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CASE LAW UPDATE

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 365S.W.3d and Supreme Court opinions released through August 24, 2012.

The Texas Property Code and the other various Texas Codes are referred to by their respective names. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue.

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

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PART I
FORMATION AND INTERPRETATION

Jones* v. *Providence Land Services, LLC, 353 S.W.3d 538 (Tex.App.-Eastland 2011, no pet.). The Howells owned land where some lake lots are located. Beginning in the 1970s, the Howells began to lease individual lots to people who wanted lake property. The lake lots were known as the "Howell Properties," and they consisted of forty-three total lots.

The Howells and their tenants executed written lease agreements for each of the lots. The terms of the leases were drafted by the Howells without the aid of an attorney. With respect to the duration of the leases, the leases can be classified into three categories: (1) leases that expressly provided that they were "indefinite;" (2) leases with no express end date; and (3) leases with fixed termination dates. The trial court labeled these categories respectively as "Indefinite Term Leases," "No End Term Leases," and "Fixed Term Leases."

The original Howells died and their son Rex gained control of Howell Properties. He sold the lots to Providence. Soon after acquiring the lake lots, Providence sent new leases to the tenants proposing new lease terms including thirty-day termination provisions and higher lease payments. Providence based this action on its assertion that the leases signed by the tenants and the Howells were tenancies at will. The tenants instituted the underlying action against Providence in an effort to establish that their original leases were long-term leases as a result of written and verbal agreements that they had made with the Howells.

The trial court determined that the use of the word "indefinite" to define the end date of the leases' duration was ambiguous as a matter of law, and ultimately determined that the duration of the Indefinite Term Leases was ninety-nine years. The court of appeals said that the determination of whether a contract is ambiguous is a matter of law for the court to decide.

The key word in the court's analysis is use of the word "indefinite" to define the end date of the term of the leases. The tenants contend that "indefinite" is subject to two meanings: a "legal definition" of uncertain or vague, and a layperson's definition of "not limited." Thus, the tenants contend that the use of "indefinite" in the leases indicates that their duration was ninety-nine years or longer.

The court disagreed. "Indefinite" is not synonymous with "infinity," "perpetual," or "forever." The definition of "not limited" for "indefinite" is simply another way of saying that it means "uncertain." The use of "indefinite" in the leases has a definite and certain legal meaning; the leases, as written, have no end date. As a matter of law, the leases are not ambiguous. If the tenant is holding the premises for no certain time as provided by the contract, he is merely a tenant at will, and the tenancy may be terminated at the will of either party.

As to the No End Term Leases, the tenants under those leases argued that the leases were ambiguous and that parol evidence should have been admitted to show that the parties intended them to be long term leases. Ambiguity in contract language is not to be confused with silence. Ambiguity results when the intention of the parties is expressed in language that is susceptible of more than one meaning. In contrast, when a contract is silent, the question is not one of interpreting the language but, rather, one of determining its effect. The court of appeals held that the No End Term Leases were not ambiguous. As noted previously, a lease for an uncertain length of time is an estate at will.

Effel* v. *Rosberg, 360 S.W.3d 626 (Tex.App.-Dallas 2012, no pet.). Rosberg bought a house from Effel as part of a settlement agreement. The settlement

agreement provided that Lena, the current resident of the property could continue to occupy the property for the remainder of her natural life, or until such time as she voluntarily chose to vacate. The settlement agreement provided that a lease containing those terms would be prepared before the closing of the sale of the property to Rosberg. Lena was not a party to the settlement agreement.

The property was deeded to Rosberg with no reservation of a life estate. A lease for appellant was prepared by Effel's attorney. The term of the lease was "for a term equal to the remainder of the Lessee's life, or until such time that she voluntarily vacates the premises." The lease also contained various covenants relating to payment of rent and charges for utilities as well as the use and maintenance of the grounds. The lease provided that if there was any default in the payment of rent or in the performance of any of the covenants, the lease could be terminated at the option of the lessor. The lease was signed by Rosberg as lessor and by Henry Effel as attorney-in-fact for Lena.

