CASE LAW UPDATE

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CHAPTER 3

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 502S.W.3d and Supreme Court opinions released through May 26, 2017.

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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B.A., Southern Methodist University - 1971
Juris Doctor, *cum laude*, Southern Methodist University - 1976
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ACADEMIC APPOINTMENTS, AND PROFESSIONAL ACTIVITIES

Past Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas
Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2010-2011
Vice Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2009-2010
Treasurer, Real Estate, Probate & Trust Law Section, State Bar of Texas 2008-2009
Council Member, Real Estate, Probate & Trust Section, State Bar of Texas 2003-2007
Adjunct Professor of Law, Southern Methodist University School of Law / Real Estate Transactions - 1986 to 1995 and 2014
Member, State Bar Standing Committee on Real Estate Forms
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SELECT LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Course Director for the State Bar of Texas, Advanced Real Estate Law Course and for the University of Texas at Austin - Mortgage Lending Institute
Author/Speaker for the State Bar of Texas, Advanced Real Estate Law Course - 1987 to present
Author/Speaker for the University of Texas at Austin - Mortgage Lending Institute - 1992 to present
Author/Speaker for Texas Land Title Institute - 1992 to present
Author/Speaker for the State Bar of Texas, Advanced Real Estate Drafting Course
Panel Member for State Bar of Texas, Advanced Real Estate Strategies Course – 2007 and 2008
Author of "Annual Survey of Texas Law -- Real Estate," 51 SMU L. Rev. 1321 (1998) and 52 SMU L. Rev. 1393 (1999)

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PART I MORTGAGES AND FORECLOSURES

Bauder* v. *Alegria, 480 S.W.3d 92 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Property Code § 51.002(b) requires that a notice of foreclosure be served by certified mail addressed to the debtor's last known address. If the property is a borrower's residence, the notice must be sent to the borrower's residence address. Property Code § 51.002(d). Here, the notice address for the borrower in the loan documents was 704 Roosevelt Street. Several default or payment reminders were sent to that address. In May of 2013, the lender sent a Notice to Cure to the Roosevelt address. Before sending it, he sent the borrower a text message stating that he'd heard she sold the Roosevelt property and also stating that he assumed that her address at 1825 Neuman Street was her primary residence. There were also text messages for an extended period from the borrower for the lender to pick up payments at the Neuman address. A month later, the lender sent a Foreclosure Notice to the Roosevelt address, but none was sent to the Neuman address. The trustee foreclosed.

The borrower sued to set aside the foreclosure, claiming that she did not receive proper notice. The trial court set the foreclosure aside, finding that the lender had reasonable notice of her change of address and that notice was sent to the wrong address.

The lender argued that, because the Roosevelt address was shown in the deed of trust, the borrower was required to give written notice of a change of address. The deed of trust was silent as to the obligation to give a notice of change of address.

The court held, based upon the texting back and forth regarding the Neuman address, that the last known address of borrower as shown by the lender's records was the Neuman address.

EverBank, N.A.* v. *Seedergy Ventures, Inc., 499 S.W.3d 534 (Tex.App.-Houston [14th Dist.] [14th Dist.] 2016, no pet.). In this case, the deed of trust was bought and sold several times over the years in a series of assignments. The history of those assignments is somewhat tangled. The assignment of the deed of trust to MERS was executed in 2001, but not recorded until 2013. MERS assigned it to EverBank, and its assignment was recorded a month before the assignment into MERS.

Sometime in between the assignments in and out of MERS, the homeowners defaulted in paying HOA assessments, and the HOA foreclosed and sold the property to Seedergy. EverBank then posted for foreclosure. Seedergy obtained a TRO in a lawsuit that claimed that EverBank lacked standing to foreclose.

Under the Texas Property Code, a party has standing to initiate a nonjudicial foreclosure sale if the party is a mortgagee. A mortgagee includes the grantee, beneficiary, owner, or holder of a security instrument, such as a deed of trust, or if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record. Even if a party does not have a recorded interest in a security instrument, the party may still have standing to foreclose if the party is the holder or owner of a note secured by the instrument. This rule derives from the common law maxim, now codified in Texas, that the mortgage follows the note.

Seedergy argued that EverBank did not have standing to foreclose as a matter of law because (1) EverBank was not the last assignee of record of the deed of trust, (2) EverBank was not the holder of the note, and (3) EverBank was not the owner of the note with the right to enforce it.

Seedergy argued that EverBank could not be the last assignee of record of the deed of trust because there were three breaks in the chain of assignments. Any one break would be sufficient to defeat EverBank's standing to foreclose under the deed of trust because a party not named in the original security instrument must be able to trace its rights back to the original holder.

The first break alleged by Seedergy addressed the original deed of trust in favor of Kellibrook and the assignment from Kellibrook to Inland. Without citing to any authority, Seedergy argued that there was a break in the chain because the assignment predated the deed of trust. Seedergy specifically focused on the notary dates of the two instruments: December 18, 1996 for the deed of trust, and December 13, 1996 for the assignment. Seedergy's argument appears to be that an assignment of a deed of trust cannot be executed before the deed of trust itself. Even if the court assumed that this argument were legally sound, Seedergy would not be entitled to summary judgment because Seedergy did not conclusively establish that the assignment predated the deed of trust. The face of the assignment contains specific information indicating where the deed of trust was recorded in the real property records. If the deed of trust was already recorded at the time the assignment was executed, then the assignment could not have predated the deed of trust.

