question was a necessary predicate to determine whether the jury should award damages commensurate with the cost to restore the trees and stream or damages commensurate with the loss in the Mountain's fair market value. Wheeler contended that the distinction was irrelevant. Ultimately, the trial court submitted the charge without the question, and the jury found Enbridge liable for the damage to Wheeler's property on both trespass and breach-of-contract theories. In conjunction with the breach-of-contract claim, the jury awarded $300,000 to compensate Wheeler for the reasonable cost to restore the property. In conjunction with the trespass claim, the jury found no loss in the Mountain's fair market value and awarded Wheeler $288,000 in damages for the intrinsic value of the trees Enbridge destroyed. Wheeler elected to recover the damages awarded for breach of contract.

Enbridge appealed, arguing that the trial court erred in failing to submit the predicate question of whether the injury to the Mountain was temporary or permanent. Enbridge also contended that the injury was permanent as a matter of law, that cost-to-restore damages were therefore improperly awarded, and that Wheeler could not recover damages for the intrinsic value of the trees because that measure of damages was unavailable and not properly submitted to the jury in any event. Wheeler countered that the temporary-versus-permanent distinction did not apply because its case sounded in contract. Wheeler argued in the alternative that it could recover for the intrinsic value of the trees destroyed without respect to the temporary-versus-permanent distinction. The court of appeals agreed with Enbridge and held that, because Wheeler had failed to secure a finding as to whether the injury to the property was temporary or permanent, Wheeler had waived

its entitlement to a damage award. For that reason, the court of appeals rendered a take-nothing judgment in Enbridge's favor. Wheeler petitioned this Court for review.

II. Analysis

Wheeler's petition raises broad concerns about the boundaries of the temporary-versus-permanent distinction and its application to the calculation of damages for injury to real property. In order to resolve the confusion surrounding this distinction, we take this opportunity to clarify its contours.

A. Temporary-Versus-Permanent Injury to Real Property

Applying the distinction between temporary and permanent injury to real property has proven a vexing task for litigants and courts alike. After all, injury to real property often appears permanent in the sense that the exact real estate in question—a demolished house or destroyed tree—no longer exists. However, as discussed below, the law recognizes that such items frequently can be replaced in an adequate manner, rendering the landowner suitably compensated. To further complicate matters, Texas courts have attempted to categorize various aspects of a legal claim, including a party's conduct, an event or occurrence, a condition, an injury or harm, and the damages resulting from an injury or harm, as either temporary or permanent.

Further muddling things are the multiple purposes served by characterizing an injury to real property as temporary or permanent. The distinction guides courts in determining: "(1) whether damages are available for future or only past injuries; (2) whether one or a series of suits is required; and (3) whether claims accrue (and thus limitations begins) with the first or each subsequent injury." *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275 (Tex. 2004). The present case

illustrates a fourth application of the distinction: it guides the proper measure of damages for injury to real property.[1] To that end, we have applied the distinction in evaluating real-property damages across many different theories of liability. *See, e.g.*, *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 921 (Tex. 2013) (trespass); *Natural Gas Pipeline Co. v. Justiss*, 397 S.W.3d 150, 152 (Tex. 2012) (nuisance); *State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 172 (Tex. 2009) (eminent domain); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 235 (Tex. 2004) (negligence).

In today's case, we focus on the significance of classifying injury to real property as temporary or permanent in the context of properly compensating the injured landowner. Our analysis takes into consideration the fact that the property in question was injured due to a breach of contract, as well as the fact that the injury involves loss of trees.

B. Application of Distinction to the Measure of Damages for Injury to Real Property

As early as 1889, we stated that "[i]f land is temporarily but not permanently injured by the negligence or wrongful act of another, the owner would be entitled to recover the amount necessary to repair the injury, and put the land in the condition it was at the time immediately preceding the injury, with interest thereon to the time of the trial." *Trinity & S. Ry. Co. v. Schofield*, 10 S.W. 575, 576–77 (Tex. 1889). The companion rule, of equally venerable provenance, states that "the true measure of damages in case of permanent injury to the soil is the difference between the value of the

[1] We specifically recalled this "different purpose" for the temporary-versus-permanent distinction in *Schneider*. 147 S.W.3d at 270 n.12. We note that these purposes are not exclusive. We have held, for example, that a landowner may receive injunctive relief to prevent certain future trespasses if the trespass is "continuing." *See, e.g.*, *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 567 n.2 (Tex. 1962).

land immediately before the injury and its value immediately after." *Fort Worth & D. C. Ry. Co. v. Hogsett*, 4 S.W. 365, 366 (Tex. 1887). These rules are premised on the notion that the ordinary measure of damages is the cost to restore the property. When restoration is not possible, however, we award damages equal to the loss in fair market value of the property as a whole.

1. Application of Distinction to the Breach-of-Contract Claim

Wheeler argues that, with respect to calculating damages for injury to real property, the temporary-versus-permanent distinction has no place when those damages stem from breach of contract rather than tort. Wheeler notes that contract damages serve to give a plaintiff the benefit of his bargain, i.e., to place the plaintiff in the position he would have occupied if the contract had been performed. Wheeler contends that restoration costs will give it the benefit of its bargain under the right-of-way agreement and thus are the proper measure of damages regardless of whether the injury to the Mountain is characterized as temporary or permanent.

We have never directly addressed this issue, and the courts of appeals are not in agreement. Some have held that calculating damages for injury to real property requires application of "general principles" across causes of action, whether sounding in contract or tort. *Hall v. Hubco, Inc.*, 292 S.W.3d 22, 32 n.4 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *see also Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 545–46 (Tex. App.—El Paso 2001, no pet.) (holding that cost to restore was the appropriate measure of damages for temporary injury to real property caused by breach of a lease agreement). Others have been more flexible in evaluating damage awards. *See, e.g.*, *P. G. Lake, Inc. v. Sheffield*, 438 S.W.2d 952, 954–55 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.) (declining to apply the temporary-versus-permanent distinction

where an oil and gas lessee breached his contract to repair the leased premises); *see also B. A. Mortg. Co. v. McCullough*, 590 S.W.2d 955, 956–57 (Tex. Civ. App.—Fort Worth 1979, no writ) (affirming cost-to-restore damages in a case involving permanent injury to land because "the reasonableness of applying a given measure of damages in a given case unavoidably hinges on the peculiarities of the case" (citation and internal quotation marks omitted)).

We hold that application of the temporary-versus-permanent distinction in cases involving injury to real property is not limited to causes of action that sound in tort rather than contract. Of course, contracting parties are free to specify in an agreement how damages will be calculated in the event of a breach, but when they do not, both courts and parties benefit from the application of general principles with respect to calculating damages for such injury. In this case, we find persuasive our prior holding that, with respect to right-of-way agreements like the one at issue here, "the measure of damages for breach of an easement that restricted a right to cut trees would be the same as the measure for negligently cutting trees." *DeWitt Cnty. Electric Coop., Inc. v. Parks*, 1 S.W.3d 96, 105 (Tex. 1999). This stands to reason because the injury in question under either cause of action is the same. We see no reason to compensate a party differently because the wrongful conduct that caused the identical injury stems from breaching a contract rather than committing a tort. Further, the exceptions to the general rules in this area, discussed below, operate to ensure landowners are adequately compensated. Accordingly, we hold that the temporary-versus-permanent distinction underlies the determination of the proper measure of damages for both the trespass and breach-of-contract claims at issue.

2. Definitions of Temporary and Permanent Injury

Having clarified the significance of whether injury to real property is temporary or permanent with respect to measuring the resulting damages, we turn to how that determination is made. We have previously defined a permanent action or consequence in accordance with its ordinary meaning—that is, as a thing which will continue indefinitely, or at least for a very long time. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 558 (Tex. 2004). But we have also recognized that the same action or consequence "need not be eternal" or "perpetual" to qualify as permanent. *Schneider*, 147 S.W.3d at 277. On the contrary, an action or consequence may qualify as permanent if it is ongoing, continually happening, or occurring repeatedly and predictably. *Gragg*, 151 S.W.3d at 558; *Schneider*, 147 S.W.3d at 272; *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684–85 (Tex. 1975); *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 106 (Tex. 1961). Identifying the opposites of the same themes, we have defined as temporary those actions and consequences that do not last for long periods of time, are not ongoing, are not likely to occur again, occur only sporadically, or occur unpredictably. *Schneider*, 147 S.W.3d at 272; *Atlas*, 524 S.W.2d at 685; *Brazos River Auth.*, 354 S.W.2d at 108.

For the sake of clarity, we reformulate these definitions in the following way. An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, *or* (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. Conversely, an injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, *and* (b) any anticipated recurrence would be only occasional, irregular, intermittent, and

not reasonably predictable, such that future injury could not be estimated with reasonable certainty. These definitions apply to cases in which entry onto real property is physical (as in a trespass) and to cases in which entry onto real property is not physical (as with a nuisance). With these definitions in hand, we turn to whether the jury or the court is the proper entity to determine whether an injury to real property is temporary or permanent.

3. Whether Injury to Real Property Is Temporary or Permanent Is a Question of Law

We held long ago that "[w]hether the injury [to real property] amounts to total or only partial destruction of value, or whether it be permanent or temporary, as well as the extent of the injury and the resulting amount of damages, are all questions for the determination of the jury under proper instructions." *Trinity & S. Ry. Co. v. Schofield*, 10 S.W. 575, 577 (Tex. 1889). However, we have more recently clarified, in the context of a nuisance suit, that "[j]urors must still decide the frequency, extent, and duration of noxious conditions . . . [b]ut jurors cannot decide questions such as whether damages can be estimated with reasonable certainty, whether principles of res judicata allow one or a series of suits, or when limitations ought to accrue." *Schneider*, 147 S.W.3d at 281. Accordingly, we instructed that jurors should determine whether a nuisance works temporary or permanent injury only "to the extent there is a dispute regarding what interference has occurred or whether it is likely to continue." *Id.*

Because this instruction should apply with equal force in cases considering the appropriate measure of damages for injury to real property, we hold that whether an injury is temporary or permanent is a question of law for the court to decide. At the same time, we recognize that questions regarding the facts that underlie the temporary-versus-permanent distinction must be resolved by the

jury upon proper request. Said another way, when the facts are disputed and must be resolved to correctly evaluate the nature of the injury, the court, upon proper request, must present the issue to the jury, relying on the definitions we have provided in this opinion.

4. Exceptions to the General Rule as to Damages

As noted above, the general rule in cases involving injury to real property is that the proper measure of damages is the cost to restore or replace, plus loss of use for temporary injury, and loss in fair market value for permanent injury. However, we apply this rule with some flexibility, considering the circumstances of each case to ensure that an award of damages neither over- nor under-compensates a landowner for damage to his property. We maintain that the purpose of the law "in every case, is to compensate the owner for the injury received, and the measure of damages which will accomplish this in a given case ought to be adopted." *Pac. Express Co. v. Lasker Real–Estate Ass'n*, 16 S.W. 792, 793 (Tex. 1891). For that reason, Texas courts have appealed to a number of exceptions to the general rule when it would compensate a landowner unjustly. Two of those exceptions are at issue in this case.

a. The Economic Feasibility Exception

In cases involving temporary injury, Texas courts have recognized the so-called economic feasibility exception to the general rule that the cost to restore is the proper measure of damages. This exception applies when the cost of required repairs or restoration exceeds the diminution in the property's market value to such a disproportionately high degree that the repairs are no longer economically feasible. In those circumstances a temporary injury is deemed permanent, and damages are awarded for loss in fair market value. *See N. Ridge Corp. v. Walraven*, 957 S.W.2d

116, 119 (Tex. App.—Eastland 1997, pet. denied); *see also Hubco*, 292 S.W.3d at 32; *Jim Walter Homes, Inc. v. Gonzalez*, 686 S.W.2d 715, 717 (Tex. App.—San Antonio 1985, writ dism'd). In *North Ridge*, a landowner sued for injury to his property caused by unrelated spills of saltwater and oil. 957 S.W.2d at 117. Although these injuries were capable of being remediated, and therefore temporary, the combined cost to complete the restoration would have "exceeded the maximum value of the entire 100–acre tract by more than six times." *Id.* at 119. As a result, the court of appeals concluded that the repairs were not economically feasible as a matter of law, and awarded damages in keeping with the loss in the property's fair market value. *Id.* at 119–20.

Although this Court has not expressly recognized the economic feasibility exception, we have applied it, or something very similar to it, when necessary to prevent a landowner from being overcompensated. Two cases with similar facts illustrate the application of this exception. In *Pacific Express*, a landowner sued to recover damages for the negligent destruction of his house, which by most accounts would be considered a temporary injury because the house could be rebuilt. 16 S.W. at 793. We held, however, that the house should be treated "as a part of the land," and the measure of damages should be "the difference between the value of the land immediately before and after a house on it is injured or destroyed." *Id.* at 794. We reached that result because declining local land values led us to conclude that to award the landowner the cost of restoring the home "would be to give to him more than would be just compensation." *Id.* at 793. By contrast, we reached the opposite result in *Coastal Transport Co. v. Crown Central Petroleum*, 136 S.W.3d 227, 235 (Tex. 2004). In that case, fire destroyed a landowner's facility. *Id.* at 229. The injury was found to be temporary, and the trial court awarded an amount commensurate with the cost of replacing the

facility, rather than the much larger sum the jury found constituted the property's lost market value. *Id.* at 230, 235. The landowner argued that the injury was permanent, as the facility had been totally destroyed, but we held that the landowner was "entitled to recover only the amount of money necessary to rebuild its facility and to compensate for its loss of use during the interim." *Id.* at 235. This, we explained, was a measure sufficient to place the landowner "in the same position [it] occupied prior to the injury." *Id.* (citations and internal quotation marks omitted).

Though we reached divergent results in these cases, in each instance we explained that our holding was necessary to ensure that the landowner was adequately, but not excessively, compensated. Consistent with these decisions, we confirm today our recognition of the economic feasibility exception to the general rule governing the measure of damages for temporary injury to real property.

b. The Intrinsic Value of Trees Exception

In cases involving real property injured by the destruction of trees, even when the proper measure of damages is the loss in the fair market value of the property to which the trees were attached, and the value of the land has not declined, we have held that the injured party may nevertheless recover for the trees' intrinsic value. This exception was created to compensate landowners for the loss of the aesthetic and utilitarian value that trees confer on real property. In *Porras v. Craig*, a landowner sued his neighbor for cutting down trees on his property, some as large as four feet in diameter. 675 S.W.2d 503, 504 (Tex. 1984). The parties agreed that the damage to the land was permanent, and we noted that the usual measure of damages for permanent injury to real property is "the difference in the market value of the land immediately before and immediately after"

the injury occurs. *Id.* However, we observed that Texas courts of appeals had begun to apply "a conditional measure of damages, . . . contingent on a showing of no reduction in market value," which compensated landowners for the intrinsic value of the trees that were destroyed. *Id.* at 506. We recognized the exception and remanded the case for a new trial in the interest of justice. *Id.*

We recently revisited this exception in *Strickland v. Medlen*. 397 S.W.3d 184 (Tex. 2013). In that case, we considered whether pet owners could recover noneconomic damages for the negligent loss of their dog. *Id.* at 185. We concluded that they could not, as more than a century of case law has classified pets as personal property. *Id.* (citing *Heiligmann v. Rose*, 16 S.W. 931, 932 (Tex. 1891)). Ultimately, we held that the plaintiffs could recover only the objective, economic value of their pet. *Id.* at 198. In arriving at this conclusion, we distinguished *Porras*. We explained that *Porras* presented no obstacle to the result in *Strickland* because a tree's intrinsic value is not "rooted in an owner's subjective emotions," nor does it encompass the tree's "sentimental value" to its owner. *Id.* at 190. Rather, the intrinsic value of a tree lies in "its ornamental (aesthetic) value and its utility (shade) value." *Id.* (citing *Porras*, 675 S.W.2d at 506). We also do not rule out other elements of objective value to the extent an expert lays a proper predicate.