Three years later, Rosberg sent a letter to Effel and Lena terminating the lease. He alleged a violation of the covenants of the lease. He gave Lena ten days to vacate and eventually brought this forcible detainer action to evict her. Both the justice court and the county court ruled in Rosberg's favor. The county court held that the lease created a tenancy at will, terminable by either party at any time.

Lena's first claim was that the courts lacked jurisdiction for the forcible detainer action. She claimed that she had a life estate in the property; however, she introduced no evidence that she actually did have a life estate. In fact, everything in the record spoke of a lease, just as the actual lease document said. In addition, as noted above, there was no reservation of a life estate in the deed.

Next, Lena attacked the finding that the lease created a tenancy at will. She claimed that the lease had to be read together with the settlement agreement; however, the court noted that Lena was not a party to the settlement agreement and that the lease alone was the basis for the forcible detainer action. So the court looked only to the lease.

The lease was "for a term equal to the remainder of the Lessee's life, or until such time that she voluntarily vacates the premises." It is the long-standing rule in Texas that a lease must be for a certain period of time or it will be considered a tenancy at will. Courts that have applied this rule to leases that state they are for the term of the lessee's life have concluded that the uncertainty of the date of the lessee's death rendered the lease terminable at will by either party.

Lena argued that the current trend in court decisions is away from finding a lease such as hers to be terminable at will. The court reviewed the cases Lena came up with and found no such trend. The rule continues to be that a lease for an indefinite and uncertain length of time is an estate at will.

Furthermore, in this case, not only was the term of the lease stated to be for the uncertain length of appellant's life, but her tenancy was also "until such time that she voluntarily vacates the premises." If a lease can be terminated at the will of the lessee, it may also be terminated at the will of the lessor. Because the lease at issue was terminable at will by either party, the trial court's first conclusion of law was correct.

Lena then attacked the notice to vacate. Property Code § 24.005 requires the landlord to give at least three days notice to vacate. The notice must be delivered either in person or by mail at the premises in question. It was undisputed that Rosberg's attorney sent a written notice both by regular and certified mail, giving her 10 days' notice to vacate. Nothing in the lease required a

longer notice period. Rosberg did not begin the forcible detainer action until more than two months after the notice was sent. The court held that the notice was sufficient.

Lena then argued that the notice was defective because it contained two allegedly false statements, i.e., that she had breached the lease and that she didn't have a right to cure. There is nothing in the property code that requires the landlord to give a reason for the notice to vacate or an explanation of the right to cure. In addition, because the tenancy was one at will, Rosberg could terminate at any time regardless of whether there had been a default.

Royalco Oil & Gas Corporation* v. *Stockhome Trading Corporation, 361 S.W.3d 725 (Tex.App.-Fort Worth 2012, no pet.). The Lease in this case was a salt water disposal agreement. The Lease itself states that it "shall in no way affect ownership" of the oil, gas, or minerals in, on, or under the lease premises. The Lease is for the sole purpose of allowing Lessee to conduct activities relating to the disposal and treatment of water produced from oil and gas wells, but it does not include recovery of any minerals, or indeed the recovery of any natural resource. Because this Lease was not a lease for the production of minerals, the trial court correctly applied the law relating to leases generally, not the law governing oil and gas leases.

Thomas P. Sibley, P.C.* v. *Brentwood Investment Development Company, L.P., 356 S.W.3d 659 (Tex.App.—El Paso 2011, pet. denied). A lease was drawn up between Brentwood, as Landlord, and Sibley, as Tenant. Sibley signed the document, but, although there was a signature block for the Landlord, Brentwood did not sign the lease. Sibley moved into the office building, but failed to pay all of its rent payments. Brentwood sued Sibley for breach of the lease.

Sibley claims that the lease is not enforceable because it was never signed by Brentwood. But, said the court, the absence of a party's signature does not necessarily destroy an otherwise valid contract. A party may accept a contract, and indicate its intent to be bound to the terms by acts and conduct in accordance with the terms. In this instance, although Brentwood did not sign the agreement, the uncontested evidence indicates that the parties proceeded with the lease as though the lease had been fully executed. There is no dispute that Sibley occupied the space defined in the lease, and operated a law firm from the premises, and made several partial payments of base rent. Likewise, there is no dispute that Brentwood, continually operated and maintained Tuscany Park, including Sibley's offices in accordance with the lease terms. As such, the failure by Brentwood to sign the lease document does not create a fact issue as to the parties' mutual assent to the agreement, or the instrument's enforceability against Sibley.