Seedergy argued that a second break occurred in the assignment from MERS to EverBank. In this assignment, MERS expressly transferred the deed of trust to EverBank, but no mention was made of the underlying note. Because there was no express assignment of the note, Seedergy argued that MERS split the note from the deed of trust, rendering both null. Seedergy relied upon an 1872 U.S. Supreme Court case which dealt with Colorado Territory law and federal common law. But, the court said, in Texas, nonjudicial foreclosure sales are governed by the Texas Property Code and there is no provision in the Texas Property Code that requires a foreclosing party to prove its status as holder or owner of the note.

Seedergy finally argued that a third break occurred between the assignment from the original mortgagee to Inland Mortgage Corporation and the assignment from Irwin Mortgage Corporation to MERS. In its motion, Seedergy claimed that there was an unexplained gap between these two assignments because Inland and Irwin are two different entities. In fact, it was the same entity that had changed its name.

Because Seedergy did not negate that EverBank was the last assignee of record of the deed of trust, we conclude that Seedergy did not conclusively establish that EverBank lacked standing to foreclose on the property.

Even if Seedergy had demonstrated that EverBank was not the last assignee of record of the deed of trust, Seedergy did not carry its additional burden of showing that EverBank was neither the holder nor the owner of the note.

Seedergy argued that EverBank could not be the holder of the note because Irwin purported to assign the note to MERS, and according to Seedergy, "MERS cannot actually hold mortgage notes as a matter of Texas law." Continuing with that premise, Seedergy argued that if MERS cannot hold the note, then neither can EverBank along an unbroken chain of assignments.

Seedergy was relying on ***Nueces County v. MERSCORP Holdings, Inc.,*** No. 2:12-CV-00131, 2013 WL 3353948 (S.D. Tex. July 13, 2013) which held, in that case, that MERS was not a lender, not holder, or note owner, but was acting merely as the nominee or agent of the lender. In this case, MERS was a beneficiary, not a nominee or agent for another lender.

Seedergy also argued in its motion that EverBank cannot show that it holds or owns the note along an unbroken chain of transfers. This argument was based on the fact that the assignment from MERS to EverBank transferred the deed of trust alone, whereas the other two assignments transferred both the deed of trust and the note. However, EverBank had the original note indorsed in blank. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed. Under Texas law, a holder of a note indorsed in blank is presumed to be entitled to enforcement of the instrument merely by showing possession of that instrument. Such a holder is not also required to establish an unbroken chain of title.

Furthermore, because the rule in Texas is that the mortgage follows the note, EverBank would be entitled to foreclose on the property as holder of the note even if the assignment of the deed of trust was void.

LSREF2 Cobalt (TX), LLC* v. *410 Centre LLC, 501 S.W.3d 626 (Tex. App. San Antonio, 2016, no pet.). The Note and Guaranty waived the borrower's and guarantor's rights under Property Code § 51.003. There was a default and the parties began negotiating a settlement. Before negotiations began, the parties entered into a pre-negotiation agreement. The pre-negotiation agreement contained the following provision:

> 3. No Waiver by Obligor. [The borrower and guarantor] ha[ve] not in any way waived any rights or remedies it may have prior to and until the date of the Agreement with respect to the Loan or any of the Loan Documents, or otherwise available at law or in equity either directly in an action against Creditor, as a defense against any action by [the lender] against [the borrower or guarantor] or any other civil proceeding or otherwise.

The borrower and guarantor acknowledged that § 51.003 had been waived in the loan documents, but argued that Paragraph 3 of the pre-negotiation agreement revived their rights under that section. The court disagreed.

Paragraph 1 of the pre-negotiation agreement stated that nothing that occurred during settlement discussions would affect the parties' rights, remedies or defenses under the loan documents. It further provided that the loan documents would not be affected by anything unless agreed to in writing. Here, there was no settlement or written modification of the loan documents. The pre-negotiation agreement, by its express terms, sets parameters for these negotiations and specifies precise procedures for modifying the loan documents and the guaranty. Thus, the commercial setting and other objective factors indicate that the pre-negotiation agreement was a stand-alone agreement that did not alter the parties' legal rights under the existing agreements.

Lamell* v. *OneWest Bank, FSB, 485 S.W.3d 53 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). Lamell refinanced his home. After borrowing it, servicing was transferred to IndyMac, a division of OneWest.

Lamell protested the property tax on his home. He did not pay the contested portion of the taxes, but OneWest advanced the funds to pay these and increased Lamell's payments to cover the costs. Lamell sued HCAD and the Harris County Tax Assessor-Collector. He stopped paying on his mortgage and when OneWest threatened foreclosure, he added OneWest to the lawsuit.

Among other things, Lamell challenged the assignment of his loan to OneWest and the securitization of the loan. The court held that Lamell had standing to make the challenges. A homeowner's interest in the title to his property gives the homeowner a sufficient justiciable interest to advance arguments challenging the deed of trust.

Lamell asserts that the deed of trust is void because it was securitized in the mortgage-backed trust in

violation of the terms of the Pooling and Servicing Agreement that governs the trust. In particular, Lamell asserts that the deed of trust is void because it was not assigned to the trust before the trust's start-up date and because there is no evidence that the deed of trust was transferred into the trust by the depositor. Even presuming for the sake of argument that the deed of trust was placed into the trust in violation of trust's terms, Lamell has not cited and the court did not find any authority holding that the breach of the securitization agreement renders the deed of trust void. Therefore, Lamell's argument that the deed of trust is void does not show that the trial court erred in granting summary judgment as to his fraud claim.