Applying *Strickland*, we confirm and clarify this exception to the general rule governing damages for permanent injury to real property. Specifically, we affirm that when a landowner can show that the destruction of trees on real property resulted in no diminishment of the property's fair market value, or in so little diminishment of that value that the loss is essentially nominal, the landowner may recover the intrinsic value of the trees lost; that is, the ornamental and utilitarian value of the trees. We recognize that in *Porras* we stated that the exception applies when there is

"no" diminution in market value, *Porras*, 675 S.W.2d at 506, but we decline to limit the exception so strictly. *See Moran Corp. v. Murray*, 381 S.W.2d 324, 328 (Tex. Civ. App.—Texarkana 1964, no writ) (holding that intrinsic value measure of damages is proper when the plaintiff shows "that destruction of the trees did not have a significant effect upon the market value of the land"). If we were to permit application of the exception when the property suffered no loss in fair market value but not permit application of the same exception when the property suffered what amounts to a nominal loss in value, we would controvert the purpose of a damage award, which is to adequately compensate the injured party. *See Pac. Express*, 16 S.W. at 793.

III. Application

Having considered our case law concerning the temporary-versus-permanent distinction, we turn to the matter at hand. First, we consider whether Wheeler was required to submit a question asking the jury to characterize the injury to the Mountain as temporary or permanent. Second, we consider the propriety of the jury's award of cost-to-restore damages. Finally, we consider whether the jury question concerning the intrinsic value of the trees was properly submitted.

A. Absence of a Temporary-Versus-Permanent Jury Question

The court of appeals ultimately held that Wheeler's claims failed because it had neglected to request, and in fact actively opposed, a jury question concerning whether the injury to the Mountain was temporary or permanent. The court of appeals stated that "whether injury to real property is permanent or temporary is a question of fact." 393 S.W.3d at 925. As a result, it reasoned that "before damages for injury to real property may be awarded, the plaintiff must first obtain a finding on whether the injury to the land was permanent or temporary." *Id.* The court relied

on Texas Rule of Civil Procedure 279 to hold that, because Wheeler had declined to include a necessary predicate question, and Enbridge had objected to that omission, Enbridge was entitled to rendition of judgment in its favor. *See State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).[2] As explained above, the court of appeals' analysis is predicated on an erroneous premise—that the temporary-versus-permanent distinction is a question of fact. We therefore reject its conclusion.

Any dispute about the underlying facts of the case at bar has no bearing on the classification of the injury to the Mountain as temporary or permanent. Wheeler presented evidence that the cost to restore the Mountain to the condition it was in before Enbridge cleared the right of way was somewhere between $585,745 and $857,589. The jury ultimately found that the reasonable cost to restore the Mountain was $300,000. Although Enbridge contested the opinions of Wheeler's experts, at the very least they show that restoration was possible, rendering the injury temporary under the definitions supplied above. There was also competing expert testimony that the loss in the Mountain's fair market value was either $0 (according to Wheeler's expert) or $3,000 (according to Enbridge's expert). Under these circumstances, when restoration of the land is technically possible but exceeds the diminution in market value to such a disproportionately high degree that

[2] In *Payne*, we applied Rule 279 to hold that when an element of a party's claim is omitted from the jury charge, and the opposing party objects to the omission, a finding on the element may not be deemed in the prevailing party's favor. 838 S.W.2d at 241.

the repairs are no longer economically feasible,[3] the injury is deemed permanent. *See Pac. Express*, 16 S.W. at 793–94. Moreover, the parties now agree that the injury is a permanent one.

We hold that whether the injury to the Mountain was temporary or permanent is a question of law and that Wheeler therefore was not required to submit a jury question on that issue. Indeed, it would have been error for the trial court to include such a question in the charge. *Grohman v. Kahlig*, 318 S.W.3d 882, 887 (Tex. 2010). Instead, applying the definitions supplied in this opinion, we hold that the injury to the Mountain is deemed permanent as a matter of law due to the parties' agreement and the application of the economic feasibility exception.

Because the injury is deemed permanent, however, the trial court improperly instructed the jury to calculate damages based on the cost to restore the property. In turn, the trial court's judgment may not be upheld based on the jury's calculation of such damages. Accordingly, we turn to the jury's award of intrinsic value damages.

B. The Intrinsic Value of Trees Jury Question

The jury independently awarded Wheeler $288,000 in damages for the intrinsic value of the trees that were destroyed. Enbridge contends that Wheeler is barred from recovering such damages because (1) the loss of trees caused some diminution in the Mountain's fair market value, and (2) the

[3] We note that even the lower range of cost-to-restore damages presented by Wheeler's experts significantly exceeded the fair market value of the entire 153-acre property. The amount of cost-to-restore damages awarded by the jury was approximately 78% of the value of the entire property.

intrinsic value jury question was submitted in conjunction with the trespass cause of action, which was itself improperly submitted.[4]

In its first argument, Enbridge contends that Wheeler may not recover the intrinsic value of the trees that were destroyed because Wheeler did not adduce legally sufficient evidence that the value of the Mountain was not at all diminished by the destruction. In support of this argument, Enbridge cites the opinions of several courts of appeals. *See, e.g.*, *Lamar Cnty. Electric Coop. Ass'n v. Bryant*, 770 S.W.2d 921, 923 (Tex. App.—Texarkana 1989, no writ); *Garey Constr. Co. v. Thompson*, 697 S.W.2d 865, 867 (Tex. App.—Austin 1985, no writ). But, as we have already explained, a landowner may recover for the intrinsic value of the trees on his property so long as the diminution in the fair market value of the land is essentially nominal. To the extent these opinions hold otherwise, we expressly overrule them.

In this case, the record indicates that the fair market value of the Mountain as of the date of the injury was $383,000. As noted above, Wheeler's expert testified that the destruction of the trees had not diminished the value of the Mountain at all, while Enbridge's expert testified that the Mountain had been reduced in value by $3,000. Assuming that the latter figure is the correct one,[5] the fair market value of the Mountain was reduced by less than one percent. This negligible

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[4] Enbridge also argues that Wheeler failed to show that the destroyed trees had no market value as timber separate and apart from the real property to which they were attached, rendering intrinsic value damages improper. *E.g.*, *Lucas v. Morrison*, 286 S.W.2d 190, 191 (Tex. Civ. App.—San Antonio 1956, no writ). When we recognized intrinsic value damages in *Porras*, we did not require the plaintiff to make such a showing, which makes sense because that measure applies to trees that serve ornamental or shade purposes. 675 S.W.2d at 506.

[5] The jury agreed with Wheeler that there was no loss in fair market value, but Enbridge challenges the sufficiency of the evidence to support that finding. We need not decide that issue because the result is the same even if we assume there was a $3,000 loss in fair market value.

reduction in fair market value is essentially nominal and does not preclude application of the intrinsic value exception.

Enbridge also suggests an independent ground on which the jury's damage award must be invalidated. In the jury charge, the question that asked the jury to consider the intrinsic value of the trees was posed in connection with a liability question on Wheeler's trespass cause of action. Relying on *DeWitt County Electric Cooperative, Inc. v. Parks*, 1 S.W.3d 96 (Tex. 1999), Enbridge argues that Wheeler cannot recover on its trespass claim as a matter of law and that, as a result, the jury question related to the intrinsic value of the trees is infirm.

In *Parks*, certain landowners entered into a contract with an electrical services cooperative for an easement across the landowners' property. *Id.* at 99. The right-of-way agreement that created the easement gave the cooperative certain rights with regard to the trees that were located on or near the easement. *Id.* When the cooperative cut down several trees, the landowners sued, alleging breach of contract and negligence among other claims. *Id.* We considered whether the plaintiffs could maintain their negligence claim independently of their contract claim. *Id.* at 105. Ultimately, we held that when a contract between two parties "spells out the parties' respective rights about whether trees may be cut, the contract and not common-law negligence governs any dispute about whether trees could be cut or how trees were cut." *Id.* That is, we held that the landowners' claims sounded only in contract, not in negligence, and we affirmed the trial court's grant of directed verdict to the cooperative on the landowners' negligence claims. *Id.* However, in *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, we held that the existence of a contract did not prevent a plaintiff from bringing an additional claim for fraudulent inducement. 960 S.W.2d 41, 43

(Tex. 1998). Because in the instant suit Wheeler brought a claim for trespass—distinct from both the negligence claim in *Parks* and the fraudulent inducement claim in *Formosa Plastics*—it is not immediately clear whether the trial court erred in submitting Wheeler's claim to the jury.

However, we need not resolve that question to conclude that, even if the submission of the trespass cause of action was error, it was harmless. We have held that the submission of an improper jury question may be harmless when an appellate court determines that the verdict was based on a valid theory of liability. *Thota v. Young*, 366 S.W.3d 678, 693–94 (Tex. 2012). And, as we have already stated, the temporary-versus-permanent dichotomy and its concomitant rules and exceptions—including the intrinsic value exception—govern the proper measure of damages on Wheeler's breach-of-contract claim. *See Parks*, 1 S.W.3d at 105. Because breach of contract was a valid theory of liability on which Wheeler prevailed, it is of no moment that the intrinsic value of trees jury question was submitted in conjunction with a trespass cause of action.

IV. Remaining Issues

Enbridge raised several issues in the court of appeals that were not reached because of that court's disposition of the case. Some of those issues were argued in the parties' briefing to this Court and have been discussed in this opinion. However, several were not, including various challenges to the trial court's admission of Wheeler's experts' testimony, exclusion of Enbridge's experts' testimony, and failure to submit a jury question on one of Enbridge's breach-of-contract defenses. As these issues were not briefed in this Court, we hereby remand the case to the court of appeals to address them.

V. Conclusion

The court of appeals erred in rendering judgment for Enbridge based on the trial court's failure to submit a jury question on whether the injury to the Mountain was temporary or permanent. For the reasons discussed above, we reverse the court of appeals' judgment and remand the case to that court to address the remaining issues in a manner consistent with this opinion.

_____
Debra H. Lehrmann
Justice

OPINION DELIVERED: August 29, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0257

IN THE INTEREST OF K.N.D., A CHILD

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

PER CURIAM

In this case, the trial court terminated A.D.'s parental rights to her daughter, K.N.D., under section 161.001(1)(O) of the Texas Family Code and appointed the Department of Family and Protective Services (the Department) as sole managing conservator. A.D. challenged the sufficiency of the evidence to establish removal for "abuse or neglect" of K.N.D. under chapter 262 of the Family Code and the sufficiency of the evidence to terminate in the child's best interest. The court of appeals upheld the Department's appointment as sole managing conservator but reversed the termination judgment and denied the Department's petition for termination. *In re K.N.D.*, 403 S.W.3d 277, 287 (Tex. App.—Houston [1st Dist.] 2012, pet. granted). The court of appeals held that the evidence was legally insufficient to establish that K.N.D. was removed for "abuse or neglect" under chapter 262, stating:

> There is no evidence to suggest that A.D.'s living arrangements, status as a prostitute, or personal relationships prior to one episode of domestic violence actually exposed K.N.D. to a substantial risk of harm so as to constitute evidence of neglect. . . . And there is no evidence to suggest that K.N.D. was actually injured so

> as to support an inference that such injury arose from the mother's abusive conduct. Evidence relating to past abuse or neglect of children other than the removed child is not relevant for purposes of section 161.001(1)(O).

Id. at 284–85. In light of our recent decision in *In re E.C.R.*, 402 S.W.3d 239 (Tex. 2013), we now reverse.

On April 28, 2011, A.D. gave birth to K.N.D. The following day, while K.N.D. remained in the hospital, the Department received a referral concerning the "neglectful supervision" of K.N.D. The referral reported that A.D. had been involved in a domestic dispute with her roommates while thirty-seven weeks pregnant, resulting in A.D.'s falling down. A.D. had then been taken to the hospital, where she gave birth. The referral reported that A.D.'s male roommate put his hands around the female roommate's neck and that the male roommate chased A.D., causing her to fall. The female roommate came to the hospital and told a nurse that she and A.D. were prostitutes and that the male roommate was their pimp. A.D. denied the allegations, claiming that her two roommates got into an altercation, and that she felt dizzy and fell down. Because the evidence was in dispute, caseworker Candice Chandler from the Department conducted an investigation and filed an affidavit with the court, in accordance with chapter 262 of the Texas Family Code.

The investigation revealed that A.D. told a hospital social worker that A.D.'s male roommate had been chasing her and stepped on her shoe, causing her to fall. An apartment worker also witnessed A.D. being chased by her male roommate and saw her fall down before getting back up and running to her apartment. The apartment worker told Chandler that the male roommate had kicked the door into the apartment, and that the police escorted the male roommate off the premises

while A.D. was taken to the hospital in an ambulance. The affidavit also stated that less than two weeks prior to giving birth to K.N.D., A.D. had relinquished parental rights to her first child, S.L.A.D., because she could not care for the child. A.D. had a history of "neglectful supervision" and "medical neglect" of S.L.A.D. The affidavit further reported that the caseworker assigned to S.L.A.D.'s case, Jasmin Green, classified A.D. as a "flight risk" with untreated "mental health issues;" A.D. would say she would comply with agency recommendations, but she would not follow through. Finally, the affidavit stated that A.D. had an assault charge on file from 2009.

Following the initial removal of a child, a court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the 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). In *In re E.C.R.*, we held:

> [W]hile 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. . . . 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."

402 S.W.3d at 248. We further held that a reviewing court may examine a parent's history with other children as a factor of the risks or threats of the environment, saying, "Part of [the] calculus includes the harm suffered or the danger faced by other children under the parent's care." *Id.* In light of *In re E.C.R.*, we hold that K.N.D. was removed for abuse or neglect under chapter 262 of

the Texas Family Code. Pursuant to Texas Rule of Appellate Procedure 59.1, we reverse the judgment of the court of appeals and remand for further proceedings.

OPINION DELIVERED: January 17, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0321

KENNEDY HODGES, L.L.P., PETITIONER,

v.

VENTURA GOBELLAN, JR. AND PAULA GOBELLAN, RESPONDENTS

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

PER CURIAM

A party waives its right to arbitration by substantially invoking the judicial process to the other party's detriment or prejudice. Proving waiver is a high hurdle due to the strong presumption against waiver of arbitration. This appeal concerns whether a law firm waived its right to arbitrate a fee dispute with former clients by litigating with a former associate. After the associate left the firm and took several clients with him, the firm sued the former associate—with whom it had no arbitration agreement—over client contingency fees. The firm also sued the former clients and moved to compel that dispute to arbitration pursuant to an arbitration clause in the contingency fee agreement between the firm and the clients. The trial court and the court of appeals both concluded that because the firm had litigated the fee issue with the former associate, it waived its right to arbitrate any claims stemming from its fee agreement with the former clients. Importantly, the firm could not arbitrate its dispute with the former associate because it had no arbitration agreement with

him. Because the firm's litigation with the former associate neither prejudiced the former clients nor substantially invoked the litigation process with them, we reverse the court of appeals' judgment and remand to the trial court.

Ventura Gobellan was driving an armored car for his employer when the vehicle became unstable and rolled over, killing a passenger and injuring Gobellan. Gobellan and his wife retained Kennedy Hodges, L.L.P. to defend against a wrongful death suit and to bring suit against Gobellan's employer and other defendants (the Gobellan Suit). The Gobellans agreed to pay Kennedy Hodges forty percent of the gross recovery obtained after suit was filed but before trial. Their fee agreement provided that the Gobellans would be liable for the entire contingency fee if they terminated Kennedy Hodges without cause and required the Gobellans and Kennedy Hodges to arbitrate any fee dispute. Kennedy Hodges assigned associate attorney Canonero Brown to the case.