Sibley then argued that the lease did not satisfy the statute of frauds and was unenforceable. Sibley's argument was based on the conclusion that a written agreement did not exist between the parties based on Brentwood's failure to sign the lease. As we have concluded that the omission of the lessor's signature was not fatal to the lease's enforceability, Sibley's statute of frauds argument is without merit.

Southern* v. *Goetting, 353 S.W.3d 295 (Tex.App.-El Paso 2011, pet. denied). In 1996, pursuant to an oral agreement, Goetting sold to Crouse a one-half interest in a building and lot known as 1602 Olive in El Paso, Texas, for $150,000 with interest. At trial, Goetting stated that Crouse paid him more than $170,000 and obtained a one-half interest in the property. Crouse operated a successful business from the property and paid one-half of the property taxes from 1996 to 2002. Although there is no dispute that Crouse fully paid for his one-half interest in the property, Goetting never executed a deed to any part of the property in Crouse's name. Thereafter, Goetting

orally agreed to repurchase Crouse's one-half share of the property and paid Crouse $1,200 per month for several years. After Crouse died in May 2007, Goetting soon stopped making payments for the repurchase of the property and claimed that he owed nothing more for the repurchase.

After Crouse's death, Southern, as executor of his estate, brought suit to have the half interest in the building and lot conveyed to the estate. At trial, Goetting admitted that he had paid Crouse $76,180 of the $150,000 repurchase amount for the property but had not paid the remaining balance of $73,820. Although not pled in his answer, Goetting asserted during trial that Crouse had agreed to pay rent during his occupancy of the property and, because Crouse had not done so during his purchase of the property, Crouse had agreed to offset the unpaid rent against Goetting's repurchase obligations. Goetting admitted that he did not make any rent calculations until after Crouse had died and said that he never discussed any rental figures or terms with Crouse.

Although the jury found that Crouse failed to comply with an agreement to pay rent and awarded to Goetting rental damages totaling $73,820, after a thorough review of the record, we conclude that no evidence was presented to prove the following essential terms of the purported agreement to pay rent: (1) the specific area or portion of the property that the parties agreed would be subject to rental; (2) the amount of rent Crouse agreed to pay; (3) the agreed-upon method for calculating the rental amount; (4) the frequency and manner for making rental payments; (5) the period or length of time for which rental payments would be made; and (6) the date on which Crouse, as owner of one-half interest in the property, would no longer be obligated to pay the agreed-upon rental amount. We find that reasonable parties would regard these terms to be vitally important elements of the rental bargain in this case, and that these essential elements were missing from the alleged agreement to pay rent.

Because the essential terms of the alleged rental agreement are indefinite, uncertain, and unclear, because the evidence reflects that no less than one of the essential terms of the alleged rental agreement was left open for negotiation in the future, and because there was no evidence of a meeting of the minds between Crouse and Goetting regarding the essential terms of the alleged rental agreement, the court concluded as a matter of law that no binding contract to pay rent exists under these facts.

PART II
WARRANTIES AND COVENANTS

Italian Cowboy Partners, Ltd.* v. *Prudential Insurance Company of America, 341 S.W.3d 323 (Tex. 2011). The Secchis wanted to expand their restaurant business. In late 1999 and early 2000, with the help of their real estate broker, the Secchis began to look for additional restaurant property. Hudson's Grill was a restaurant located in a building at Keystone Park Shopping Center. Keystone Park, as well as the Hudson's Grill building, was owned by Prudential. The Secchis' broker told them that Hudson's Grill was probably going to close and that the restaurant site might be coming up for lease. The Secchis met with the property manager and discussed the Hudson's Grill building. They entered into a letter of intent to lease the property and began negotiating the lease. Negotiations continued for about five months. At least seven different drafts of the lease were circulated. During this period of time, the Secchis visited the site on several occasions.