Lamell also asserts that OneWest, as the servicer of the mortgage, cannot foreclose because OneWest did not prove its status as owner and holder of the note. However, among other things, the court held that it need not address Lamell's other complaints regarding the note because OneWest did not need to be the owner or holder of the note to foreclose since OneWest was acting on behalf of the CSMC Trust, which held the deed of trust. Non-judicial sales of real property under contract liens are governed by Chapter 51 of the Texas Property Code. Under Section 51.0025, a mortgagee or a mortgage service provider may conduct foreclosure proceedings without proving its status as the owner and holder of the note.

Calvillo* v. *Carrington Mortgage Services, 487 S.W.3d 626 (Tex.App.-El Paso 2015, pet. denied). On December 9, the law firm retained by Carrington sent the Calvillos a notice of acceleration and a foreclosure notice. The notice was posted and filed around December 12. The notice said that one or more of the substitute trustees named in it would conduct the foreclosure sale. The notice letter was not picked up by the Calvillos.

On December 21, an appointment of substitute trustees was executed which authorized the persons named in the foreclosure notice to act as substitute trustees. The foreclosure was held January 3 of the following year.

After the foreclosure, the Calvillos sued claiming, among other things that the required 21-day notice of foreclosure had not been given. They didn't dispute that the notice letter was dated December 9, but claimed it was untimely because the substitute trustees named in it were not appointed until December 21, which was only 12 days before the foreclosure.

Although, as a general rule, a substitute trustee has no power to act prior to his appointment, it has long been settled in Texas that when a substitute trustee signs and posts a notice prior to the substitute trustee's appointment, the subsequent post-appointment acts of the substitute trustee have the effect of ratifying and affirming his pre-appointment acts. Here, the instrument appointing the substitute trustees, which was executed on December 21, was designated to be effective as of December 12. Consequently, the substitute trustee's actions in issuing the notices of foreclosure were ratified by the subsequent appointment, and thus the notices of foreclosure sale were timely. Accordingly, the trial court did not err in granting a directed verdict.

PART II HOME EQUITY LENDING

Wood* v. *HBC Bank USA, N.A, 504 S.W.3d 542 (Tex. 2016). The Woods borrowed a home equity loan. Nearly 8 years later, the Woods notified the note holder that the loan did not comply with the Texas constitution in several respects, including that the closing fees exceeded 3% of the loan amount. The Woods sued the lender, seeking to quiet title and asserting claims for constitutional violations, breach of contract, fraud, and a declaratory judgment that the lien securing the home-equity loan is void, that all principal and interest paid must be forfeited, and that the Woods have no further obligation to pay.

The Woods moved for summary judgment, arguing that the lien is void because the evidence shows as a matter of law that the closing fees exceeded 3% and the Lenders did not cure after proper notice. The Lenders also moved for summary judgment on traditional and no-evidence grounds, asserting in pertinent part that the lien is voidable, not void, and that the statute of limitations barred all claims. The trial court granted summary judgment in favor of the lender.

On appeal, the only issue raised by the Woods was whether their claims based on constitutional noncompliance, including claims to quiet title and for forfeiture, are subject to a statute of limitations. The court of appeals affirmed, holding that liens securing constitutionally noncompliant home-equity loans are voidable and that the residual four-year statute of limitations applied to the Woods' claims, accruing from the date of closing.

A lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. The Supreme Court therefore conclude that no statute of limitations applies to an action to quiet title on an invalid home-equity lien.

Under the common law, a void act is one which is entirely null, not binding on either party, and not susceptible of ratification. When an instrument is void, a quiet-title action can be brought at any time to set it aside. However, when an instrument is voidable, a four-year statute of limitations applies to actions to cancel it.

A plain reading of the Constitution necessitates a finding that liens securing noncompliant home-equity loans are not valid before the defect is cured. Holding otherwise would contravene section 50(c)'s plain language. Section 50(c) dictates that no lien on a homestead "shall ever be valid" unless it secures a debt that meets section 50(a)(6)'s requirements. Such a lien

is made valid by the lender's compliance with a Section 50(a)(6)'s cure provisions. Here, the lender chose not to cure after being given notice, but the starting point is the same: the lien is not valid until the defect in the underlying noncompliant loan is cured.

In any event, the text of the Constitution and our decision in Doody do not support a holding that liens securing constitutionally noncompliant home-equity loans are merely voidable. A voidable lien is presumed valid unless later invalidated, while Section 50 contemplates the exact opposite: noncompliant liens are invalid until made valid. Holding otherwise would essentially permit lenders to ignore the Constitution and foreclose on the homesteads of unwitting borrowers who do not realize that their home-equity loans violate the Constitution.

The Woods did not fare as well in their claim for forfeiture. Relying on Garofolo, which held that section 50(a) does not create substantive rights beyond a defense to a foreclosure action on a home- equity lien securing a constitutionally noncompliant loan and that forfeiture is not a constitutional remedy.