Brown subsequently left Kennedy Hodges and assured Gobellan "he would work out a fee splitting arrangement with Kennedy Hodges and that [they] would not be affected." The Gobellans retained Brown to represent them. Kennedy Hodges sued Brown to recover contingency fees for former clients he took with him (the Brown Suit). The Gobellans were not a party to that suit. Kennedy Hodges later settled with Brown for a portion of all contingency fees collected from former firm clients who retained Brown, including the Gobellans.

In the Gobellan Suit, Gobellan's employer and the Gobellans submitted their dispute to arbitration. The Gobellans obtained an award that was confirmed in a final judgment, which Gobellan's employer satisfied by paying $470,000. Kennedy Hodges sued the Gobellans in a separate proceeding, and moved for a no-answer default judgment. But after conferring with the

Gobellans, Kennedy Hodges pursued its claim in the Gobellan Suit by intervening and moving to compel arbitration. The trial court denied the motion, and the court of appeals affirmed, concluding that Kennedy Hodges substantially invoked the litigation process as to the Gobellan fee based on the discovery it conducted in the Brown Suit. __ S.W.3d __, __. The court also found the Gobellans established prejudice because Kennedy Hodges attempted to "have it both ways" by switching between litigation and arbitration. *Id.* at __. As we explain below, the court of appeals' decision conflicts with our decision in *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008), on a question of law material to the disposition of the case, which confers jurisdiction on this Court over this interlocutory appeal, TEX. CIV. PRAC. & REM. CODE § 171.098(a)(1); TEX. GOV'T CODE §§ 22.001(a)(2), 22.225(c).

The Gobellans argue Kennedy Hodges's litigation in the Brown Suit substantially invoked the litigation process against them. Kennedy Hodges counters that the Brown Suit contained tort and contract claims not involving the Gobellans as parties. We agree with Kennedy Hodges.

Because the parties do not dispute the facts, whether Kennedy Hodges's conduct waived its right to arbitrate is a question of law we review de novo. *Cull*, 258 S.W.3d at 598 & n.102. A party waives the right to arbitrate "by substantially invoking the judicial process to the other party's detriment or prejudice." *Id*. at 589–90. The strong presumption against waiver of arbitration renders this hurdle a high bar. *Id*. at 590. We decide waiver on a case-by-case basis by assessing the totality of the circumstances. *Id.* We have considered such factors as (1) when the movant knew of the arbitration clause; (2) how much discovery was conducted; (3) who initiated the discovery; (4) whether the discovery related to the merits rather than arbitrability or standing; (5) how much

of the discovery would be useful in arbitration; and (6) whether the movant sought judgment on the merits. *Id*. at 591–92. Further, the substantial invocation of the litigation process must also have prejudiced the opposing party. *Id*. at 593. In this context, prejudice is "inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Id*. at 597.

Two cases in particular illuminate how we apply this standard. First, in *Cull*, the Culls substantially invoked the litigation process by initially resisting the opposing party's motion to compel arbitration, filing motions to compel discovery, conducting extensive discovery about every aspect of the merits, and waiting until shortly before trial to request arbitration. *Id*. at 595-97. There, we specifically emphasized the extreme delay the Culls caused, which we noted undercuts one of the prime benefits of arbitration: an expedient and cost-effective dispute resolution process. *Id.* at 596. Additionally, our statement that waiver occurs when a party substantially invokes litigation with "the other party[]" indicates the party claiming waiver was the other party in the litigation. *Id.* at 590.

More relevant to our inquiry here, we held in *In re Service Corp. International* that a party who litigated one claim with an opponent did not substantially invoke the litigation process for a related yet distinct claim against another party with whom it had an arbitration agreement. 85 S.W.3d 171, 175 (Tex. 2002).

Here, Kennedy Hodges's litigation with Brown in the Brown Suit did not substantially invoke the litigation process with the Gobellans, who were not parties to the Brown Suit. The Brown Suit involved alleged breaches of Brown's employment agreement with Kennedy Hodges

as well as tort claims. And there was no arbitration agreement between Kennedy Hodges and Brown. By contrast, the Gobellan Suit involved an alleged breach of the Gobellans' contingency fee agreement with Kennedy Hodges, which contains an arbitration clause. By litigating with Brown, Kennedy Hodges did not litigate with the Gobellans. Our holding in *Service Corp. International*, compels this conclusion. *Id.* Additionally, Kennedy Hodges's litigation with Brown did not prejudice the Gobellans as it did not cause delay, expense, or damage to the Gobellans' legal position. *See Cull*, 258 S.W.3d at 597.

Likewise, we cannot agree that Kennedy Hodges substantially invoked the litigation process with its pleadings against the Gobellans. Kennedy Hodges filed pleadings against the Gobellans in two suits. First, Kennedy Hodges initiated litigation against the Gobellans in a separate proceeding in Harris County and filed a motion for a no-answer default judgment. But these pleadings alone do not rise to the level required to show waiver. *See, e.g.*, *id.* at 592 (assessing whether a party moved for judgment on the merits); *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763–64 (Tex. 2006) (holding that seeking initial discovery, taking four depositions, and moving for dismissal did not substantially invoke the litigation process). Second, after conferring with the Gobellans, Kennedy Hodges intervened in the existing Gobellan Suit and moved to compel their dispute to arbitration. The firm conducted no discovery. In sum, we conclude Kennedy Hodges did not substantially invoke the litigation process with the Gobellans by intervening and moving to compel arbitration. *See Vesta*, 192 S.W.3d at 763–64.

To conclude, Kennedy Hodges's litigation conduct involved suing a third party with whom it had no arbitration agreement and filing limited pleadings against the Gobellans. Such activity did

not substantially invoke the litigation process against the Gobellans or prejudice them. Thus, Kennedy Hodges did not waive its right to arbitrate its dispute with the Gobellans. 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 to grant Kennedy Hodges's motion to compel arbitration.

OPINION DELIVERED: May 16, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0409

IN THE INTEREST OF M.G.N. AND A.C.N., MINOR CHILDREN

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

PER CURIAM

Our constitution permits trial courts to proceed with fewer than twelve jurors if the trial court finds that up to three jurors are constitutionally *disabled*. Our statutes allow trial courts to substitute qualified alternate jurors for regular jurors who become statutorily *disqualified*—a different standard altogether. This case tests both principles. Here, the trial court substituted an alternate for a regular juror whom it found to be disqualified. Subsequently, the trial court found that one of the twelve jurors had become disabled and proceeded with the remaining eleven. The court of appeals reversed, concluding that the dismissal of the disqualified juror ultimately led to an eleven-member jury in violation of the constitutional right to a jury trial. We conclude the court of appeals failed to properly examine the two dismissals under their appropriate standards: whether the substitution for an alternate was proper due to a statutory disqualification and whether continuing with eleven jurors was proper due to a constitutional disability. Accordingly, we reverse the court of appeals' judgment and remand to that court for further proceedings consistent with this opinion.

This is a child custody dispute. George Carl Noyes and Monica Noyes were divorced in May 2007. The final divorce decree appointed them joint managing conservators of their two children. In 2010, each party sought to be designated sole managing conservator, and both agreed to a jury trial.

Following voir dire, the trial court empaneled twelve jurors and retained one alternate. During cross-examination of George at trial, Monica's counsel asked him a series of questions concerning his former employer, Tim Smoot. The inquiries insinuated that George was at least partly responsible for Smoot's alleged business troubles, and Smoot was said to have accused George of "running his business into the ground." At the recess following this cross-examination, Joel Turney, a juror, alerted a court deputy to the fact that he personally knew Smoot. Before continuing with trial, and outside the presence of the other jurors, the trial court questioned Juror Turney about his connection to Smoot. Juror Turney disclosed he had transacted business with Smoot for many years and believed the insinuations by Monica's counsel were misleading because the juror knew Smoot was solvent. The trial court asked Juror Turney whether, in light of this personal knowledge, he could deliberate as a fair and impartial juror. Juror Turney admitted he was inclined to share his knowledge with the other jurors "unless you tell me I can't bring up things that were not brought up between the lawyers." The trial court instructed Juror Turney to withhold this information from the other jurors.

Following this hearing, Monica's counsel requested Juror Turney be excused, and George's counsel objected. The trial court dismissed Juror Turney, replaced him with the lone alternate juror, and proceeded with the trial. The court reasoned that because there was an alternate juror available,

"there [was] no reason to take the risk here of impartiality . . . or of extra information going into the jury room."

A second juror issue arose on the morning of the seventh day of trial when juror George Park left a message with the clerk indicating he was ill and unable to attend the proceedings. Before resuming trial for the day, the trial court called Juror Park and, along with counsel for both parties, questioned him about the nature of his illness. Juror Park was not able to definitively state when he thought he would convalesce sufficiently to return to service. Recalling its assurance to the jurors that they would be done with trial by that day and noting that Juror Park's return date was uncertain, the court held that the trial would proceed with eleven jurors. George's counsel moved for a mistrial, which the trial court denied. The eleven-member jury returned a unanimous verdict denying both parties' requests for sole managing conservatorship.

George appealed, arguing that the trial court violated his constitutional right to a jury trial, as the eleven-person jury fell short of constitutional and statutory strictures. The court of appeals agreed, and reversed and remanded for new trial, citing the Texas Constitution's requirement that a jury must consist of twelve members unless not more than three of them die or become "disabled from sitting." TEX. CONST. art. V, § 13. Such disability, the court reasoned, must be in the nature of an actual physical or mental incapacity–mere inconvenience or delay does not suffice. 401 S.W.3d 677, 679. While Juror Turney concededly "posed a risk of impartiality and of extra information going into the jury room," potential contamination from a tendentious juror is not a constitutional disability requiring dismissal. *Id.* at 680. When the trial court dismissed the second juror—Juror Park—due to illness, only eleven jurors remained. Therefore, the court of appeals

concluded the dismissal of Juror Turney when he was not constitutionally disabled ultimately resulted in an eleven-member jury and violated George's constitutional right to a jury trial.

Monica petitioned this Court for review, claiming the court of appeals misconstrued the Texas Constitution and our precedent. The construction of the constitution and statutes are questions of law we review de novo. *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 585 (Tex. 2013); *Nathan v. Whittington*, 408 S.W.3d 870, 872 (Tex. 2013).

The parties invite us to consider whether a juror's potential bias may render her constitutionally "disabled from sitting." But we need not reach that question in resolving this matter, as the issue is considerably more straightforward. In brief, a court need not find a juror constitutionally disabled in order to substitute an alternate when doing so does not lead to numerical diminution of a twelve-member jury.

The relevant jury requirements in this proceeding are found in both the Texas Constitution and in the Texas Rules of Civil Procedure. TEX. CONST. art. V, § 13; TEX. R. CIV. P. 292. The constitution specifies that grand and petit juries in the district courts shall be composed of twelve members. TEX. CONST. art. V, § 13. As few as nine jurors may render a verdict if, during trial, as many as three jurors "die, or become disabled from sitting." *Id.* The Rules of Civil Procedure have similar language allowing as few as nine remaining jurors to return and render a verdict if "as many as three jurors die or be disabled from sitting." TEX. R. CIV. P. 292. Thus, if a trial court's dismissal of a juror results in fewer than twelve jurors, the dismissal must either be based on the juror's constitutional disability or the trial court must declare a mistrial if there was no constitutional disability.

In an effort to improve efficiency by reducing mistrials, the Legislature implemented a system of alternate jurors. These alternate jurors are "drawn and selected in the same manner as regular jurors." TEX. GOV'T CODE § 62.020(c). In practice, this means that an alternate juror must have the same qualifications as a regular juror, be subjected to the same challenges, swear the same oath, and otherwise be considered equivalent to a regular juror. The plain language of this statute allows an alternate juror to substitute for a regular juror by a different and lesser standard than constitutional disability: when a regular juror is "unable or disqualified to perform their duties." *Id.* § 62.020(d); *see also Schlafly v. Schlafly*, 33 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). A juror is deemed disqualified if he "has a bias or prejudice in favor of or against a party in the case." TEX. GOV'T CODE § 62.105(4). Taking the statute and constitution together, a trial court may substitute a regular juror with an alternate if the regular juror is unable to fulfill or is disqualified from fulfilling his duties, but a trial court may only dismiss a juror and proceed with fewer than twelve jurors if the dismissed juror is constitutionally disabled.

Here, the court of appeals conflated these provisions and held that the trial court wrongly proceeded with fewer than twelve jurors even though Juror Turney was not constitutionally disabled. Because the trial court substituted an alternate juror for Juror Turney, under the statute the trial court only needed to find that Juror Turney was disqualified from fulfilling his duties and that the alternate was qualified to serve. TEX. GOV'T CODE § 62.020(c)–(d); *Schlafly*, 33 S.W.3d at 863. The parties do not brief those issues here, and we do not address them. If the court of appeals concludes the trial court did not abuse its discretion in substituting the alternate juror for Juror Turney, it must then assess whether the trial court abused its discretion in proceeding with eleven jurors after finding

Juror Park constitutionally disabled. *See, e.g.*, *McDaniel v. Yarbrough*, 898 S.W.2d 251 (Tex. 1995) (juror not disabled due to severe flooding that made travel to the courthouse difficult); *Houston & T.C. Ry. Co. v. Waller*, 56 Tex. 331, 337 (1882) ("If a juror becomes so sick as to be unable to sit longer, he is plainly disabled from sitting."). Accordingly, pursuant to Texas Rule of Appellate Procedure 59.1, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand for that court to consider the remaining issues in a manner consistent with this opinion.

OPINION DELIVERED: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0450

GRAHAM CENTRAL STATION, INC., PETITIONER,

v.

JESUS PEÑA, RESPONDENT

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

PER CURIAM

In this negligence case involving a nightclub patron's injuries sustained during an altercation outside the club, the trial court rendered judgment against the club's purported owner, Graham Central Station, Inc. (GCS). Because no evidence supports the finding that GCS owned the club, we reverse the court of appeals' judgment and render a take-nothing judgment in favor of GCS.

Jesus Peña was assaulted by other patrons of the Graham Central Station nightclub (the Nightclub) in Pharr, Texas. Peña sued GCS, alleging that GCS owned the Nightclub and failed to provide adequate security to protect Peña from his assailants. GCS filed a verified denial stating that it was not a proper party to the suit, did not control the relevant premises, and had no connection with the Nightclub. In written discovery responses, GCS identified Roger Gearhart as its President. GCS also disclosed that Pharr Entertainment Complex, L.L.C. d/b/a Graham Central Station in Pharr, Texas (Pharr Entertainment) owned and operated the Nightclub, and was the tenant-in-

possession of the premises where the Nightclub was located. The disclosure included Pharr Entertainment's address and phone number.

Notwithstanding this disclosure, Peña never amended his petition to add Pharr Entertainment as a defendant, and the case against GCS was tried to the bench. At trial, the parties presented evidence regarding the ownership of the Nightclub and Peña's injuries. The trial court rendered judgment for Peña, awarding him $450,000 for pain and suffering as well as mental anguish, together with prejudgment interest and court costs. GCS requested findings of fact and conclusions of law, but the record does not reflect that the trial court ever filed them. GCS appealed, arguing that Peña sued the wrong party and that the trial evidence was legally and factually insufficient to support the trial court's damages award.

The court of appeals held that the evidence was sufficient to establish that GCS owned the Nightclub. ___ S.W.3d ___. The court modified the judgment by remittitur, reducing Peña's damages to $249,000, and otherwise affirmed. GCS filed a petition for review in this Court, maintaining that no evidence shows it owned the Nightclub.