After the parties executed the lease, Italian Cowboy began remodeling the property. While it was remodeling the building, several different persons told Italian Cowboy that there had been a sewer gas odor problem in the restaurant when it was operated by Hudson's Grill. One of the owners also personally noticed the odor. He

told the property manager about it about the problem but continued to remodel. After Italian Cowboy was operational and opened for business, the sewer gas odor problem continued. Although Prudential attempted to solve the problem, the transient sewer gas odor remained the same. Eventually, the restaurant closed. Italian Cowboy then sued Prudential.

The lease with Italian Cowboy contained the following relevant provisions:

> 14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.
>
> 14.21 Entire Agreement. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party....

The court first turned to the question whether the lease contract effectively disclaims reliance on representations made by Prudential, negating an element of Italian Cowboy's fraud claim and concluded that it does not. First, a plain reading of the contract language at issue indicates that the parties' intent was merely to include the substance of a standard merger clause, which does not disclaim reliance. Moreover, even if the parties had intended to disclaim reliance, the contract provisions do not do so by clear and unequivocal language. For these reasons, the court held, as a matter of law, that the language contained in the lease agreement at issue does not negate the reliance element of Italian Cowboy's fraud claim.

A contract is subject to avoidance on the ground of fraudulent inducement. For more than fifty years, it has been the rule that a written contract even containing a merger clause can nevertheless be avoided for antecedent fraud or fraud in its inducement and that the parol evidence rule does not stand in the way of proof of such fraud.

The court has recognized an exception to this rule in ***Schlumberger Technology Corp.*** **v.** ***Swanson***, 959 S.W.2d 171 (Tex.1997), and held that when sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement. In other words, fraudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause. In Schlumberger, the court stated that it had a clear desire to protect parties from unintentionally waiving a claim for fraud, but also identified a competing concern—the ability of parties to fully and finally resolve disputes between them.

Here, the parties dispute whether a disclaimer of reliance exists, or whether the lease provisions simply amount to a merger clause, which would not disclaim reliance. The question of whether an adequate disclaimer of reliance exists is a matter of law. The analysis of the parties' intent in this case begins with the typical rules of contract construction.

Prudential focuses on section 14.18 of the lease contract, suggesting that Italian Cowboy's fraud claim is barred by its agreement that Prudential did not make any representations outside the agreement, i.e., that Italian Cowboy impliedly agreed not to rely on any external representations by agreeing that no external representations were made. Standard merger clauses, however, often contain language indicating

that no representations were made other than those contained in the contract, without speaking to reliance at all. Such language achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms. The court disagreed and held that the only reasonable interpretation of the contract language at issue here is that the parties to this lease intended nothing more than the provisions of a standard merger clause, and did not intend to include a disclaimer of reliance on representations. Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement.

To disclaim reliance, parties must use clear and unequivocal language. This elevated requirement of precise language helps ensure that parties to a contract—even sophisticated parties represented by able attorneys—understand that the contract's terms disclaim reliance, such that the contract may be binding even if it was induced by fraud. Here, the contract language was not clear or unequivocal about disclaiming reliance. For instance, the term "rely" does not appear in any form, either in terms of relying on the other party's representations, or in relying solely on one's own judgment.

The court then discussed Italian Cowboy's fraud claims, which the Court of Appeals did not deal with and, holding that the actions of the property manager were actionable as fraud, remanded the fraud claims to the Court of Appeals for further consideration.

The court then dealt with the claims of breach of the implied warranty of suitability. In a commercial lease, the lessor makes an implied warranty that the premises are suitable for the intended commercial purposes. Specifically, a lessor impliedly warrants that at the inception of the lease, no latent defects exist that are vital to the use of the premises for their intended commercial purpose. Moreover, a lessor is responsible for ensuring that essential facilities will remain in a suitable condition. However, if the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.

Here, Italian Cowboy did not expressly waive the implied warranty of suitability. However, it did accept responsibility to make certain repairs that might otherwise have run to Prudential as a result of the implied warranty of suitability. The parties dispute whether Italian Cowboy's responsibilities under the lease included repairs to the particular defect in the premises—the sewer gas odor, or its cause. While Italian Cowboy characterizes the defect as the presence of the odor itself, the court said that the proper analysis of the defect in this particular case must inquire into the cause of the odor because this is the condition of the premises covered by the duty to repair. Italian Cowboy offered uncontroverted evidence that a grease trap had been improperly installed, causing raw sewage to back up from the sewer lines. The court looked to the lease to see which party had the responsibility for repairing that defect.