PART III GUARANTIES

Rainier Income Fund I, Ltd.* v. *Gans, 501 S.W.3d 617 (Tex. App.-Dallas, 2016, pet. denied). In connection with the formation of two partnerships, Gans executed guaranties which guarantied the repayment of partner loans and capital contributions. The guaranties provided that the guarantied obligations were to be paid if the partner loans and contributions were not repaid in full upon the liquidation of the partnerships. The partnership agreements provided that the partnerships would be dissolved and liquidated upon the occurrence of various "dissolving events." Among the dissolving events was "a sale by the Partnership of the entire Project and the collection of all amounts derived from any such sale or sales...."

The partnerships were developing two real estate projects and borrowed bank loans. Ultimately the projects failed and the bank foreclosed. The question was whether the foreclosure was a "dissolving event" giving rise to the guarantor's liability under the guaranties.

According to the rule of strictissimi juris, a guarantor may require the terms of his guaranty be strictly followed and the agreement not be extended beyond its precise terms by construction or implication. The court construed the guaranties in light of this rule.

That there was a "sale" of the properties is not in dispute—legal title to the properties was transferred in exchange for money. The question is who sold the properties. Appellants argue the parties intended that once they did not own and operate the commercial real estate projects that "represented the rationale and purpose" of the partnerships, the partnerships would be dissolved. They further assert the agreements do not specifically exclude any foreclosure or other manner of "sale." This argument, however, ignores the plain language of the partnership agreements, which specifically requires the sale to be "by the Partnership" for a dissolving event to occur. The properties were not sold by the partnerships; rather, they were sold by the substitute trustee at the direction of the bank at the foreclosure sales.

Moreover, in addition to a "sale by the Partnership," the partnership agreements also required "the collection of all amounts derived from any such sale or sales...." The parties stipulated the partnerships did not collect any amounts as a result of those foreclosure sales. The court agreed that the guaranties reflect an intent to establish personal liability on Gans to guarantee the investors would receive payment if the subject properties were sold by the partnership and funds were received in exchange. In other words, the purpose of the guaranties was to preclude the general partner from selling the properties and then refusing to distribute the funds. It is undisputed that neither the investors nor Gans received any payment as a result of the foreclosure sale. And the investors' suggestion that the sale did result in "proceeds" in the form of a "credit" against the debt owed to the Bank did not persuade the court otherwise.

PART IV LEASES

Shields Limited Partnership* v. *Bradberry, No. 15-0803 (Tex. March 23, 2017). Though the tenant frequently defaulted on the lease's rental-payment terms, the landlord regularly accepted the tenant's rental payments when tendered and without protest. The lease provided that the landlord's acceptance of late payments "shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of [the] lease in the future." It also provided that all waivers had to be in a writing signed by the waiving party and that forbearance of enforcement would not constitute a waiver.

When the landlord sought to evict the tenant, the tenant contended that the landlord's conduct in accepting late rental payments waived the contractual nonwaiver clause.

The right to possession of the leased premises is governed by the commercial lease between landlord and tenant. The terms of the lease in this case required the tenant to pay rent on time, in full, and without demand. Rent paid more than ten days late is a default under the lease. There was no evidence that the parties ever agreed in writing to waive any lease obligation.

The landlord asserts that a nonwaiver provision may not be waived by engaging in the very act the contract disclaims as constituting waiver, The tenant argues that nonwaiver provisions are "wholly ineffective" and can be waived to the same extent as any other contractual provision.

The court considered the force and effect of a nonwaiver provision in light of Texas's public policy that strongly favors freedom of contract. Given Texas's strong public 31 policy favoring freedom of contract, there can be no doubt that, as a general proposition, nonwaiver provisions are binding and enforceable. Here, however, the question is not whether the nonwaiver clause in the parties' agreement is enforceable, but whether that clause is waivable and, if so, the circumstances under which waiver may occur.

Freedom of contract is a policy of individual self-determination; individuals can control their destiny and structure their business interactions through agreements with other competent adults of equal bargaining power, absent violation of law or public policy. The contractual doctrine of waiver, whether express or implied, rests on a similar conceptual policy of individual self-determination—an idea no more complicated than that any competent adult can abandon a legal right and if he does so then he has lost it forever.

To the extent there has been any doubt up to this time, the court affirmed that a party's rights under a nonwaiver provision may indeed be waived expressly or impliedly. But the mere fact that a nonwaiver provision may be waived does not render the provision wholly ineffective.

The court agreed that a nonwaiver provision absolutely barring waiver in the most general of terms might be wholly ineffective. But it did not agree that a nonwaiver provision is wholly ineffective in preventing waiver through conduct the parties explicitly agree will never give rise to waiver. Such a contract-enforcement principle would be illogical, since the very conduct which the clause is designed to permit without effecting a waiver would be turned around to constitute waiver of the clause permitting a party to engage in the conduct without effecting a waiver.

While the court couldn't address every possible situation for delineating the circumstances under which a nonwaiver provision could be waived, it could say "with certainty" that accepting late rental payments could not waive the parties' agreement that contractual rights, remedies, and obligations will not be waived on that basis, especially when the lease provides a specific method for obtaining a waiver. The court therefore held that engaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify the nonwaiver provision in the parties' lease agreement.

In re *American Homes for Rent Properties Eight, LLC*, 498 S.W.3d 153 (Tex.App.-Dallas 2016, no pet.), This is a mandamus proceeding arising from a county court at law order abating a post-foreclosure eviction case on the basis that title was in dispute and the subject of a separate district court proceeding.