As an initial matter, GCS complains that the trial court failed to file findings of fact and conclusions of law despite GCS's timely filing both a request and a notice of past due findings with that court. *See* TEX. R. CIV. P. 297. Any error in this regard was harmless, as it did not prevent GCS from properly presenting its case to the court of appeals or this Court. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam). Accordingly, we imply a finding by the trial court that GCS owned the Nightclub, which GCS has properly challenged on legal sufficiency grounds. *See BMC Software*

Belgium, N.V. v. Marchand, 83 S.W.3d 789, 795 (Tex. 2002); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

When a party attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate on appeal that no evidence supports the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). We will sustain a legal sufficiency challenge if "'the evidence offered to prove a vital fact is no more than a scintilla.'" *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). In conducting our review, "we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so." *Id.* "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

Peña's negligence claim against GCS stems from its failure to protect him from being assaulted by third parties at the Nightclub. Generally, "a person has no legal duty to protect another from the criminal acts of a third person." *Timberwalk Apartments v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) (citation and internal quotation marks omitted). However, "one who controls . . . premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee." *Id.* (citation and internal quotation marks omitted). The exception includes an owner that "retains control over the security and safety of the premises." *Id.* (citation and internal quotation marks

omitted). GCS does not dispute whether the Nightclub's owner controlled the security of the premises or owed Peña a duty under *Timberwalk*, but it does dispute whether GCS was that owner.

In holding that the evidence was sufficient to prove that GCS owned the Nightclub, the court of appeals relied largely on the following testimony by Gearhart:

> Q. Mr. Gearhart, what is your position with Graham Central Station?
>
> A. I'm a minority owner.
>
> Q. Minority owner, okay. And the full name for that company is different than Graham Central Station; is that correct?
>
> A. That's correct.
>
> Q. And what is the real name for that, for Graham Central Station?
>
> A. Pharr Entertainment Complex, L.L.C.
>
> Q. Okay. And who besides yourself is an owner of that corporation?
>
> A. I'm not sure who the exact owners are.
>
> Q. Okay. And are you a minority owner?
>
> A. That's correct.
>
> Q. And what is your percentage of the ownership of this corporation?
>
> A. Ten percent.
>
> Q. Ten percent? Okay. And are you here as the corporate representative for the corporation?
>
> A. I am.

Gearhart further testified that "he" provided security at the Nightclub, and that the club's security was "in-house."

The court of appeals held that because Pharr Entertainment is a limited liability company and GCS is a corporation, Gearhart must have been referring to GCS, and not Pharr Entertainment, when he stated that he was a minority owner of "that corporation." __ S.W.3d at __. From this testimony, in conjunction with the fact that Gearhart had identified himself as GCS's president in written discovery, the court concluded that a factfinder could reasonably infer that Gearhart was testifying about GCS and that GCS owned and provided in-house security for the Nightclub.

We disagree that a reasonable factfinder could make this inference. Although Peña's attorney posed questions to Gearhart using shorthand references to "that corporation," "this corporation," and "the corporation," the only antecedent to those references in the line of questioning is Pharr Entertainment, which Gearhart identified as "the real name . . . for Graham Central Station." It stretches the imagination to infer that Gearhart was describing GCS when discussing his minority interest. Indeed, the term "Graham Central Station, Inc." was never mentioned during Gearhart's testimony, either by Peña's attorney or by Gearhart. The only reasonable inferences to be drawn from Gearhart's testimony were that Gearhart owned a minority interest in Pharr Entertainment and that Pharr Entertainment owned and provided in-house security for the Nightclub. This conclusion is buttressed by the lease agreement for the premises that housed the Nightclub, which identified El Centro Mall, Ltd. as landlord and Pharr Entertainment as tenant. Whether Gearhart was also an officer of GCS is immaterial to this conclusion, as nothing in the record supports the notion that he was acting in that capacity in providing security for the Nightclub. Nor has Peña ever contended or demonstrated that GCS and Pharr Entertainment were engaged in a joint enterprise or were alter egos of each other.

The court of appeals also noted the testimony of Nightclub security guard Javier Gallegos, who stated that he was paid by "Graham Central Station." Though he did not specifically reference "Graham Central Station, Inc." or "Pharr Entertainment Complex, L.L.C. d/b/a Graham Central Station," the court of appeals concluded the trial court could have reasonably inferred that Gallegos was referring to GCS. We disagree. Given the lack of specificity in this testimony, such an inference would violate the equal inference rule, under which a factfinder "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." *Hancock v. Variyam*, 400 S.W.3d 59, 70–71 (Tex. 2013) (citation and internal quotation marks omitted). Nothing in Gallegos's testimony makes it more likely that he was referring to GCS, as opposed to Pharr Entertainment, when identifying who paid him for his security services at the Nightclub.

Finally, the court of appeals concluded that the trial court was "free to disbelieve" the testimony of Mark Threadgill, who testified as the corporate representative of GCS that: GCS had no relationship with or ownership interest in Pharr Entertainment; GCS had no role in the management of Pharr Entertainment; Pharr Entertainment, not GCS, provided security for the Nightclub; and Pharr Entertainment, not GCS, owned the Nightclub. But GCS did not have the burden to prove that it did not own the Nightclub; rather, Peña bore the burden to prove that GCS *did* own the Nightclub and in turn owed him a duty of care. Even ignoring Threadgill's testimony in its entirety, Peña failed to adduce any evidence to support that allegation.

In sum, we hold that the evidence supporting a finding that GCS owned the Nightclub was legally insufficient. On the contrary, the trial evidence supported the opposite conclusion—that

Pharr Entertainment actually owned and operated the Nightclub. The absence of evidence that GCS owned the Nightclub and in turn owed a duty to Peña under *Timberwalk* is fatal to his claim, and we need not reach the issue of whether legally sufficient evidence supported the trial court's award of damages. Accordingly, we grant GCS's petition for review and, without hearing oral argument, reverse the court of appeals' judgment and render judgment in GCS's favor. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0638

FRANKIE SIMS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; AND PATSY SIMS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS,

v.

CARRINGTON MORTGAGE SERVICES, L.L.C., APPELLEE

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

Argued December 4, 2013

CHIEF JUSTICE HECHT delivered the opinion of the Court.

To avoid foreclosure, homeowners and lenders often try to restructure underwater home mortgage loans that are in default by capitalizing past-due amounts as principal, lowering the interest rate, and reducing monthly payments, thereby easing the burden on the homeowners. But home equity loans are subject to the requirements of Article XVI, Section 50 of the Texas Constitution. The United States Court of Appeals for the Fifth Circuit has asked whether those requirements apply to such loan restructuring.[1] We answer that as long as the original note is not

[1] 538 F. App'x 537 (5th Cir. 2013) (per curiam); *see* TEX. CONST. art. V, § 3-c(a) ("The supreme court [has] jurisdiction to answer questions of state law certified from a federal appellate court.").

satisfied and replaced, and there is no additional extension of credit, as we define it, the restructuring is valid and need not meet the constitutional requirements for a new loan.

I

Frankie and Patsy Sims obtained a 30-year home equity loan in 2003. In 2009, the Simses, behind on their payments, reached what was entitled a "Loan Modification Agreement" with Carrington Mortgage Services, L.L.C. The agreements involved capitalizing past-due interest and other charges, including fees and unpaid taxes and insurance premiums, and reducing the interest rate and monthly payments. Two years later, the Simses were again behind, and this time CMS sought foreclosure. The Simses resisted, asserting that the 2009 restructuring violated constitutional requirements for home equity loans. The parties then reached a second "Loan Modification Agreement", further reducing the interest rate and payments. The following chart summarizes the loan data at the outset and after the two restructurings:

	Principal	Amt. Cap'd	New Prin.	Rate	Payment	Appraisal
2003 Loan	$76,000.00	—	—	9%	$611.51	$96,000
2009 Mod.	$72,145.50	$2,200.00	$74,345.50	6.5%	$511.16	$72,300
2011 Mod.	$72,655.61	$7,368.44	$80,023.95	4.75%	$492.34	$73,000

The original note required the Simses to pay principal, interest, and late charges.[2] The security agreement echoed that requirement and added an obligation for the Simses to make

[2] The note signed by the Simses stated: "In return for a loan that I have received, I promise to pay U.S. $76,000.00 (this amount is called 'principal'), plus interest, to the order of the Lender." The note also provided for a 5% late charge on overdue principal and interest.

payments for "Escrow Items", such as taxes, assessments, and insurance premiums.[3] The security agreement also authorized the lender to "do and pay for whatever is reasonable or appropriate" to protect its interest in the property and its rights under the agreement and provided that any amount the lender disbursed to that end "shall become additional debt of Borrower secured by this Security Instrument." The 2009 and 2011 "Loan Modification Agreements" provided that all the Simses' obligations and all the loan documents remained unchanged.[4]

Two months after the 2011 agreement, the Simses brought this class action against CMS in the United States District Court, alleging that CMS's loan modifications for them and other similarly situated borrowers violated Article XVI, Section 50 of the Texas Constitution. Before considering certification, the court dismissed the case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a cause of action,[5] and the Simses appealed. After oral argument, the Fifth Circuit certified the following four questions to us:

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[3] The security instrument stated: "Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the 'Funds') to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; . . . and (c) premiums for any and all insurance required by Lender under Section 5. These items are called 'Escrow Items.'"

[4] The 2009 agreement stated: "All covenants, agreements, stipulations, and conditions in your Note and Mortgage will remain in full force and effect, except as modified herein, and none of your obligations or liabilities under your Note and Mortgage will be diminished or released by any provisions hereof, nor will this Agreement in any way impair, diminish, or affect [the] rights under or remedies on your Note and Mortgage."

Similarly, the 2011 Agreement stated: "[A]ll terms and provisions of the Loan Documents, except as expressly modified by this Agreement, remain in full force and effect; nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents; and [] except as otherwise specifically provided in, and expressly modified by, this Agreement, the Lender and you will be bound by, and will comply with, all of the terms and conditions of the Loan Documents."

[5] 889 F. Supp. 2d 883, 884 (N.D. Tex. 2012).

1. After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction a modification or a refinance for purposes of Section 50 of Article XVI of the Texas Constitution?

If the transaction is a modification rather than a refinance, the following questions also arise:

2. Does the capitalization of past-due interest, fees, property taxes, or insurance premiums constitute an impermissible "advance of additional funds" under Section 153.14(2)(B) of the Texas Administrative Code?

3. Must such a modification comply with the requirements of Section 50(a)(6), including subsection (B), which mandates that a home equity loan have a maximum loan-to-value ratio of 80%?

4. Do repeated modifications like those in this case convert a home equity loan into an open-end account that must comply with Section 50(t)?

II

As we have more fully explained in prior decisions, because of Texas' strong, historic protection of the homestead, home equity loans are regulated, not by statute as one might suppose, but by the "elaborate, detailed provisions" of Article XVI, Section 50 of the Texas Constitution.[6] To provide guidance to lenders, the Finance Commission and the Credit Union Commission have been authorized by the Constitution and by statute to interpret these provisions, subject to judicial review,[7] and the Commissions have done so in Chapter 153 of the Texas Administrative Code.[8] "A

[6] *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 571 (Tex. 2013); *see also LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 618 (Tex. 2007) (per curiam) ("Texas became the last state in the nation to permit home-equity loans when constitutional amendments voted on by referendum took effect in 1997.").

[7] *Norwood*, 418 S.W.3d at 573; TEX. CONST. art. XVI, § 50(u).

[8] 7 TEX. ADMIN. CODE §§ 153.1-.96

lender's compliance with an agency interpretation of Section 50, even a wrong interpretation, is compliance with Section 50 itself."[9] Thus, in answering the certified questions, we look to the constitutional text and the Commissions' interpretations. However, those interpretations "can do no more than interpret the constitutional text, just as a court would."[10] The issue is not whether a lending practice or policy is advisable, something the Commissions would decide in exercising their regulatory functions; the issue is what the Constitution requires.[11]

A

The certified questions assume a distinction between a loan modification and a refinancing that, if understood in financial circles,[12] is not clear in the text of Section 50. Neither concept is defined in Section 50. The word "refinance" is used eleven times in Section 50, and "refinancing" once.[13] In each instance, the reference seems to be to a redone transaction. A form of the word

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[9] *Norwood*, 418 S.W.3d at 573.

[10] *Id.* at 585.

[11] *Id.*

[12] CMS points to the Federal Reserve Board's definition of a "refinancing" requiring new Truth In Lending Act disclosures under Regulation Z when refinancing is undertaken by the original creditor, or a holder or servicer of the original obligation. Under this definition, a refinancing is "a new transaction requiring new disclosures" that "occurs when an existing obligation that was subject to [federal "closed end credit" disclosure requirements] is satisfied and replaced by a new obligation". 12 C.F.R. § 226.20(a); 12 C.F.R. pt. 226, supp. 1, cmt. 20(a) (Official Staff Interpretations). Some transactions, however, will not be treated as a refinancing under this section, including "[a] change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation insurance . . . ." *Id.* § 226.20(a)(4). The Federal National Mortgage Association, in an amicus brief, references the same regulation but does not otherwise attempt to define a distinction between refinancings and modifications. An amicus brief by the Independent Bankers Association of Texas, the Texas Bankers Association, and the Texas Mortgage Bankers Association refers to the distinction but does not attempt to define it. Other federal entities, like HUD and FDIC, have their own glossaries referring to and defining general terms like "modification," "mortgage modification," "refinancing," and "debt restructuring," but these agencies, to fulfill their specific missions, also define and apply more specific classifications or limitations.

[13] TEX. CONST. art. XVI, § 50(a)(4), (a)(6)(M)(iii), (a)(6)(Q)(vii), (a)(6)(Q)(x)(f), (a)(8); § 50(e) and (f).

"modify" is used in three places in Section 50. In one, lenders are authorized to "modify" previously provided documentation at closing in exigent circumstances.[14] In the other two, lenders can correct noncompliance with Section 50 by sending a borrower "notice modifying any . . . amount, percentage, term, or other provision prohibited by this section",[15] or, if noncompliance cannot be cured under the other provisions, by offering the borrower a $1,000 credit and "the right to refinance the extension of credit" for the remaining term at no cost "with any modifications necessary to comply" or that the parties agree will comply.[16] In these two instances, if not also in the first, a modification could substantially alter the loan; indeed, in the last situation, modifications can shape the refinancing.[17]

The modification–refinancing distinction is one drawn by the Commissions in interpreting Section 50(a)(6)(M)(iii). The effect of that provision is to prohibit a second home equity loan within a year of the first, with certain exceptions. As interpreted by the Commissions, the provision prohibits a "refinancing" like a "new equity loan" but not a "modification".[18] According to the

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[14] *Id.* § 50(a)(6)(M)(ii).

[15] *Id.* § 50(a)(6)(Q)(x)(c).

[16] *Id.* § 50(a)(6)(Q)(x)(f).

[17] Section 153.96(b) of the Commissions' interpretations contemplates that in order to comply with constitutional requirements, "the lender . . . and borrower may . . . modify the equity loan without completing the requirements of a refinance". 7 TEX. ADMIN. CODE § 153.96(b)(2)(A).

[18] "§ 153.14. One Year Prohibition: Section 50(a)(6)(M)(iii)

"An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property.

"(1) Section 50(a)(6)(M)(iii) prohibits an owner who has obtained an equity loan from:

"(A) **refinancing** the equity loan before one year has elapsed since the loan's closing date; or

Commissions, a modification does not involve satisfaction or replacement of the original note, an "advance of additional funds", or new terms that would not have been permitted for the original "extension of credit".[19] Further, the original loan and a subsequent modification are treated as a single transaction, including for purposes of the 3% fee cap.[20]

But Section 50(a)(6)(M)(iii) of the Constitution does not mention refinancing or modification. It states:

> (a) The homestead . . . is . . . protected from forced sale[] for the payment of all debts except for: . . .
>
> (6) *an extension of credit* that: . . .

> "(B) obtaining a new equity loan on the same homestead property before one year has elapsed since the previous equity loan's closing date, regardless of whether the previous equity loan has been paid in full.