The lease provided that the landlord was responsible for repairs to the common area and for structural repairs. At various points, the lease assigned repair obligations in different ways to both parties. With respect to plumbing matters, however, the court noted that while Italian Cowboy may have assumed at least some duty to repair, it was at the same time expressly precluded from making alterations to utility lines or systems without consent. Although the court of appeals did not discuss it, the trial court credited this distinction, finding the fact that "structural components and ... utility lines or systems serving and within the Premises ... ultimately had to be altered (not just repaired) to arrest the sewer gas odor.

Because, as the court noted, the ultimate cure for the odor problem was an alteration of the sewer lines, and because Italian Cowboy was prohibited from making alterations, the obligation was Prudential's and this was covered to the implied warranty.

The court also noted Prudential's obligation to maintain the common areas, which included sanitary sewer lines. Thus, Prudential was not relieved by the contract from liability for breach of the implied warranty of suitability as to a latent defect in facilities that were vital to Italian Cowboy's use of the premises as a restaurant.

Prudential asserts that even if rescission might have been proper at some point, Italian Cowboy ratified the lease by continuing in the lease for a period of time after having knowledge of the defect. However, even if ratification were a defense to breach of the implied warranty of suitability, Italian Cowboy's actions in this case could not give rise to ratification. Texas law requires only that one rescind within a reasonable time from discovering the grounds for rescission. The court reviewed the facts and determined that Prudential failed to establish ratification. It was in no way injured or suffered unjust consequences by Italian Cowboy's temporary efforts alongside Prudential to remedy the odor. Moreover, Prudential has not established that Italian Cowboy waited an unreasonable length of time to terminate the lease. The latent defect was not yet remedied—indeed, the underlying causes of the odor remained unknown—when Italian Cowboy closed and stopped paying rent, only a few weeks after the persistent odor materialized

PART III
REMEDIES

GKG Net, Inc.* v. *Mitchell Rudder Propertyies, L.P., 330 S.W.3d 426 (Tex.App.-Houston [14th Dist.] 2010, no pet.). Traditionally, Texas courts have regarded the landlord whose tenant has abandoned the lease before the end of its term as having four options. First, the landlord can maintain the lease and sue for rent as it becomes due. Second, the landlord can treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals reduced by the reasonable cash market value of the property for the remainder of the lease term. Third, the landlord can treat the breach as anticipatory, repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant. Fourth, the landlord can declare the lease forfeited (if the lease so provides), and relieve the tenant of liability of future rent. If the landlord re-lets the premises for only a portion of the unexpired term, as here, then the measure of damages has two components: (1) the measure of damages for the period of re-letting is the contractual rent provided in the original lease less the amount realized from the re-letting, and (2) the measure of damages for that portion or period of the lease term as to which there has been no re-letting is the difference between the present value of the rent contracted for in the lease and the reasonable cash market value of the lease for its unexpired term.

Aspenwood Apartment Corp.* v. *Coinmach, Inc., 349 S.W.3d 621 (Tex.App.-Houston [1st Dist.] 2011, pet. denied). Coinmach had a laundry lease at the apartment complex. The lender foreclosed and later sold the complex to Aspenwood. Aspensood gave Coinmach written notice to vacate the laundry room, stating that Aspenwood believed that the foreclosure had terminated the lease. Coinmach believed otherwise, and a long and extended period, litigation continued while Coinmach remained on the premises.

When a landlord-mortgagor is foreclosed upon, the general rule is that a tenant's lease is terminated. A tenant who continues to occupy the premises after expiration of a lease is a holdover tenant.

Absent evidence to the contrary, a holdover tenant is presumed to be bound by covenants that were binding on him during the term of the lease. Even when the lease does not contain a holdover provision, if the tenant remains in possession and rent continues to be accepted by the landlord, the terms of the expired lease are presumed to continue unless there is an agreement to the contrary.