Woods purchased a home in Wylie and executed a deed of trust securing the purchase money. The deed of trust provided that following a foreclosure sale, the borrower or any person holding possession of the property through the borrower must immediately surrender the premises to the purchaser at the foreclosure sale. It further provided if possession was not surrendered, the person in possession would become a tenant-at-sufferance. Woods defaulted on the note.

After Woods defaulted, she entered into an option contract with Southern Home which gave Southern Home the option to purchase the property. The option contract included an addendum that provided upon purchase of the property, Southern Home agreed it would not evict Woods but rather would make a rental agreement. The lender foreclosed its lien on the property. American Homes purchased the property at the foreclosure.

American Homes notified Woods that she had to vacate the property. It then filed a forcible detainer action. The day before the eviction hearing, Woods deed the property to Southern Home. At the eviction hearing, the JP dismissed the action. American Homes appealed to county court. Woods answered the county clerk suit filing a plea to the jurisdiction, claiming that that the right to actual possession of the property could not be decided without determining ownership of the property as between American Homes and Southern Home.

A justice court or county court at law is not deprived of jurisdiction in a forcible detainer lawsuit merely because of the existence of a title dispute. In fact, in most cases the right to immediate possession can be determined separately from the right to title. The trial court is only deprived of jurisdiction if the determination of the right to immediate possession necessarily requires the resolution of a title dispute.

When the owner of real estate executes a valid deed of trust and then conveys an interest in the mortgaged property to a third party, the rights of the grantor's vendee (here, Southern Home) are subject to the rights held by the beneficiary of the deed of trust (here, American Homes). Thus, a grantor subject to a tenant-at-sufferance clause in a mortgage cannot convey an interest in property free of that clause. Both the grantor under the deed of trust and any occupant who holds the property pursuant to a conveyance from the party who agreed to the deed of trust become tenants-at-sufferance following foreclosure of the deed of trust. Accordingly, Southern Home, as a tenant-in-sufferance, was not entitled to possession of the property after foreclosure. As the questions of possession and title were not intertwined in this case, the trial court erred in abating the lawsuit.

Goodman-Delaney* v. *Grantham, 484 S.W.3d 171 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Mary owned a home in Houston when she married James. In addition to James, Mary had five children, including Grantham. Mary died intestate. James continued to live at the house following Mary's death and later married

Rhonda. James dies in 2014. Grantham served a notice to vacate on Rhonda and subsequently file for eviction, which the justice court granted.

On appeal to the county court, Grantham admitted she did not have a landlord-tenant relationship with Rhonda. The county court also ruled in favor of Grantham.

A justice court has subject matter jurisdiction over forcible detainers, but the justice court and the county court at law on appeal lack jurisdiction to resolve title issues. The forcible detainer process is supposed to be a summary, speedy, and inexpensive proceeding to determine who has the right to immediate possession of property. Thus, a forcible detainer only addresses who has the right to possess the property, not who has title to it.

A forcible detainer action is dependent on proof of a landlord-tenant relationship. Without a landlord-tenant relationship, a justice court cannot determine the issue of immediate possession without first determining who has title to the property.

Here, Grantham conceded that she did not have a landlord-tenant relationship with Rhonda. Rhonda entered the property legally when she married James. Grantham alleges she obtained title to the property in part through inheritance and in part by deed from her siblings. Accordingly, the justice court had to determine whether Grantham had title to the property before it could determine whether Grantham had a superior right to possess the property over Rhonda. The justice court, and the county court at law on appeal, did not have jurisdiction to make such a determination.

Guillen* v. *U.S. Bank, N.A., 494 S.W.3d 861 (Tex.App.-Houston [14th Dist.] 2016, no pet.). Guillen defaulted on his mortgage and the lender foreclosed then instituted an eviction proceeding in the justice court. Guillen appealed to the county court and, while that appeal was pending, filed a suit in district court to set aside the foreclosure claiming it was barred by limitations. Guillen then filed a plea to the jurisdiction of the county court, claiming that it did not have jurisdiction until the title issue was settled in the district court. The county court ruled against Guillen and entered judgment in favor of the lender.

Guillen argues that: (1) the statute of limitations issue litigated in the district court is so intertwined with the issue of the right of immediate possession that the county court was deprived of jurisdiction to determine possession until such time as the title issue was resolved; (2) the tenancy-at-sufferance clause in his deed of trust cannot provide an independent basis for jurisdiction in the county court because the deed of trust is void; and (3) because the power of sale expired prior to the foreclosure sale, the lien and the power of sale to enforce it became invalid.

Justice courts have exclusive subject matter jurisdiction over forcible entry and detainer actions. The only issue in an action for forcible entry and detainer is the right to actual and immediate possession. The justice courts do not have jurisdiction over any title disputes, even those related to and involving the same parties as the forcible entry and detainer action. The justice court generally may resolve the issue of immediate possession independent of any title issues as long as a landlord-tenant relationship exists. .). If a deed of trust contains an enforceable tenancy-at-sufferance clause, the justice court may resolve the issue of possession independent of any title issues. Accordingly, a justice court is not deprived of jurisdiction merely by the existence of a title dispute; it is deprived of jurisdiction only if resolution of a title dispute is a prerequisite to determination of the right of immediate possession.

Guillen argues that the statute of limitations issue he raised in the district court is sufficiently intertwined with the issue of immediate possession such that it must be resolved in the district court before the county court may assume jurisdiction to rule on the forcible entry and detainer action. Guillen contends that, because the statute of limitations has run, both the deed of trust and the power of sale pursuant to it are void. If the deed of trust is void, it follows that the tenancy-at-sufferance clause is also void, which deprives the justice court of its independent basis for jurisdiction.