"(2) Section 50(a)(6)(M)(iii) does not prohibit **modification** of an equity loan before one year has elapsed since the loan's closing date. A modification of a home equity loan occurs when one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced. A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction.

> "(A) A modification of an equity loan must be agreed to in writing by the borrower and lender, unless otherwise required by law. An example of a modification that is not required to be in writing is the modification required under the Soldiers' and Sailors' Civil Relief Act.
>
> "(B) The advance of additional funds to a borrower is not permitted by modification of an equity loan.
>
> "(C) A modification of an equity loan may not provide for new terms that would not have been permitted by applicable law at the date of closing of the extension of credit.
>
> "(D) The 3% fee cap required by Section 50(a)(6)(E) applies to the original home equity loan and any subsequent modification as a single transaction."

7 TEX. ADMIN. CODE § 153.14 (emphasis added).

[19] *Id.* § 153.14(2).

[20] *Id.* § 153.14(2)(D).

> (M) is closed not before: . . .
>
> (iii) the first anniversary of the closing date of any other extension of credit described by Subsection (a)(6) of this section secured by the same homestead property [with certain exceptions] . . . .[21]

The applicability of this particular provision, as well as all of Section 50(a)(6), which governs home equity loans, depends not on whether the transaction is a modification or a refinance but on whether it is an "extension of credit". If the restructuring of a home equity loan does not involve a new extension of credit, the requirements of Section 50(a)(6) do not apply. Thus, we restate the first certified question as follows:

> 1. After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction *a new extension of credit* for purposes of section 50 of Article XVI of the Texas Constitution?

B

Neither the Constitution nor the Commissions' interpretations define an "extension of credit", but its meaning is clear. Credit is simply the ability to assume a debt repayable over time, and an extension of credit affords the right to do so in a particular situation.[22]

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[21] TEX. CONST. art. XVI, § 50(a)(6)(M)(iii) (emphasis added).

[22] *See, e.g.*, TEX. FIN. CODE § 31.002(a)(34) ("'Loans and extensions of credit' means direct or indirect advances of money . . . to a person that are conditioned on the obligation of the person to repay . . . ."); *id.* § 181.002(a)(28) (same); *id.* § 350.001(a) ("credit means the right granted to a debtor to defer payment of debt or to incur debt and defer its payment"); *id.* § 393.001 (4) ("'extension of consumer credit' means the right to defer payment"); *see also* 7 TEX. ADMIN. CODE § 12.3(a)(2) (defining "[l]oans or extensions of credit" for purposes of TEX. FIN. CODE § 34.201 as including various transactions involving an advance of funds to be repaid over time).

The Simses argue that any increase in the principal amount of a loan is a new extension of credit within the meaning of Section 50(a)(6), in effect equating the loan principal with an extension of credit. The Constitution contradicts the Simses' argument. Section 50(a)(6)(E) refers to principal as a component of an extension of credit, capping fees at "three percent of the original principal amount *of* the extension of credit".[23] The extension of credit for purposes of Section 50(a)(6) consists not merely of the creation of a principal debt but includes all the terms of the loan transaction. Terms requiring the borrower to pay taxes, insurance premiums, and other such expenses when due protect the lender's security and are as much a part of the extension of credit as terms requiring timely payments of principal and interest. The Simses argue that in restructuring a loan to capitalize past-due amounts, the lender is actually advancing additional funds to itself (past-due interest) or others (past-due taxes and insurance) to pay those amounts for the borrower, and that this constitutes a new extension of credit. But the borrower's obligation for such amounts, and the lender's right to pay them to protect its security, were all terms of the original extension of credit. The Simses argue that requiring interest on capitalized, past-due amounts is really a new loan, but it is simply a mechanism for deferring payment of obligations already owed in a way that allows the borrower to retain his home.

The Simses argue that a loan that can be restructured to change the amount of the periodic payments does not meet the requirement of Section 50(a)(6)(L)(i) that loans be "scheduled to be repaid . . . in substantially equal successive period installments".[24] But the required schedule is not

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[23] TEX. CONST. art. XVI, § 50(a)(6)(E) (emphasis added).

[24] *Id.* § 50(a)(6)(L)(i).

one that, when initially set, can never be altered. After all, whenever a payment is missed, the schedule is altered. Further, Section 50(g) gives the borrower the right to prepay the loan,[25] which would alter the initial schedule. Section 50(a)(6) does not forbid a revision of the initial repayment schedule that merely adjusts the regular installment amount.

CMS argues that restructuring a loan does not involve a new extension of credit so long as the borrower's note is not satisfied or replaced and no new money is extended. We agree that these two conditions are necessary, but we cannot say with assurance that they are sufficient. For example, a restructuring to make the homestead lien security for another indebtedness, such as the borrower's consumer or credit card debt, would certainly be a new extension of credit. The test should be whether the secured obligations are those incurred under the terms of the original loan.

The Simses object that this test provides no effective limit on the size or frequency of additions to principal. But the terms of the original loan supply the limit. The Simses' argument is that any change in principal is a new extension of credit, but as we have shown, their position is inconsistent with Section 50.

The Simses argue that it matters not that, as in their own situation, restructuring lowers the interest rate and the amount of installment payments, and makes it possible for borrowers to keep their homes and meet their obligations. Lenders have two options other than foreclosing on loans in default: further forbearance and forgiveness. Nevertheless, the Simses' argument encourages lenders to foreclose, which is certainly at odds with the fundamental purpose of Section 50: to protect the homestead.

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[25] TEX. CONST. art. XVI, § 50(g).

To the first certified question, we answer: the restructuring of a home equity loan that, as in the context from which the question arises, involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50.

C

Our reasons for answering the first question as we have largely dictate our answers to the other three certified questions.

Is the capitalization of past-due interest, taxes, insurance premiums, and fees an "advance of additional funds" under the Commissions' interpretations of Section 50?[26] No, if those amounts were among the obligations assumed by the borrower under the terms of the original loan. And more importantly, such capitalization is not a new extension of credit under Section 50(a)(6).

Must a restructuring like the Simses' comply with Section 50(a)(6)? No, because it does not involve a new extension of credit, for the reasons we have explained. The Simses argue that any restructuring must satisfy Section 50(a)(6)(B), which requires a home equity loan to be

> of a principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead *on the date the extension of credit is made . . . .*[27]

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[26] 7 TEX. ADMIN. CODE § 153.14.

[27] TEX. CONST. art. XVI, § 50(a)(6)(B) (emphasis added).

The Simses' argument incorrectly assumes that the restructuring is a new extension of credit.[28]

Finally, would repeated restructuring convert a home equity loan into an open-end account subject to Section 50(t)? Section 50(t) applies to a home equity line of credit — "a form of an open-end account that may be debited from time to time, under which credit may be extended from time to time and under which . . . the owner requests advances, repays money, and reborrows money". The repeat transactions are clearly contemplated from the outset.[29] This description does not remotely resemble a loan with a stated principal that is to be repaid as scheduled from the outset but must be restructured to avoid foreclosure.

* * * * *

Fundamentally, the requirements of Article XIV, Section 50 of the Texas Constitution for extensions of credit secured by the homestead are designed to protect the homestead, not endanger

[28] The Circuit noted that if the highlighted phrase modified the word "value" and not the word "exceed", the provision would never allow the loan principal, during the life of the loan, to exceed the amount that was the value of the property when the loan was closed. 538 F. App'x 537, 545-546 (5th Cir. 2013) (per curiam). This could happen if the loan-to-value ratio was very close to the limit at the time the loan closed, and when the loan was restructured, the amount capitalized caused the total principal indebtedness to exceed the limit. But nothing in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made.

[29] *See also* TEX. FIN. CODE § 301.002(a)(14)(A) ("In this subtitle . . . 'Open-end account' . . . means an account under a written contract between a creditor and an obligor in connection with which: (i) the creditor reasonably contemplates repeated transactions and the obligor is authorized to make purchases or borrow money; (ii) an interest or time price differential may be charged from time to time on an outstanding unpaid balance; and (iii) the amount of credit that may be extended during the term of the account is generally made available to the extent that any outstanding balance is repaid . . . .").

it. The Constitution does not prohibit the restructuring of a home equity loan that already meets its requirements in order to avoid foreclosure while maintaining the terms of the original extension of credit. We answer the certified questions accordingly.

Nathan L. Hecht
Chief Justice

Opinion delivered: May 16, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0639

STATE OFFICE OF RISK MANAGEMENT, APPELLANT

v.

CHRISTY CARTY, INDIVIDUALLY AND AS NEXT FRIEND FOR B.C., J.C. AND M.C., MINORS AND AS REPRESENTATIVE OF THE ESTATE OF JIMMY CARTY JR., DECEASED, APPELLEE

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

Argued February 5, 2014

JUSTICE LEHRMANN delivered the opinion of the Court.

When a workers' compensation beneficiary recovers from a third party for injuries compensable under the Texas Workers' Compensation Act (Act), the insurance carrier is entitled to be reimbursed from that recovery for benefits paid to the beneficiary and to treat any excess proceeds as an advance against future benefits owed. The U.S. Court of Appeals for the Fifth Circuit has certified the following three questions regarding the carrier's right to excess proceeds recovered by multiple beneficiaries:

> 1. In a case involving a recovery by multiple beneficiaries, how should the excess net settlement proceeds above the amount required to reimburse a workers' compensation carrier

for benefits paid be apportioned among the beneficiaries under section 417.002 of the Texas Labor Code?

2. How should a workers' compensation carrier's right under section 417.002 to treat a recovery as an advance of future benefits be calculated in a case involving multiple beneficiaries? Should the carrier's right be determined on a beneficiary-by-beneficiary basis or on a collective-recovery basis?

3. If the carrier's right to treat a recovery as an advance of future benefits should be determined on a beneficiary-by-beneficiary basis, does a beneficiary's nonbinding statement that she will use her recovery to benefit another beneficiary make the settlement allocation invalid?

Because our answer to Question 2 is dispositive, we answer it only. We hold that, when multiple beneficiaries recover compensation benefits through the same covered employee, the carrier's rights to a third-party settlement are determined by treating it as a single, collective recovery rather than separate recoveries by each beneficiary.

I. Legal and Factual Background

Because the underlying case involves the extent of a workers' compensation carrier's right to reimbursement of death benefits paid and owed to a legal beneficiary, an overview of the Act's general provisions governing payment of death benefits is helpful in introducing the facts at hand.

A. Summary of Workers' Compensation Death Benefits

Under the Act, "if a compensable injury to [an] employee results in death," the carrier is required to pay death benefits to the employee's legal beneficiary equal to 75% of the employee's average weekly salary. TEX. LAB. CODE § 408.181(a), (b). As is relevant to this case, if the employee is survived by an eligible spouse and one or more eligible children, half of the benefits are paid to the spouse and half to the children in equal shares. *Id.* § 408.182(a). The spouse is eligible

for benefits "for life or until remarriage." *Id.* § 408.183(b). Upon remarriage, the spouse is entitled to an additional 104 weeks of benefits, payable in a lump sum. *Id.*; 28 TEX. ADMIN. CODE § 132.7(b). Following the expiration of 104 weeks from the date of remarriage, the spouse's share of benefits is redistributed to the children. TEX. LAB. CODE § 408.184(b). Minor children are eligible for benefits until they reach the age of eighteen or, so long as they remain a full-time student, until the age of twenty-five. *Id.* § 408.183(c), (d).

B. Facts

Jimmy Carty died in a training accident at the Texas Department of Public Safety Training Academy. He was survived by his wife, Christy, and their three minor children. State Office of Risk Management (SORM), the workers' compensation carrier for state employees, paid Jimmy's medical and funeral benefits[1] and began paying death benefits to Christy and the children.

Christy, individually, as representative of Jimmy's estate, and as next friend of the children, brought suit in federal court against Ringside, Inc., and Kim Pacific Martial Arts, asserting product liability claims and claims under the Texas wrongful death and survival statutes. While that suit was pending, Christy remarried and is thus no longer eligible for death benefits.

The Cartys settled with Ringside for $100,000, agreeing to pay SORM $20,000 from the settlement proceeds in partial satisfaction of SORM's reimbursement claim for benefits paid. The Cartys then settled with Kim Pacific for $800,000, and SORM intervened to assert its right to reimbursement from those funds. Following a hearing at which Christy testified that she intended

[1] An employee who sustains a compensable injury "is entitled to all health care reasonably required by the nature of the injury." TEX. LAB. CODE § 408.021(a). If the compensable injury results in the employee's death, the carrier must pay up to $6,000 in burial costs to the person who incurred liability for those costs. *Id.* § 408.186(a).

to use her portion of the settlement for the care and well-being of the children, the district court approved the settlement and apportioned it among the parties. The court determined that SORM's gross claim for benefits paid to date was $153,306.62, representing the amount SORM had paid in funeral and medical benefits, weekly death benefits to Christy and the children, and a lump sum payment to Christy for the remaining death benefits to which she was entitled following her remarriage. After reducing the gross amount by SORM's portion of the Ringside settlement and its share of the attorney's fees and expenses,[2] the trial court calculated SORM's net reimbursement as $78,295.55. The remainder of the settlement was apportioned $290,316.87 for attorney's fees and expenses,[3] $351,278.91 to Christy (individually and as representative of Jimmy's estate), and $80,108.67 to the children.

The district court also determined that the recovery that SORM was entitled to treat as an advance against future benefits owed to the children equaled their share of the settlement. In other words, as soon as the amount of suspended benefits equaled $80,108.67, SORM was required to resume payment to the children. The district court made the apportionment between Christy and the children based on the relative ratio of benefits they had already received. SORM challenged the apportionment on appeal.

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[2] The Act requires a "carrier whose interest is not actively represented by an attorney in a third-party action" to pay a fee to the claimant's attorney in the agreed-upon amount or, absent an agreement, to pay "a reasonable fee for recovery of the insurance carrier's interest that may not exceed one-third of the insurance carrier's recovery," plus "a proportionate share of expenses." TEX. LAB. CODE § 417.003(a).

[3] Amicus Texas Mutual Insurance Company argues that the district court erred in calculating the attorney's fee on the gross settlement amount before deducting SORM's lien. The parties have not briefed this issue, which is well beyond the scope of the certified questions. Accordingly, we do not address it.

The Fifth Circuit disagreed with the district court's apportioning the settlement funds among Christy and the children "in the same ratio as they received death benefits," noting that this method was required by prior versions of the governing statute, but "was eliminated in the 1989 Act and is nowhere to be found in the current version of the Workers' Compensation Act." *Carty v. State Office of Risk Mgmt.*, 733 F.3d 550, 556 (5th Cir. 2013) (citing Act of Dec. 13, 1989, 71st Leg., 2d C.S., ch. 1, § 4.05(f) (amended 1993), and TEX. LAB. CODE § 417.002). The Fifth Circuit declined to elaborate on how the district court should have apportioned the settlement, concluding that "the current Texas statute does not clarify how a net recovery in excess of the amount of benefits paid by the workers' compensation carrier should be apportioned among beneficiaries when multiple beneficiaries recover from a third-party tortfeasor." *Id.* Accordingly, the Fifth Circuit certified, and we accepted, three questions seeking clarity on the issue. TEX. R. APP. P. 58.1.

II. Discussion

We first address Question 2, which asks whether a workers' compensation carrier's statutory right to treat a third-party recovery as an advance against future benefits in a case involving multiple beneficiaries should be determined on a beneficiary-by-beneficiary basis or a collective-recovery basis.