The tenant and a foreclosure-sale purchaser may also independently enter into a new landlord-tenant relationship, but both parties must manifest consent to enter into a new lease. Thus, we must look at the post-foreclosure conduct of the parties to determine whether a new lease, with terms supplied by the previous one, was created by implication. The fact that the parties are held to the terms of the previous lease does not alter this conclusion, because it is merely the origin of the new contractual relationship that is independent of the prior lease, not the substance of the relationship.

When no new lease is formed and a tenant continues in possession of land covered by a prior lease but omitted from a succeeding lease, that tenant is either a tenant at sufferance or a tenant at will. A tenant at will is one who is in lawful possession of premises by permission of the owner or landlord for no fixed term. Tenancy at sufferance is created and exists where a person who has entered as a tenant for a term holds over after the expiration of the term or when a person holds over after a judgment has divested him or her of title to real property. Tenancy at sufferance is a lesser possessory estate than tenancy at will.

No one disputed that the lease was terminated by the foreclosure, so the only determination was whether a new lease was formed. The court looked at the evidence and determined that no new lease was formed. The evidence pretty much showed that Aspenwood did not consent to Coinmach's presence on the property. It gave several notices to vacate. It never cashed any of Coinmach's rent checks. It filed forcible detainer actions. So, as a matter of law, there was no actual or implied contractual landlord-tenant relationship between Aspenwood and Coinmach.

Black* v. *Washington Mutual Bank, 318 S.W.3d 414 (Tex.App.-Houston [1st Dist.] 2010, pet. dism'd w.o.j). Lundy owned a house and got a $1 million loan on it from WaMu. Less than a month after obtaining the loan, Lundy conveyed the house by quitclaim to Black, who paid $100,000 down and made monthly payments of $8,500. About a year after entering into the agreement to purchase the property, Black received a phone call from Lundy telling her that he needed to do something with the lender or bank and he needed her to go and release the property but he would give it back to her. Black signed the deed giving the property back to Lundy. Lundy did not transfer the property back to Black, and Black never heard from Lundy again.

WaMu foreclosed on the loan. Black was given notice of the sale. After the foreclosure, WaMu gave Black a notice to vacate and then filed this forcible detainer action. Black claimed that the justice court and county court lacked subject matter jurisdiction over the case because it involved the determination of title to the property. A justice court in the precinct in which real property is located has jurisdiction over a forcible detainer suit. The sole issue to be determined in a forcible detainer action is the entitlement to actual and immediate possession, and the merits of the title shall not be adjudicated.

Black argues that the granting of a quitclaim deed from Lundy granted her "equitable title" and a greater right of possession than WaMu. However, a quitclaim deed, by its very nature, only transfers the grantor's right in that property, if any, without warranting or professing that the title is valid. Thus, Black took the property subject to the terms of the deed of trust, which allow foreclosure. Further, Black admitted at trial that she did not have

title at the time of sale because she conveyed her interest back to Lundy. Black fails to include in her analysis how her conveyance of the property back to Lundy affected her claimed "equitable title." While Black may seek recourse against Lundy independent of the forcible detainer suit, her argument has no bearing on the determination of immediate right of possession.

See also ***Williams* v. *Band of New York, Mellon***, 315 S.W.3d 925 (Tex.App.-Dallas 2010, no pet.). Defects in the foreclosure process may not be considered in a forcible detainer action to evict the foreclosed homeowner.

And see also ***Shutter* v. *Wells Fargo Bank***, N.A., 318 S.W.3d 467 (Tex.App.-Dallas 2010, pet. dism'd w.o.j.). The lender proved its right to possession of the property by presenting in evidence the substitute trustee's deed, the deed of trust, and notices to the borrower and the other residents of the property to vacate. The substitute trustee's deed showed the lender purchased the property in a public auction following appellant's default on the deed of trust. The deed of trust showed the borrower was a tenant at sufferance when she did not vacate the property after thje lender purchased it. The notice to vacate informed the borrower of her tenant-at-sufferance position and the lender's requirement that she vacate the property. This evidence was sufficient to establish the lender's right to immediate possession of the property.