The court held, though, that even though Guillen asserts that this case presents a novel issue, his title suit raises a validity-of-foreclosure issue that the court has twice held is not relevant to possession. The court could see no reason to treat Guillen's statute of limitations claim differently than any other attack on the foreclosure process. The question of the foreclosure's validity— whether based on the terms of the deed or the terms of the governing statute— is to be resolved by the district court independent of the county court's determination in the forcible detainer action that the lender is entitled to immediate possession of the property.

PART V DEEDS AND CONVEYANCES

Davis* v. *Mueller, No. 16-0155 (Tex. May 26, 2017) reversing ***Mueller* v. *Davis***, 485 S.W.3d 622 (Tex.App.-Texarkana 2016). While the Statute of Frauds requires only that certain promises or agreements be in writing and signed by the person to be charged, as applied to real-estate conveyances, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty. This rule by which to test the sufficiency of the description of property to be conveyed is so well settled at this point in our judicial history, and by such a long series of decisions by the supreme court, as almost to compel repetition by rote.

Cope conveyed her mineral interests in ten vaguely

described tracts in Harrison County, Texas to Davis. The conveyance was on a printed form with tiny text. The list of tracts was followed by this sentence: "Grantor agrees to execute any supplemental instrument requested by Grantee for a more complete or accurate description of said land."

Another paragraph, including a Mother Hubbard clause, followed this, saying "The 'Lands' subject to this deed also include all strips, gores, roadways, water bottoms and other lands adjacent to or contiguous with the lands specifically described above and owned or claimed by Grantors. . . . Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described."

About the same time, it so happened that Mills conveyed his mineral interests in two tracts, also in Harrison County, also to Davis. The conveyance was on an identical form with a similarly vague description of the tracts followed by the same provisions.

Later, Cope and Mills, independently, deed to Mueller the same interests previously deeded to Davis. Mueller sued to quiet title to the mineral interests.

In this case, the specific property descriptions in Cope's and Mills's deeds to Davis do not satisfy the Statute of Frauds, and Davis does not argue to the contrary. But Texas law has long given effect to a general conveyance of all the grantor's property in a geographic area, such as a county, the state, or even the United States, thereby enlarging an accompanying conveyance of property specifically described.

Mueller argues that the 1deeds are ambiguous because the general granting clause is in the same paragraph as the Mother Hubbard clause. A Mother Hubbard clause is not effective to convey a significant property interest not adequately described in the deed. The proximity shows, Mueller contends, that the general grant was only of all small pieces of the specifically described tracts in Harrison County, not of other tracts. But if that were true, the general grant would accomplish nothing; the Mother Hubbard clause itself covers small pieces that may have been overlooked or incorrectly described. The general grant's conveyance of "all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described" could not be clearer. All means all.

Mueller also argues that a reference to an unidentified portion of a larger, identifiable tract is not sufficient to satisfy the Statute of Frauds. The court agreed with that proposition, of course, but it has no application here. A conveyance of the north or east part of a tract does not identify specific acreage; neither does a conveyance of a certain number of acres out of a subdivision or survey in which the grantor owns multiple tracts. The rule Mueller cites would apply if Cope and Mills had conveyed part of what they owned in Harrison County, because the parts could not be identified from the deeds. But they conveyed all.

Mueller argues that each grantor's express agreement "to execute any supplemental instrument requested byGrantee for a more complete or accurate description of said land" shows that the parties contemplated that any other tracts would be covered by separate instruments, which would not be necessary if the general grant covered them. But the agreement is consistent with the general grant. It simply provides that if supplemental instruments are required to carry out the specific and general grants, the grantor will supply them.

We conclude that the general grants in the deeds are valid and unambiguous, conveying title of Cope's and Mills's Harrison County mineral interests to Davis. Because those conveyances preceded the conveyances of the same interests to Mueller, Davis has superior title.

West 17th Resources, LLC* v. *Pawelek, 482 S.W.3d 690 (Tex.App.-San Antonio 2015, pet. denied). The property was owned by several members of the Mika family. Thomas and Pamela didn't own any of it. Their mother, Irene, owned an undivided 1/6 individually and another undivided 1/10 as trustee under her late husband's will. The will provided that, on Irene's death, Thomas and Pamela have title to the trust property. The will also provided that Irene could sell the property if needed for her support.

In 1994, Irene and the other owners of the property executed a deed conveying the property to the Paweleks. The deed's wording conveyed "all" of the described property. Irene signed the deed with only her own name and did not designate whether she was signing individually or as trustee. A dispute arose as to whether Irene had conveyed the trust's interest in the land. Thomas and Pamela argued the 1994 deed did not convey the trust's 1/10 interest because Irene did not explicitly sign "as trustee." The Paweleks argued that the deed, by its express terms, conveyed "all" of the subject property. Alternatively, the Paweleks argued the recitals in the deed estopped Appellants from positing that the deed did not convey "all" of the subject property ("estoppel by deed").

The Paweleks argue the issue of whether the 1994 deed conveyed all of the subject property is an issue of deed construction. The court agreed. Neither side contends the 1994 deed is ambiguous, and the court will construe an unambiguous deed as a matter of law. The court's primary duty when construing an unambiguous deed is to ascertain the parties' true intent. To determine a grantor's intent when conveying real property by deed, courts analyze the four corners of the deed using rules of interpretation and construction. The court discerns a grantor's intent from the plain language of the deed without reference to technicalities or arbitrary rules. All parts of a written instrument must be harmonized and

given effect if possible. When courts construe deeds, there is a presumption favoring grantees over the grantor.