A. Interpretation Principles

As with any statute, in construing the Act our primary objective is to give effect to legislative intent. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010). "The plain meaning of the text is the best expression of that intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v.*

Kimbrell, 356 S.W.3d 407, 411 (Tex. 2011). We interpret statutory text by studying the language of the specific provision at issue, as well as the statute as a whole. *In re Office of Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). Further, we "endeavor to read the statute contextually, giving effect to every word, clause, and sentence." *Id.*

B. Workers' Compensation Carrier's Right to Third-Party Recovery by Multiple Beneficiaries

An employee who suffers a compensable injury under the Act may seek damages from a liable third party in addition to pursuing a claim for compensation benefits. TEX. LAB. CODE § 417.001(a). When an employee or beneficiary claims benefits, "the insurance carrier is subrogated to the rights of the injured employee [up to the total benefits paid or assumed] and may enforce the liability of the third party in the name of the injured employee or the legal beneficiary." *Id.* § 417.001(b). The carrier is entitled to reimbursement from the third-party recovery under the following scheme:

> (a) The net amount recovered by a claimant in a third-party action shall be used to reimburse the insurance carrier for benefits, including medical benefits, that have been paid for the compensable injury.
>
> (b) Any amount recovered that exceeds the amount of the reimbursement required under Subsection (a) shall be treated as an advance against future benefits, including medical benefits, that the claimant is entitled to receive under this subtitle.
>
> (c) If the advance under Subsection (b) is adequate to cover all future benefits, the insurance carrier is not required to resume the payment of benefits. If the advance is insufficient, the insurance carrier shall resume the payment of benefits when the advance is exhausted.

Id. § 417.002.

Examining subsection 417.002(b), the Fifth Circuit essentially asks us how—if at all—the apportionment among multiple workers' compensation beneficiaries of a third-party recovery that exceeds net benefits already paid to them affects the amount the carrier may treat as an advance against future benefits. The parties propose different answers to this question stemming from their diverging interpretations of the word "claimant" in section 417.002, which the Act does not define. "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." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

The Cartys argue that each beneficiary constitutes an individual "claimant" and that the carrier's right to treat the recovery as an advance against future benefits must therefore be determined, as the district court concluded, on a beneficiary-by-beneficiary basis. By contrast, SORM contends that an employee and all beneficiaries who collect benefits through that employee constitute a collective "claimant," such that the third-party settlement should be treated as a single recovery for purposes of the carrier's right to treat it as an advance against future benefits.

Suppose, for example, that X and Y are legal beneficiaries of the same employee and settle with a third party for $300,000 after attorney's fees and expenses are paid. Upon settlement, they have received $200,000 in death benefits ($100,000 each) and continue to be eligible for future benefits. The carrier is reimbursed $200,000 for the benefits already paid, leaving $100,000 to be allocated between X and Y, and to be treated as an advance against future benefits. Under the Cartys' interpretation of subsection 417.002(b), the district court should then apportion the remaining recovery to X and Y based on the relative merit and value of their claims. If we assume

this requires allocating $75,000 to X and $25,000 to Y, then the carrier would be required to resume benefit payments to X when the amount of the suspended payments to X reaches $75,000, and to resume payments to Y when the amount of suspended payments to Y reaches $25,000. Under SORM's interpretation, the carrier would resume payments when the total amount of suspended benefits reaches $100,000, irrespective of the third-party recovery's apportionment between X and Y. As explained below, we agree with SORM.

Section 417.002's statutory reimbursement scheme is designed to ensure that the carrier "gets the first money a worker receives from a tortfeasor," which "is crucial to the worker's compensation system because it reduces costs for carriers (and thus employers, and thus the public) and prevents double recovery by workers." *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 35 (Tex. 2008). In *Ledbetter*, we summarized this so-called "first money" framework as follows:

- any net [third-party] recovery up to the amount of past benefits goes to the carrier;
- any recovery greater than past benefits but less than all future benefits goes to the beneficiary, but releases the carrier from future payments to that extent;
- any recovery greater than past or future benefits combined goes to the beneficiary.

Id. at 35–36 (citing TEX. LAB. CODE § 417.002).

Interpreting subsection 417.002(a) in *Ledbetter* in accordance with this framework, we recognized that "until a carrier is reimbursed in full, 'the employee or his representatives have no right to any of [the third-party recovery].'" *Id.* at 36 (quoting *Capitol Aggregates, Inc. v. Great Am. Ins. Co.*, 408 S.W.2d 922, 923 (Tex. 1966)). Thus, as the Fifth Circuit recognized, the "net amount

recovered by a claimant" referenced in subsection 417.002(a), from which the carrier must be reimbursed for benefits already paid, is the collective third-party recovery by the employee or his beneficiaries. *See Carty*, 733 F.3d at 555. That is, any allocation of the third-party recovery among the beneficiaries has no effect on the carrier's right to reimbursement for past benefits. In the Cartys' view, however, that allocation should have a significant effect on the carrier's rights with respect to future benefits.

As a result, the Cartys would have us treat future benefits differently from past benefits in terms of the carrier's reimbursement rights. However, neither the text nor the purpose of the Act supports that interpretation. Subsection (a) requires that the net amount recovered by "a claimant" be used to reimburse the carrier for paid benefits, while subsection (b) allows the carrier to treat any excess recovery as an advance against future benefits that "the claimant" is entitled to receive. TEX. LAB. CODE § 417.002(a), (b). "[T]he claimant" in subsection (b) necessarily references the same "claimant" introduced in subsection (a), *i.e.*, the employee or the beneficiaries recovering through that employee.

Importantly, this is consistent with the Act's recognition of the carrier's subrogation interest in section 417.001, which states in pertinent part:

> (b) If a benefit is claimed by an injured employee or a legal beneficiary of the employee, the insurance carrier is subrogated to the rights of the injured employee and may enforce the liability of the third party in the name of the injured employee or the legal beneficiary. The insurance carrier's subrogation interest is limited to the amount of the total benefits paid or assumed by the carrier to the employee or the legal beneficiary . . . . If the recovery is for an amount greater than the amount of the insurance carrier's subrogation interest, the insurance carrier shall:
>
> (1) reimburse itself and pay the costs from the amount recovered; and

(2) pay the remainder of the amount recovered to the injured employee or the legal beneficiary.

Id. § 417.001(b). Notably, the carrier is subrogated to the *employee's* rights, and its subrogation interest includes "the total benefits paid or assumed by the carrier to the employee or the legal beneficiary." *Id.* The Legislature made no distinction between past and future benefits in defining the carrier's subrogation interest, which instead is determined in relation to the amount of the total benefits owed with respect to a particular employee. *See id.* And that amount does not vary with the number of beneficiaries.

Because a beneficiary's right to death benefits and a carrier's right to reimbursement both flow through the covered employee, calculating the reimbursement right in relation to the total third-party recovery by a particular employee or his legal beneficiaries makes sense. *See Fort Worth Lloyds v. Haygood*, 246 S.W.2d 865, 870 (Tex. 1952) ("The first money paid rightfully should go to reimburse the carrier who has paid, *or assumed to pay*, [workers'] compensation to the employee." (emphasis added)). Stated another way, given that past benefits are undisputedly treated collectively under subsection 417.002(a), future benefits should be treated the same way under subsection 417.002(b).

The Cartys' interpretation, in addition to being unsupported by the text of sections 417.001 and 417.002, introduces uncertainty into the reimbursement determination that is inconsistent with the statute's primary purpose—ensuring carriers are fully reimbursed in order to decrease costs to the carrier (and, in turn, the public). *See Ledbetter*, 251 S.W.3d at 35–36. First, the inevitable disputes between beneficiaries and carriers over the proper apportionment of a third-party settlement

will increase the costs of all parties involved. More importantly, we agree with amicus Texas Mutual that the Cartys' interpretation allows the settlement's timing to affect how the proceeds are to be credited to the carrier. Nothing in the language of the Act supports such an arbitrary result.

The Cartys argue that treating excess settlement proceeds collectively is inconsistent with the way courts disburse third-party settlement funds recovered by both a beneficiary and a nonbeneficiary. For example, an employee who is married with children, and who suffers a compensable injury but is not killed, will be the only beneficiary of workers' compensation insurance, although his family may join in a third-party suit. *See* TEX. LAB. CODE §§ 408.021, 408.081, 408.101, 408.121, 408.142, 408.161 (describing medical and income benefits to which an employee who suffers a compensable injury is entitled); *see also Roberts v. Williamson*, 111 S.W.3d 113, 116 (Tex. 2003) (explaining that Texas law allows a child or spouse to seek damages for loss of consortium when a parent or spouse suffers a serious, permanent, and disabling injury). If that employee is killed, his spouse and children will be beneficiaries, but his parents may also participate in the third-party suit and recovery. *See* TEX. CIV. PRAC. & REM. CODE § 71.004 (providing that the surviving spouse, children, and parents of the deceased may bring a wrongful death action).

In situations like these, the settlement must be apportioned between the beneficiary and nonbeneficiary before determining the carrier's reimbursement rights. *See, e.g.*, *U.S. Fire Ins. Co. v. Hernandez*, 918 S.W.2d 576, 579 (Tex. App.—Corpus Christi 1996, writ denied). The courts of appeals are in agreement, and we concur, that a trial court may not render judgment apportioning the funds in a manner that "arbitrarily compromises the carrier's right to subrogation." *Id.*; *see also Ins. Co. of N. Am. v. Wright*, 886 S.W.2d 337, 342 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Rather, the proper settlement division is a fact issue "based on the relative merits and worth of the claims involved." *Tex. Workers' Comp. Ins. Fund v. Serrano*, 985 S.W.2d 208, 210 (Tex. App.—Corpus Christi 1999, pet. denied). The Cartys essentially contend that the settlement division among multiple beneficiaries should work the same way.

However, this contention ignores the basis for requiring apportionment between beneficiaries and nonbeneficiaries. A carrier's subrogation interest extends only to the benefits paid to an employee or legal beneficiary. TEX. LAB. CODE § 417.001(b); *see also id.* § 417.002(a) (allowing carrier to seek reimbursement from third-party recovery by a "claimant"). The carrier therefore has no right to *any* portion of a third-party recovery that represents a nonbeneficiary's interest. *See Hernandez*, 918 S.W.2d at 579. Importantly, the carrier's rights do not depend on whether it is seeking reimbursement for benefits paid or a credit for future benefits owed, yet the Cartys assert the distinction is meaningful when multiple beneficiaries are involved.

The Cartys also posit a hypothetical in which two unrelated employees are injured in a motor vehicle accident while in the course and scope of their employment, receive workers' compensation benefits, and settle with the party driving the other vehicle. The Cartys note the unfairness of requiring one employee's recovery to potentially reimburse benefits paid or owed to the other. This hypothetical, however, presents a fundamentally different scenario from the one at issue. As discussed above, the term "claimant" in section 417.002 includes a covered employee and all beneficiaries entitled to recover benefits through that employee. In the hypothetical posed by the Cartys, each covered employee constitutes a separate claimant whose third-party recovery is subject to the carrier's reimbursement rights. Treating two unrelated employees collectively as a single

claimant does not comport with the Act's plain language. *See Employers Cas. Co. v. Henager*, 852 S.W.2d 655, 659 (Tex. App.—Dallas 1993, writ denied) (holding that, where two injured employees received workers' compensation benefits and resolved third-party claims in a single settlement, proceeds could not be allocated in a manner that compromised carrier's subrogation rights).

Finally, the Cartys rely on the well-settled principle that the Act should be construed liberally "in order to effectuate the purposes for which it was enacted." *In re Poly-America, L.P.*, 262 S.W.3d 337, 350 (Tex. 2008) (citation and internal quotation marks omitted). They contend that determining the carrier's right to treat a third-party recovery as an advance against future benefits on a collective-recovery basis ignores the statute's purpose of preventing double recovery while making the employee whole. *See Haygood*, 246 S.W.2d at 868. Apportioning the recovery among the beneficiaries based on the relative merit and value of their claims, the Cartys argue, better comports with that purpose. While the collective-recovery approach may not always best serve the purpose highlighted by the Cartys, it does serve to reduce carrier costs and is the approach that is most consistent with the statute's plain language. *See id.* (declining to construe the statute to restrict an employee's rights by implication when such restrictions are not found in the statute's plain language). Addressing the potential inequities that subsection 417.002(b) can generate is a policy decision for the Legislature, not the courts.[4]

[4] We note that such inequities may just as easily arise in the context of reimbursing a carrier for benefits already paid. Recall our hypothetical in which X and Y are legal beneficiaries of the same employee and have received $200,000 in benefits ($100,000 each) at the time they settle with a third party, this time for $200,000 after payment of attorney's fees and expenses. Further suppose that an allocation of that settlement to the beneficiaries based on the relative merit and value of their claims would yield $120,000 to X and $80,000 to Y. Under subsection 417.002(a), the carrier is entitled to be reimbursed from the full $200,000 recovery before any such allocation is made. In this scenario, X's share of the recovery is used to reimburse the carrier for benefits paid to Y, yet all agree that the carrier in this scenario is entitled to the entire recovery. *Ledbetter*, 251 S.W.3d at 36.

In sum, chapter 417 of the Act entitles the compensation carrier to "the first money a worker receives from a tortfeasor." *Ledbetter*, 251 S.W.3d at 35. This "first money" rule extends to benefits the carrier has paid or assumed to pay. *Haygood*, 246 S.W.2d at 870. Treating benefits owed differently from benefits paid when multiple beneficiaries are involved is not supported by the statute's text and undermines the goal of reducing carrier costs. Accordingly, we answer Question 2 in the following manner: a carrier's right to treat a third-party recovery as an advance against future benefits in a case involving multiple beneficiaries of the same covered employee should be determined on a collective-recovery basis.

C. The Remaining Questions

Question 1 asks: In a case involving a recovery by multiple beneficiaries, how should the excess net settlement proceeds above the amount required to reimburse a workers' compensation carrier for benefits paid be apportioned among the beneficiaries under section 417.002 of the Texas Labor Code? This question is rendered moot by our answer to Question 2 because apportioning excess proceeds among the beneficiaries does not affect the carrier's right to treat those proceeds as an advance against future benefits.

Question 3 asks whether a beneficiary's nonbinding statement that she will use her recovery to benefit another beneficiary makes the settlement allocation invalid. The question is expressly conditioned on our answering Question 2 to hold that the carrier's right to treat a recovery as an advance of future benefits should be determined on a beneficiary-by-beneficiary basis. Because we do not so hold, Question 3 is also moot.

III. Conclusion

Consistent with the text and purpose of the reimbursement scheme under the Texas Workers' Compensation Act, a workers' compensation carrier's right under section 417.002 to treat a third-party recovery as an advance of future benefits in a case involving multiple beneficiaries of the same covered employee should be determined on a collective-recovery basis. Stated another way, the well-settled rule that a carrier is entitled to the "first money" received by an employee or his beneficiaries applies equally to past benefits paid and future benefits owed. As a result, we need not address any inquiries regarding the proper apportionment method of a third-party recovery among multiple beneficiaries. We answer the certified questions accordingly.

_____

Debra H. Lehrmann
Justice

OPINION DELIVERED: June 20, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0712

CHRISTOPHER HENKEL AND LISA HENKEL, PETITIONERS,

v.

CHRISTOPHER NORMAN, RESPONDENT

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

PER CURIAM

JUSTICE BROWN did not participate in the decision.

At issue in this premises liability case is whether a homeowner's "don't slip" statement to a mail carrier was adequate as a matter of law to warn him of an icy sidewalk. The trial court determined that it was and granted summary judgment to the homeowner defendants. The court of appeals reversed. Because we agree with the trial court, we reverse the court of appeals' judgment and remand to the court of appeals for it to consider the issues it did not reach.

The trial court granted summary judgment for the defendants in this case, so our standard of review is de novo. *See Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012). We examine the record in the light most favorable to the nonmovant, indulge every reasonable inference against the motion and likewise resolve any doubts against it. *Id.* Accordingly, our recitation of facts resolves all doubts in favor of Christopher Norman, the plaintiff and nonmovant.