Mekeel* v. *U.S. Bank National Association, 355 S.W.3d 349 (Tex.App.—El Paso 2011, no pet.). Texas Property Code § 24.002(b) requires a notice to vacate and demand for possession be written by a person entitled to possession of the property. Mekeel complains that no valid demand for possession exists because the letter does not state that it is made on behalf of U.S. Bank. Select Portfolio sent the notice. Select Portfolio was the servicing agent for U.S. Bank. As such, it is authorized to represent U.S. Bank by virtue of its servicing agreement.

Morris* v. *American Home Mortgage Servicing, Inc., 360 S.W.3d 32 (Tex.App.-Houston [1 Dist.] 2011). At the hearing, the loan servicer introduced the substitute trustee's deed, showing that Wells Fargo was the successor in interest to the original lender, and that it, through its servicing agent, had purchased the property at the foreclosure sale. Evidence presented in the county court also established that the original deed of trust contained language establishing a landlord-tenant relationship between the borrower and the purchaser. The servicer also introduced the notice to vacate, which named it as the successor in interest, as a servicing agent, to the original lender. Because the evidence in the county court showed that the servicer was the service agent for Wells Fargo, and there was a landlord tenant-relationship between the borrower and Wells Fargo, the county court could determine possession without quieting title. Accordingly, the court held that the justice and county courts were not deprived of subject-matter jurisdiction.

Moncada v. Navar, 334 S.W.3d 339 (Tex.App.-El Paso 2011, no pet.). Navar bought the Moncadas' home at a foreclosure sale. When they refused to vacate, Navar brough an action to evict them. The JP ruled in Navar's favor and the Moncadas filed a notice of appeal and pauper's affidavit.

At the trial de novo in county court, Navar testified that he did not want the Moncadas as tenants and that there had never been a rental contract between him and the Moncadas. Juana Moncada testified the same; that she and her husband had never entered into any kind of agreement to rent the property from Navar. At the conclusion of the trial, the judge announced that the Moncadas had not properly perfected their appeal because they failed to pay rent into the court's registry. She signed an order of dismissal, which states that the Moncadas "failed to perfect the appeal as required by Texas Rules of Civil Procedure

749(b)." The Moncadas appealed the dismissal to the court of appeals.

Within five days after a justice of the peace signs a judgment in a forcible entry and detainer case, a party may appeal to a county court by filing either a bond or a pauper's affidavit. If the appellant files a pauper's affidavit, the appellee has five days to contest the affidavit. If the appellee does not contest the affidavit, it will be considered approved. When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal is perfected.

The court of appeals held that the county court mistakenly relied on Rule 749b, which states that the tenant has to timely pay rent into the registry of the court in a nonpayment of rent case. By its terms, Rule 749a applies only if a suit for rent has been joined with the suit for forcible detainer. In this case, the complaint did not allege that the Moncadas failed to pay rent.

Navar alleged that he had sent a letter to the Moncadas requesting they pay rent into the court registry every month until resolution of the appeal. The court said that Navar's letter did not establish an agreement to pay rent. At most, the letter is an offer to enter into a rental agreement.

Furthermore, even if Rule 749b applied to this case, it would have no effect on the Moncadas's perfection of their appeal to the county court. In focusing on Rule 749b, Navar, like the county court, ignores Rule 749c, which expressly defines when an appeal is perfected. In the case of an indigent appellant, all that Rule 749c requires is the approval of a pauper's affidavit.

Rule 749b simply provides a procedure by which an indigent appellant may remain on the premises during the appeal: an appellant who appeals by filing a pauper's affidavit "shall be entitled to stay in possession of the premises during the pendency of the appeal" by complying with the procedures set forth in the rule. One of the rule's procedures is that the appellant "must pay into the justice court registry one rental period's rent." Isolating the word "must," Navar argues that paying rent is mandatory whenever an appellant appeals with a pauper's affidavit. Read in context, however, it is clear that paying rent is mandatory only if the appellant wishes to stay on the premises during the appeal.

Thus, the court held that the county court erred in concluding that the Moncadas' failure to pay rent into the court registry precluded them from perfecting an appeal.