The granting clause of the 1994 deed conveys "all" 290.69 acres of the subject property subject only to a utility easement. The only part of the 1994 deed that Thomas and Pamela argue supports Irene's intent not to convey the trust's undivided 1/10 interest is her failure to specify any capacity when signing the deed. Such an implied reservation is disfavored. Construing Irene's failure to specify her capacity as an implied intent to reserve the 1/10's interest would also conflict with the deed's plain, unambiguous language. By the plain, unambiguous language of the granting clause, Irene and the other grantors intended to convey ""all" of the subject property, subject only to a utility easement. The court held that the 1994 deed conveyed "all" of the subject property, including the 1/10 interest Irene held as trustee, to the Paweleks, subject only to the utility easement specified in the deed.

Aguilar* v. *Sinton, 501 S.W.3d 730 (Tex. App. – El Paso, 2016, pet. denied). At some point during a long period of contention between Aguilar and Villasenor on the one hand and the Hammett Group on the other, centering primarily about some contaminated real property that Aguilar and Villasenor had acquired from the Hammett Group, Aguilar and Villasenor prepared, executed, and recorded a "Special Deed" reconveying the property to the Hammett Group. The Special Deed was prepared without the knowledge or agreement of the Hammett Group.

The Hammett Group sued seeking a declaratory judgment that the Special Deed was null and void. Aguilar and Villasenor filed a counterclaim for breach of contract claiming, among other things, fraud because the Hammett Group had concealed the existence of a cattle dipping vat on the property, and contending that they would not have accepted the property if they had known. The trial court declared the Special Deed null and void and entering a take-nothing judgment on the counterclaims.

A deed must be both delivered and accepted by the grantee in order for there to be a valid conveyance. A deed which is not accepted by the grantee does not convey any interest in the land. The affidavits of Sinton and Hammett state that they never saw the 2006 Special Deed until 2011, and never agreed to accept the property, and have not paid taxes on it. Further, Aguilar testified in his deposition that no one in the Hammett Group agreed to have the land conveyed back to them.

Aguilar and Villasenor argue that they created a fact issue on acceptance because Aguilar asserted in his responsive affidavit that he contacted the appeal attorney for the Hammett Group, nine years after the appeal had concluded and discussed conveying property back to the Hammett Group, and that after he had prepared and recorded the Special Deed, he delivered a copy to the attorney who said he forwarded it to the members of the Hammett Group. The court disagreed that this evidence was sufficient to create a fact issue on acceptance. Aguilar never stated in his affidavit that the Hammett Group accepted conveyance of the property through the attorney, only that Aguilar prepared and filed the Special Deed and then hand-delivered a copy to the attorney who "accepted the delivery."

The court also rejected Aguilar and Villasenor's contention that by merely recording the Special Deed they created a presumption, and thus a fact issue, on delivery and acceptance. In those cases recognizing a presumption of acceptance arising from the filing of a deed, the presumption of acceptance of the conveyance was created because the deed was delivered to the grantee and recorded by the grantee. A presumption of acceptance does not arise when, as here, the grantors both execute and record the deed without the approval of the grantees.

York* v. *Boatman, 487 S.W.3d 635 (Tex.App.-Texarkana 2016, no pet.). The Smiths conveyed a life estate in four acres of their property to York and her husband, with the remainder to vest in York's daughter Gwendolyn. The Smiths died, and York and her sister partitioned the Smith's property, with York being conveyed a fee simple estate in 150+ acres that included the four acres earlier conveyed to York and her daughter.

About 10 years later, in 1995, York conveyed the 150+ acres to her daughter Gwendolyn as her separate property. The deed was subject to all outstanding matters.

Later, in 2003, Gwendolyn executed a gift deed conveying the 150+ acres back to York, but per her instructions, the gift deed was held by her lawyer and was never delivered or recorded. York's attorney demanded that Garrett release and forward the gift deed to him. After learning of York's demand, Gwendolyn requested, by letter, that her lawyer return the deed to her, and when he refused to do so, she filed a rescission of the gift deed in the deed records of Hopkins County. In Gwendolyn's lawyer submitted the gift deed into the registry of the court and filed an interpleader action, naming York and Gwendolyn as defendants. Four months later, Gwendolyn filed a pro se answer, requesting that the gift deed be returned to her. In March 2006, the trial court dismissed the interpleader for lack of prosecution and about five months later, ordered that the gift deed be released to Gwendolyn.

Gwendolyn died leaving a will naming her son Todd as her sole beneficiary. In probate, all of the 150+ acres was conveyed to Todd. York filed suit against Todd. The trial court held in favor of Todd as the owner of the 150+ acres subject to the life estate in favor of York.

The first question on appeal was whether the 1995 deed from York to Gwendolyn was void. York first

argues that the 1995 deed was void or invalid because it was not a gift "in praesenti" a gift of a present interest, as it failed to exclude or reserve the four-acre life estate from the 1967 deed or the homestead interest of Henry. Nevertheless, a gift by deed does not require proof that the gift was in praesenti. When conveyed by deed, an estate in realty may be made to commence in the future. A gift may generally not be made to take effect in the future since a mere promise to give is unenforceable without consideration. However, by virtue of statutory authority an estate in realty may be made to commence in futuro by deed.