On Saturday, January 9, 2010, mail carrier Norman was delivering mail in Houston. The day was colder than normal and the National Weather Service had issued a hard freeze warning for Friday through Sunday. Neither rain, sleet, nor snow was reported in the area, although Lisa Henkel, one of the homeowner defendants, testified both that she was aware of icy conditions in her neighborhood and that her daughter had slipped on some ice in the road that morning before Norman delivered the mail.

As Norman delivered mail he would walk on the sidewalks of some houses and through the lawns of others. On the morning he fell, he walked through the lawn of the house of Christopher and Lisa Henkel in order to deliver their mail. Lisa was standing at the door so Norman handed her the mail. As he turned to leave and continue on his route, she said "don't slip." Nevertheless, as Norman began walking away on the Henkels' sidewalk he slipped and fell. He denied having seen ice on his route that morning and denied seeing any on the Henkels' property before he fell.

Norman sued the Henkels, alleging that he was injured by the fall and the Henkels were aware of ice on the sidewalk, yet they took no action to prevent the unnatural accumulation of ice, remove the ice, or otherwise remedy the slick conditions. The Henkels filed a Motion for Summary Judgment. By their motion the Henkels asserted that there was no genuine issue of material fact as to whether they failed to warn Norma of any potential danger because "all evidence presented by either side shows . . . Lisa . . . explicitly warned [Norman] regarding potentially icy conditions just seconds before he fell." In response, Norman argued that any warning by Lisa was general, non-specific, and inadequate.

A traditional summary judgment motion is properly granted where a defendant conclusively negates at least one essential element of a cause of action. *Frost Nat'l Bank v. Hernandez*, 315 S.W.3d 494, 508 (Tex. 2009). The trial court granted the Henkels motion and Norman appealed.

By a two to one decision the court of appeals reversed, holding that "[a] general instruction not to slip or trip or fall is not conclusive evidence of a warning, let alone an adequate warning." *Norman v. Henkel*, 407 S.W.3d 502, 505 (Tex. App.—Houston [14th Dist.] 2013, pet. granted). The dissenting Justice would have held that Lisa's warning was adequate as a matter of law because it "specifically informed Norman of the particular hazard—the slippery ground." *Id.* at 506 (Brown, J., dissenting).

In their petition for review the Henkels argue that Lisa's statement was an adequate warning as a matter of law because she informed Norman about the condition of the property on which he bases his claim.[1] Norman counters that Lisa's warning was a general instruction and was not adequate because she was required to warn him of the particular condition—the ice.

The parties agree that Norman was an invitee. Generally, premises owners such as the Henkels have a duty to protect invitees from, or warn them of, conditions posing unreasonable risks of harm if the owners knew of the conditions or, in the exercise of reasonable care, should have known of them. *See TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 764-65 (Tex. 2009). To prevail on a premises liability claim against a property owner, an injured invitee must establish four

[1] The Henkels also argue that Lisa had no duty to warn Norman and there was no unreasonably dangerous condition because the ice was a natural accumulation. They did not assert those matters in their motion for summary judgment so we do not consider them. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) ("[W]e hold that a summary judgment cannot be affirmed on grounds not expressly set out in the motion or response.").

elements: (1) the property owner had actual or constructive knowledge of the condition causing the injury; (2) the condition posed an unreasonable risk of harm; (3) the property owner failed to take reasonable care to reduce or eliminate the risk; and (4) the property owner's failure to use reasonable care to reduce or eliminate the risk was the proximate cause of injuries to the invitee. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000).

The third element is negated if the property owner either adequately warned the invitee about the condition or took reasonable actions designed to make it reasonably safe. *See TXI Operations*, 278 S.W.3d at 765. If the evidence conclusively establishes that the property owner adequately warned the injured party of the condition, then the property owner was not negligent as a matter of law. *Bill's Dollar Store, Inc. v. Bean*, 77 S.W.3d 367, 369 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). To be adequate, a warning must be more than a general instruction such as "be careful"; the warning must notify of the particular condition. *TXI Operations*, 278 S.W.3d at 765. In *TXI*, for example, a speed limit sign was not an adequate warning of a pothole. *Id.* We held that the sign "neither informed the driver of road hazards generally, nor did it identify the particular hazard." *Id*; *see State v. McBride*, 601 S.W.2d 552, 556-57 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (holding signs that read "35 MPH" and "SLOW" were insufficient to warn of the actual condition of the construction area, which was that it was muddy and slick when wet). In contrast, a warning by a cashier to a customer to "watch the wet spot" was an adequate warning as a matter of law. *Bill's Dollar Store*, 77 S.W.3d at 370. And a wet floor warning sign and verbal warning to "'be careful' because the 'floor may be a little damp'" was adequate as a matter of law to discharge

a property owner's duty to an invitee. *Brooks v. PRH Invs., Inc.*, 303 S.W.3d 920, 925 (Tex. App.—Texarkana 2010, no pet.).

Turning to the facts of this case, Norman testified in his deposition that Lisa told him "don't slip."[2] He asserts that this warning was a general instruction similar in nature to the general instruction in *TXI* and did not adequately warn him of the dangerous condition. We disagree. Warnings must be taken in context of the totality of the circumstances. The warning in *TXI*—a speed limit sign—did not inform the driver of the actual condition that caused the injury—a pothole. *TXI Operations*, 278 S.W.3d at 765. But Lisa's statement was not a general "be careful" or "go slow" warning. Under the circumstances the statement Norman heard her make, "don't slip," could only have been taken by a reasonable person as a warning of a specific condition—a slippery walking surface.

Norman also argues that Lisa's warning was inadequate because she did not specifically warn him of ice on the walkway, asserting that ice was the dangerous condition, not the potential for slipping. He says that because one might slip for any number of reasons such as water, paper, freshly mowed grass, potter's clay, loose tile, or even the proverbial banana peel on the ground, Lisa's warning to not slip actually conveyed "everything and nothing." Again, we disagree. Under the circumstances Lisa was not required to warn of the ice itself as opposed to the slippery condition. *See Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992) (referencing the dangerous condition as "the slippery spot" on the floor). A warning of the specific material causing a condition is not required,

[2] In Lisa's deposition she said she told Norman "be careful. It's icy out there today," but as noted previously, we review the evidence in Norman's favor.

so long as the existence of the condition itself is conveyed. For example, warnings in *Bill's Dollar Store* and *Brooks* were held to have been adequate even though they identified only the dangerous condition (wet floors), not the specific substances that made them wet. *Brooks*, 303 S.W.3d at 925; *Bill's Dollar Store*, 77 S.W.3d at 370.

In sum, absent special circumstances which are not present here, a property owner's warning to an invitee of an unreasonably dangerous condition is adequate if, given the totality of the surrounding circumstances, the warning identifies and communicates the existence of the condition in a manner that a reasonable person would perceive and understand. Here, temperatures had been and were well below freezing and there is no evidence of any other circumstance that a reasonable person might have contemplated would precipitate Lisa's "don't slip" warning. Norman heard her statement and it was adequate in light of the totality of the circumstances to alert a reasonable person in his position that there were slippery conditions caused by the freezing temperatures.

Assuming, without deciding, that ice on the Henkels' sidewalk created an unreasonably dangerous condition, Lisa adequately warned Norman of it. Norman requests that if we reverse the court of appeals' judgment, we remand the case to the court of appeals for it to consider his alternate points raised in, but not addressed by, that court. Accordingly, we reverse the judgment of the court of appeals and remand the case to that court for it to consider Norman's additional issues.

OPINION DELIVERED: August 22, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0749

IN THE INTEREST OF A.B. AND H.B., CHILDREN,

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

Argued April 22, 2014

JUSTICE GUZMAN delivered the opinion of the Court.

In parental termination cases, our courts of appeals are required to engage in an exacting review of the entire record to determine if the evidence is factually sufficient to support the termination of parental rights. And to ensure the jury's findings receive due deference, if the court of appeals reverses the factfinder's decision, it must detail the relevant evidence in its opinion and clearly state why the evidence is insufficient to support the termination finding by clear and convincing evidence. Today, we are asked to extend this requirement well beyond its previous parameters—requiring courts to detail the evidence even when affirming the jury's decision. Because the current standard appellate courts must adhere to in conducting a factual sufficiency review in a termination case protects the fundamental interests at stake, we decline the invitation to unnecessarily expand it.

This protracted parental termination case dates back to 2008. There have been two trials resulting in termination of parental rights, two court of appeals opinions reversing and remanding for new trial on factual sufficiency grounds, and finally, an en banc court of appeals decision affirming termination. But despite the protracted history of this case, this appeal only requires us to decide whether the court of appeals, in affirming the termination, adhered to the proper standard for conducting a factual sufficiency review. Because the court of appeals' opinion and the record demonstrate the court of appeals considered the record in its entirety—as a proper factual sufficiency review requires—we affirm.

I. Background

Mother and Father married in 2005 in Missouri. Their son, A.B., was born later that year, and their daughter, H.B., was born in 2006. By the time Mother and Father separated in July 2007, the family had relocated to Texas. Following the parents' separation, the children remained primarily in Mother's care. There are varying accounts as to how often Father cared for the children following the parents' separation.

The Texas Department of Family and Protective Services ("DFPS") became involved when H.B. was admitted to the intensive care unit at Cook Children's Hospital in September 2007, after Mother reported H.B. had been having seizures. Her seizures were attributed to hyponatremia—inadequate sodium levels in the blood—which can be caused by inadequate nutrition. H.B. was fifteen months old, and weighed fifteen pounds upon admission to the hospital. Testimony at trial indicated H.B. had dropped from the fiftieth percentile in weight on February 2007, to the third percentile by April, and fell off the growth chart entirely by May. Her treating

physicians also observed significant developmental delays, noting that H.B. could not crawl, walk, or sit up on her own. She was subsequently diagnosed with failure to thrive, which DFPS concluded was a result of physical neglect.

Rather than return the children to Mother and Father after H.B. was discharged from the hospital, DFPS placed both children with maternal relatives so Mother and Father could complete services with DFPS. Father completed his services, and the children were returned to his care in June 2008. Roughly one month later, in July 2008, a caseworker visited the children at Father's home and discovered A.B. with injuries to his face and bruising on his left ear extending to his cheek. The children were removed from Father's care, placed with a foster family, and DFPS filed suit to terminate both parents' rights the following day.

After a bench trial in 2009, the trial court found, by clear and convincing evidence, grounds for termination under subsections (D) and (E) of 161.001(1) of the Texas Family Code. Specifically, the court held Father had knowingly placed or allowed the children to remain in conditions and surroundings that endangered their physical and emotional well-being, and that Father engaged in conduct and knowingly placed the children with persons who engaged in conduct that endangered the physical and emotional well-being of the children.[1] The court also concluded termination of Father's parental rights was in the children's best interest.

Father appealed the trial court's 2009 decision, challenging, among other things, the legal and factual sufficiency of the evidence to support the court's endangerment findings. 412 S.W.3d 588, 613 (Walker, J., dissenting). The court of appeals held the evidence was legally sufficient but

[1] Mother voluntarily relinquished her rights in June 2009 and is not a party to this appeal.

factually insufficient to support the finding of endangerment. *Id.* at 651–52, 656. The court reversed and remanded the case for a new trial. *Id.* at 660.

In February 2011, the case was retried before a jury. The jury made the same findings as the trial court had in 2009, including the endangerment findings under section 161.001(1)(D) and (E) and that termination was in the children's best interest. The trial court entered a decree of termination pursuant to the jury's findings in June 2011.

Father appealed the termination order, once again arguing the State failed to present legally and factually sufficient evidence to support the jury verdict. *Id.* at 674. The court of appeals, finding that DFPS did not present enough new evidence to change its holding from the prior case, once again held there was factually insufficient evidence of endangerment. *Id.* at 660.

Both DFPS and Intervenors[2] filed motions for en banc reconsideration in the court of appeals. *Id.* at 591. The court of appeals granted the motion and, in a per curiam opinion, found the evidence of endangerment was factually sufficient to support termination under section 161.001(1)(E) and affirmed the termination of Father's parental rights. *Id.* at 601. Two justices dissented, arguing the court misapplied the standard in conducting its factual sufficiency review and that, under the correct standard in which the entire record is accounted for, the evidence remained factually insufficient to terminate Father's rights under subsection (E). *Id.* at 613 (Walker, J., dissenting).

[2] In December 2010, A.B. and H.B.'s foster parents filed a motion to intervene in the second suit pursuant to sections 102.003(12) and 102.005(3) of the Family Code.

Here, Father echos the concerns raised by the dissent, namely that the court failed to conduct a proper factual sufficiency review because, though its opinion analyzed the evidence favorable to DFPS, it failed to review evidence favorable to Father. As such, Father argues the court improperly disregarded relevant, probative evidence in performing its factual sufficiency review, and erred when it "failed to detail the conflicting evidence." We granted Father's petition for review.

II. Discussion

The authority to conduct a factual sufficiency review lies exclusively with the courts of appeals. TEX. CONST. art. V, § 6. Because proper application of the standard involves a legal question, this Court may review a court of appeals' factual sufficiency analysis to ensure the court of appeals adhered to the correct legal standard. *See Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29 (Tex. 1993). Nevertheless, this Court must refrain from transforming such authority into a guise for conducting its own independent review of the facts. *See* TEX. GOV'T CODE § 22.225(a) ("A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.").

A factual sufficiency review pits two fundamental tenets of the Texas court system against one another: the right to trial by jury[3] and the court of appeals' exclusive jurisdiction over questions of fact.[4] And, in the context of parental termination cases, a third interest must also be accounted for—that is, parents' fundamental right to make decisions concerning "the care, the custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see Holick v. Smith*, 685

[3] *See* TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate."); TEX. CONST. art. V, § 10 ("In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury.").

[4] *See* TEX. CONST. art. V, § 6 ("[T]he decision of [courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.").

S.W.2d 18, 20 (Tex. 1985) ("The natural right existing between parents and their children is of constitutional dimensions."). Thus, in *In re C.H.*, we articulated a factual sufficiency standard to strike an appropriate balance between these competing principles. 89 S.W.3d 17, 25 (Tex. 2002).

Because the termination of parental rights implicates fundamental interests, a higher standard of proof—clear and convincing evidence—is required at trial. *See In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980). Given this higher burden at trial, in *C.H.* we concluded a heightened standard of appellate review in parental termination cases is similarly warranted. 89 S.W.3d at 25–26. Specifically, a proper factual sufficiency review requires the court of appeals to determine whether "the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *Id.* at 25. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). And in making this determination, the reviewing court must undertake "an exacting review of the entire record with a healthy regard for the constitutional interests at stake." *See C.H.*, 89 S.W.3d at 26.

But, as we also recognized in *C.H.*, while parental rights are of a constitutional magnitude, they are not absolute. *Id.* Consequently, despite the heightened standard of review as articulated in *C.H.*, the court of appeals must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of witnesses. *In re J.L.*, 163 S.W.3d 79, 86–87 (Tex. 2005). For this reason, we concluded that if a court of appeals is *reversing* the jury's finding based

on insufficient evidence, the reviewing court must "detail the evidence relevant to the issue of parental termination and clearly state why the evidence is insufficient to support a termination finding by clear and convincing evidence." *C.H.*, 89 S.W.3d at 19. This requirement ensures the reviewing court appropriately respects the jury's fact-finding function. *Id.* at 26–27.