Hoppenstein Properties, Inc.* v. *McLennan County Appraisal District, 341 S.W.3d 16 (Tex.App.-Waco 2010, pet. denied). Hoppenstein leased space to MCAD. The lease required Hoppenstein to construct some improvements and make repairs. The lease was to commence after completion of the work. The parties got into a number of disputes about the work and eventually, MCAD abandoned the leased premises. Hoppenstein then sued, claiming, among other things, future damages.

MCAD claims immunity from future damages. Hoppenstein contends that: (1) MCAD's immunity from suit has been waived by Local Government Code § 271.152 because the lease constitutes a contract for the provision of services to MCAD; and (2) the waiver of immunity provided by section 271.152 applies on a "contract-by-contract basis" rather than a "promise-by-promise basis."

Local Government Code § 271.152 waives the immunity from suit of certain local governmental entities for breach-of-contract claims arising from written contracts that state "the essential terms of the agreement for providing goods or services to the local governmental entity." The relevant inquiry is whether the lease entails "the provision of 'goods or services"

to MCAD. The term "services" is broad enough to encompass a wide variety of activities. The services provided need not be the primary purpose of the agreement, but they must be provided directly to the local governmental entity.

The construction addendum requires Hoppenstein to renovate the premises according to a floor plan agreed to by MCAD. Thus, the lease entails the provision of services to MCAD within the meaning of the statute. ***Kirby Lake Development, Ltd.* v. *Clear Lake City Water Authority***, 320 S.W.3d 829 (Tex. 2010).

Hoppenstein contends in its second issue that the waiver of immunity provided by section 271.152 applies on a "contract-by-contract basis" rather than a "promise-by-promise basis." Thus, Hoppenstein argues that MCAD's immunity is waived not only for damages flowing from any breach of the "services provisions" of the lease but also from any breach of the remainder of the lease terms. The court agreed with Hoppenstein. Here, the lost rentals Hoppenstein seeks to recover are those rentals which it would have received under the lease with MCAD, not from some other contract. These are direct damages.

PART IV
SECURITY DEPOSITS

Jones & Gonzalez, P.C.* v. *Trinh, 340 S.W.3d 830 (Tex.App.-San Antonio 2011, no pet.). To be liable for bad faith retention of a security deposit, a landlord must have failed to return the tenant's security deposit and a written list of itemized deductions, if any, for any portion of the security deposit that the landlord retains. Property Code § 93.005. The landlord must send to the tenant the remaining security deposit and the list of itemized deductions within sixty days of the tenant's surrendering possession of the premises. However, the sixty-day period does not start until after the tenant provides the landlord with a written statement of a forwarding address for the purpose of returning the security deposit. Given the penal nature of the statutory remedy, this requirement is strictly construed.

At trial, the Tenant presented no evidence that the Tenant sent the Landlord a written notification of a forwarding address to where the Tenant's security deposit and list of itemized deductions should be sent. Because this requirement is strictly construed, it does not matter whether or not the Landlord had actual knowledge of an address where the Tenant could be contacted. Thus, because the Landlord had no obligation to send the security deposit to the Tenant, the Landlord was not liable for bad faith retention of the Tenant's security deposit.

Mesquite Elks Lodge #2404 v. Shaikh, 334 S.W.3d 319 (Tex.App.-Dallas 2010, no pet.). The Lodge leased space in a shopping center. It gave a security deposit of $4,250 to the landlord. The lease was for a year ending April 30, 2005. In May of 2005, Shaikh bought the center from the original landlord. The Lodge had held over and ultimately gave Shaikh notice that it intended to vacate in November of 2005. The Lodge moved out in December and asked for its security deposit. In January, Shaikh responded with a letter stating that damages to the property exceeded the deposit and demanding payment for the damages. After some time, the Lodge responded with a request for an accounting or a refund. Shaikh responded by re-sending the January letter and again demanding payment.

Shaikh filed suit for breach of the lease and damages. The trial court found in his favor and awarded damages. The court of appeals found that there was not sufficient evidence to support the damages awarded to Shaikh. When the injury to realty is reparable, the proper measure of damages is the reasonable cost of repairs necessary to restore the property to its prior condition. In

question was the portion of damages related to replacing some steel doors. During the course of his testimony, Shaikh admitted replacing the doors would actually constitute an improvement of the space, rather than bringing it back to the same condition as when it was rented to the Lodge.