Though we have repeatedly articulated the above standard—requiring courts of appeals to detail the evidence—in cases *reversing* a jury verdict based on insufficient evidence,[5] we have never similarly required appellate courts to detail the evidence in this manner when the court *affirms* the judgment of termination. In fact, we have expressly held to the contrary for preponderance cases—that is, "a court of appeals must detail the evidence . . . and clearly state why the jury's finding is factually insufficient when *reversing* a jury verdict, *but need not do so when affirming a jury verdict*." *Gonzales v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681 (Tex. 2006) (emphases added) (quotation marks omitted). In *Ellis County State Bank v. Keever*, we recognized that the effort of detailing the evidence is required of the courts of appeals when reversing a jury verdict to discourage the reviewing court from "merely substituting its judgment for that of the jury." 888 S.W.2d 790, 794 (Tex. 1994). Indeed, our courts of appeals walk a very fine line in conducting an appropriate factual sufficiency review. *See Mohnke v. Greenwood*, 915 S.W.2d 585, 590 (Tex. App.—Houston [14th Dist.] 1996, no writ) ("[T]he appellate court should not act as a thirteenth juror in assessing the evidence and the credibility of the witnesses."). But when the reviewing court *affirms* the jury verdict, the risk that the court has usurped the role of the jury disappears. And in

[5] *See In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009); *In re H.R.M.*, 209 S.W.3d 105, 108–09 (Tex. 2006); *J.F.C.*, 96 S.W.3d at 266.

Keever, we perceived "no other justification for imposing this additional burden on the courts of appeals," and thus declined to require courts of appeals to detail the evidence when affirming the trial court's judgment. 888 S.W.2d at 794.

Since our decision in *Keever*, we have established one exception to the general rule that appellate courts need not "detail the evidence" when affirming a jury finding: exemplary damages. In *Transportation Insurance Co. v. Moriel*, we reasoned:

> We have already held in *Pool* that courts of appeals, when reversing on insufficiency grounds, should detail the evidence in their opinions and explain why the jury's finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust. Due to the jury's broad discretion in imposing [exemplary] damages, we believe that a similar type of review is appropriate when a court of appeals is *affirming* such an award over a challenge that it is based on insufficient evidence or is against the great weight and preponderance of the evidence.

879 S.W.2d 10, 31 (Tex. 1994) (citation omitted). Thus, we concluded that "the court of appeals, when conducting a factual sufficiency review of [an exemplary] damages award, must hereafter detail the relevant evidence in its opinion, explaining why that evidence either supports or does not support the [exemplary] damages award in light of the *Kraus* factors." *Id.* The Legislature subsequently codified this requirement.[6]

In both exemplary damages and parental termination cases, the standard of proof at trial is heightened—the plaintiff (or in the case of parental termination, the State) must prove the claim by clear and convincing evidence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003(a) (allowing recovery

[6] *See* Act of Apr. 11, 1995, 74th Leg., R.S., ch. 19, § 1, sec. 41.013(a) (current version at TEX. CIV. PRAC. & REM. CODE § 41.013(a)) ("[A]n appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award.").

of exemplary damages only if the claimant proves by clear and convincing evidence that the claimant's harm resulted from fraud, malice, or gross negligence); *G.M.*, 596 S.W.2d at 847 (extending the clear and convincing standard to termination proceedings). But the similarities essentially end there. The purpose of an award of exemplary damages is to punish and deter, "similar to that for criminal punishment." *Moriel*, 879 S.W.2d at 16. But exemplary damage awards have been plagued by concerns that, due to the broad discretion afforded juries in deciding these damages, such awards are unpredictable with little basis in fact, amounting to "unjust punishment." *See id*. at 17, 29. As the United States Supreme Court has explained, "[a] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of [exemplary] damages is an expression of its moral condemnation." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001). Such discretion has prompted both this Court and the Legislature to enact substantial procedural safeguards to ensure that jury awards for exemplary damages are properly calculated against defendants. And as one of these procedural safeguards, we concluded in *Moriel* that a court of appeals conducting a factual sufficiency review of an exemplary damages award must detail all relevant evidence in its opinion, whether it ultimately affirms or reverses the award. *See* 879 S.W.2d at 31.

The purpose of terminating parental rights, in contrast, is not to punish parents or deter their "bad" conduct, but rather to protect the interests of the child. *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003). Unlike exemplary damages awards, which leave much to the jury's discretion, the Family Code provides a detailed statutory framework to guide the jury in making its termination findings. Specifically, in proceedings to terminate the parent-child relationship under section 161.001 of the

Family Code, the petitioner is required to establish one or more of the acts or omissions enumerated under subdivision (1) of the statute, and must also prove that termination is in the best interest of the child. TEX. FAM. CODE § 161.001(1), (2). Proof under each subsection must be satisfied by clear and convincing evidence; termination may not be based solely on the best interest of the child as determined by the trier of fact. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). Thus, termination proceedings require juries to make specific findings of fact, and the Family Code provides the contours to limit unnecessary discretion. In termination cases, jurors are not provided with the same "unbridled discretion" that courts have found disconcerting in reviewing exemplary damages.

Moreover, review of exemplary damages and parental terminations are different processes for an additional reason: competing fundamental interests. An award of exemplary damages only implicates one fundamental concern, the defendant's due process rights to her property. Because no competing fundamental interest exists to balance this right in the trial court, we require courts of appeals to detail the evidence of their exacting review on appeal. *Moriel*, 879 S.W.2d at 31. By contrast, in parental termination cases, the parents' fundamental interest in maintaining custody and control of their children is balanced against the State's fundamental interest in protecting the welfare of the child. *See In re M.S.*, 115 S.W.3d 534, 547–48 (Tex. 2003). But for the State's fundamental interest in the welfare of the child, termination would not be proper. The Legislature has safeguarded the parent's fundamental interest by limiting the circumstances in which the State's interest can overcome the parent's interest. *See* TEX. FAM. CODE § 161.001. And we have further safeguarded the parent's interest by requiring courts of appeals to conduct an exacting review of the

entire record when a parent challenges a termination order for insufficient evidence. *See C.H.*, 89 S.W.3d at 19. In short, the State's competing fundamental interest, the Legislature's statutory protection of the parent's fundamental interest by narrowing the grounds for termination, and our protection of the parent's fundamental interest by requiring an exacting review of the entire record together provide ample protection of the parent's fundamental interest.

As such, the rationale which persuaded us to require courts of appeals to detail relevant evidence in affirming exemplary damage awards in *Moriel* does not likewise persuade us to require the same in termination proceedings. This is not to suggest that courts of appeals should not detail the evidence in their opinions affirming a jury's decision to terminate. To the contrary, we encourage courts to do so, and we reaffirm that they must in any event conduct an exacting review of the evidence regardless of how they dispose of the case before them. *Id*. But in light of the difference in purposes and the limits that the statute already places on the jury's decision to terminate, we decline to mandate that courts of appeals detail the evidence when affirming a jury verdict.[7]

Here, the court of appeals cited the correct standard—that is, whether "*on the entire record*, a factfinder could reasonably form a firm conviction or belief that the parent violated subsection (D)

[7] Father expresses concern that without requiring the court of appeals to detail the evidence it considered in making its decision to affirm termination, this Court surrenders its ability to determine whether the court of appeals did in fact adhere to the correct standard in conducting its factual sufficiency review. But as a practical matter, this Court has the record available when reviewing the court of appeals' opinion. If the record contains evidence that would tend to cast serious doubt on the outcome, and there is no indication in the court of appeals' opinion that this relevant evidence was considered, this Court may conclude the reviewing court did not adhere to the correct standard and remand accordingly. But when the unmentioned evidence does not rise to this level, or when the Court can readily discern from the opinion before it that the court of appeals did in fact review the record in its entirety, this Court has no reason to question whether the reviewing court adhered to the proper factual sufficiency standard.

or (E) of section 161.001(1)" and "[i]f, *in light of the entire record*, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction in the truth of its finding."[8] 412 S.W.3d at 592 (emphases added) (citing *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006) and *C.H.*, 89 S.W.3d at 28). The court of appeals subsequently devoted six pages of its opinion to articulating the evidence presented at trial. *See id.* 593–99.

As the en banc court concluded, there was some evidence tending to support the jury's termination finding under section 161.001(1)(E) that Father engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered the physical or emotional well-being of the child. For example, as to H.B.'s failure to thrive diagnosis, there was medical testimony that H.B. was "severely malnourished" and suffered from "significant developmental delays." *Id.* at 594–95. There was also evidence that H.B.'s condition would take months to develop, and thus her growth problems began well before Father and Mother separated. *Id.* at 594. Regarding A.B.'s injuries in 2008, there was medical testimony opining that such injuries "were not of a kind that a child would sustain accidentally," that the linear bruises on A.B.'s face were likely caused by a slap, and that the injury to A.B.'s ear was more consistent with a pinch or "blow." *Id.* at 597.

The record also contains some evidence favorable to Father's position. For instance, Father testified that he was a small child and simply thought H.B. took after him and that Mother was the one who took the children to the doctor and fed the children. *Id.* at 594. He also denied having ever

[8] Additionally, in considering the best interests of the children, the court of appeals concluded "viewing the entire record in a neutral light, we hold that the evidence is factually sufficient for the jury to form a firm conviction or belief that termination was in the children's best interest." 412 S.W.3d at 607.

hit either of his children, maintaining that he pled guilty to injury of a child only because he was told he could be in jail for up to two years awaiting trial. *Id.* at 612 (Walker, J., dissenting). The court of appeals undoubtably considered this evidence, for it was thoroughly articulated in the court of appeals' earlier decisions in the case, which were included as appendices to the dissent. *See id*. at 613, 660. Thus, from the court of appeals' decision, as well as the record before us, it is evident that the en banc court of appeals, though it did not specifically detail all evidence favorable to Father in its majority opinion, did in fact comply with the standard articulated in *C.H.* when it considered the record in its entirety.

III. Conclusion

For over a decade, we have required courts of appeals conducting factual sufficiency reviews in parental termination cases to engage in a thorough review of the entire record. This exacting review safeguards the constitutional rights of parents, while simultaneously ensuring the emotional and physical interests of the child are appropriately considered. But the court of appeals' authority to conduct a factual sufficiency analysis does not permit the court to stand in the role of a thirteenth juror. Thus, if the reviewing court is to reverse the factfinder, it must detail the evidence supporting its decision. Here, by considering the record in its entirety, the court of appeals executed an appropriate factual sufficiency review. Because the court ultimately affirmed the jury's termination findings, it was not required to detail the evidence. Accordingly, we affirm.

Eva M. Guzman
Justice

OPINION DELIVERED: May 16, 2014

IN THE SUPREME COURT OF TEXAS

NO. 13-0776

CHAPMAN CUSTOM HOMES, INC., AND MICHAEL B. DUNCAN, TRUSTEE OF THE M. B. DUNCAN SEPARATE PROPERTY TRUST, PETITIONERS,

v.

DALLAS PLUMBING COMPANY, RESPONDENT

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

PER CURIAM

In this summary-judgment case, we consider whether a homeowner has stated a cognizable negligence claim for water damage to new construction allegedly caused by a plumber's negligent performance under its subcontract with the homeowner's general contractor. The court of appeals affirmed the plumber's summary judgment, concluding that the homeowner did not have a negligence claim. ___ S.W.3d ___ (Tex. App.—Dallas 2013) (mem. op.). The court reasoned that the homeowner did not have a negligence claim because it "did not allege violation of any [tort duty] independent of the contract" and further did not have a contract claim because it was not a party to the plumbing subcontract. *Id*. at ___ (citing *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991)). Because the negligent performance of a contract that proximately injures a non-

contracting party's property or person states a negligence claim, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

Chapman Custom Homes, Inc. contracted with Michael B. Duncan, trustee of the M.B. Duncan Trust, to build a home on property owned by the trust. The builder, in turn, contracted with Dallas Plumbing Company to put in the plumbing at the new house. After the home's completion, plumbing leaks allegedly caused extensive damage to the structure. The builder and trust sued the plumber for the damage, alleging breach of contract, breach of express warranty, and negligence. The plumber denied liability and moved for summary judgment, which the trial court granted and the court of appeals affirmed. ___S.W.3d ___.

The court of appeals reasoned that the trust could not recover contract damages, even though it owned the damaged property, because it was not a party to the plumbing subcontract. *Id*. at ___. The court further reasoned that summary judgment was also proper as to the builder's contract claim because the builder, although a party to the plumbing contract, did not own the property and therefore had not suffered any compensable damage. *Id*. Finally, the court concluded that the pleadings asserted only the breach of contractual duties, and thus the trial court had not erred in granting summary judgment as to plaintiffs' negligence claims. *Id*.

The Plaintiffs' Amended Petition alleged that the builder, on its behalf and that of the trust, contracted with Dallas Plumbing to furnish all necessary plumbing labor and materials for the new house. The pleadings further asserted that Dallas Plumbing failed to install the hot water heating system properly, resulting in water flooding the house and damaging the structure. Among other allegations, the pleadings claimed that Dallas Plumbing's negligent failure to properly join the water

system to the hot water heaters was a proximate and foreseeable cause of the water damage to the new house. We disagree with the court of appeals that these allegations assert only the breach of Dallas Plumbing's contractual duty. *See id*. at ___.

In *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947), we observed that a common law duty to perform with care and skill accompanies every contract and that the failure to meet this implied standard might provide a basis for recovery in tort, contract, or both under appropriate circumstances. *See also Coulson v. Lake L.B.J. Mun. Util. Dist.*, 734 S.W.2d 649, 651 (Tex. 1987) (reaffirming this observation). The underlying contract in *Scharrenbeck* was for the repair of a heater in the plaintiff's home. 204 S.W.2d at 509. The defendant performed his work so poorly that the house burned down. *Id*. And, a jury found that the plaintiff's loss was proximately caused by the defendant's negligence. *Id*. at 511. On appeal, the defendant argued that it had not breached any duty to the plaintiff, but this Court disagreed, holding that a "duty arose by implication" and that "[h]aving undertaken as an expert and for a consideration to repair and adjust the heater, [the repairman] owed [the homeowners] the duty, as a matter of course, not negligently to burn their house in the undertaking." *Id*. at 510-11; *cf. LAN/STV v. Martin K. Eby Constr. Co.*, ___ S.W.3d ___, ___ n.35 (stating that *Scharrenbeck*, which involved a suit by a contracting party, has been limited by subsequent cases).

The circumstances here are very similar. Having undertaken to install a plumbing system in the house, the plumber assumed an implied duty not to flood or otherwise damage the trust's house while performing its contract with the builder. Although the court of appeals views this property damage as a mere economic loss arising from "'the subject [matter] of the contract itself,'" ___

S.W.3d at ___ (quoting *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986), and purports to apply the economic loss rule as a bar to any tort claim, the rule does not apply here.

The economic loss rule generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy. *LAN/STV*, ___ S.W.3d at ___; *Jim Walter Homes*, 711 S.W.2d at 618. But it does not bar all tort claims arising out of a contractual setting. As we have said, "a party [cannot] avoid tort liability to the world simply by entering into a contract with one party [otherwise the] economic loss rule [would] swallow all claims between contractual and commercial strangers." *Sharyland Water Supply Corp. v. City of Alton,* 354 S.W.3d 407, 419 (Tex. 2011). Thus, a party states a tort claim when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit. *See LAN/STV*, ___ S.W.3d at ___ (discussing the limitations on recovery of purely economic damages by contractual strangers); *DeLanney*, 809 S.W.2d at 494-95 (suggesting that the source of the duty and the nature of the wrong should be examined to determine whether the underlying claim is in tort or contract). Such was the case in *Scharrenbeck*, and such is also the case here. The plumber's duty not to flood or otherwise damage the house is independent of any obligation undertaken in its plumbing subcontract with the builder, and the damages allegedly caused by the breach of that duty extend beyond the economic loss of any anticipated benefit under the plumbing contract.

Because the court of appeals erroneously concludes that the pleadings and summary judgment evidence negate the existence of a negligence claim, we grant the petition for review and, without

hearing oral argument, reverse the court of appeals' judgment and remand the case to trial court. TEX. R. APP. P. 59.1.

Opinion Delivered: August 22, 2014