Yet, even if transfer of a present interest were required, there is no indication in the 1995 deed that York did not immediately convey all of her present rights and title in the 150+ acres or that any part of the conveyance was to take place in the future. The 1995 deed purports to convey York's rights and title in the 150+ acres to Gwendolyn. At the time of the 1995 deed, York owned the 150+ acres subject to the four-acre life estate and homestead rights of her husband. Thus, on its face, the deed purports to grant all of York's interest in the property to Gwendolyn.

York argues, however, that that conveyance is invalid because the deed fails to reserve her husband's rights in the property. Nevertheless, said the court, one spouse's conveyance of her separate property family homestead, without the joinder of the other spouse, is not void as to the conveying spouse. It is, however, inoperative against the continuing homestead claim of the nonjoining spouse. Moreover, a homestead right is analogous to a life tenancy, with the holder of the homestead right possessing the rights similar to those of a life tenant for so long as the property retains its homestead character. Accordingly, even though the deed does not specifically reserve the husband's homestead and life estate rights, the conveyance was made subject to those rights as a matter of law, and the failure of the deed to specifically reserve those rights does not render it void as to York.

York's second argument was that the 1995 deed is invalid because the evidence is insufficient to establish that the 1995 deed was a gift. The trial court's conclusion that Todd was the fee simple owner of the 150+ acres was based on an implied finding that the 1995 deed was a gift from York to Gwendolyn. York argues that the 1995 deed was not a valid gift of the property because she lacked the requisite donative intent and because no actual delivery and acceptance occurred. Specifically, she argues that she and Gwendolyn agreed to transfer the property to Gwendolyn in order to protect it from seizure by the government to satisfy her husband's nursing home costs and then transfer it back to York upon his death.

A gift of realty can be made either by deed, as is alleged in this case, or by parol gift. The elements of a valid gift by deed are: (1) donative intent, (2) delivery of the property, and (3) acceptance of the property. The owner must release all dominion and control over the gifted property. Generally, the party claiming the gift has the burden of establishing the elements of gift, but because the 1995 deed purports to convey the property at issue from York to Gwendolyn it is presumed that York intended the conveyance to be a gift. To rebut this presumption, York had to prove a lack of donative intent by clear and convincing evidence at the trial court level. The court examined the evidence and determined that trial courts determination that the 1995 deed was a gift was not against the great weight and preponderance of the evidence.

Lemus* v. *Aguilar, 491 S.W.3d 51 (Tex.App.-San Antonio 2016, no pet.). Elvira and Garza signed a document titled "Will from Johnny Montoya Garza and Elvira G. Aguilar." The "Will" said "we agree that the house be evenly owned by John Rene Aguilar, Laura Ashley Wells and Johnny B. Wells and that nothing will be done without the authorization of John Rene Aguilar, Johnny B. Wells and Laura Ashley Wells." After that, Elvira was diagnosed with Alzheimers.

The trial court found the "Will" constituted a present transfer of title of the house to the grandchildren, subject to a life estate for the benefit of Elvira and Garza. The trial court further held the document met the requisites of a good and valid gift deed, transferring title from Elvira, as grantor, to the grandchildren, as grantees.

On appeal, the court first held that the "Will" was not, in fact, a valid will under Texas law. Because the will was not written by Elvira or signed in the presence of two competent witnesses, it concluded that it was not a valid will under section 251.051 or section 251.052 of the Texas Estate Code.

The court then addressed whether the "Will" was, in fact, a gift deed. Whether a document is a valid gift deed is a question of law and reviewed de novo. Irma argued that the document fails as a gift deed because it is testamentary in nature, has no present intent of land conveyance, and was not acknowledged, witnessed, or filed.

Property Code § 5.021 sets forth the requirements for a valid deed. The document must (1) be in writing, (2) be signed, (3) describe the property, and (4) be delivered. A valid gift of real property further requires the document set forth (1) the intent of the grantor, (2) the delivery of the property to the grantee, and (3) the gift to be accepted by the grantee. Delivery is required, but it need not be actual or immediate. If, however, the grantor intended for the title to pass immediately upon execution and acknowledgement, there is a valid constructive delivery.

The court said the key issue turns on the intent of the donor when the document was executed. Establishing donative intent requires evidence that the donor intended an immediate and unconditional

divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee. Until the donor has absolutely and irrevocably divested herself of the title, dominion, and control of the subject of the gift, she has the power to revoke the gift.

Here, said the court, the conveyance in the "Will" lacks present donative intent. The document provides "[w]e agree that the house be evenly owned by [John, Laura, and Johnny]" and the document's title as a will clearly implies the donor's intent to transfer ownership of the property to the grandchildren upon the testators' deaths. The transfer did not provide for an immediate and unconditional divestment of the donors' interests. The donors' intent is further evidenced by the document's title—"Will from Johnny Montoya Garza and Elvira G. Aguilar."

Aery* v. *Hoskins, Inc., 493 S.W.3d 684 (Tex.App.-San Antonio 2016, no pet.). This litigation arises from a dispute involving three siblings' agreement to pool and share royalty interests in each of their three separate tracts of land. This appeal concerns the issue whether one sibling's undivided royalty interest held in the other tracts included in the pool became an appurtenance to his land and thereby was passed with that sibling's conveyance of his land through a general warranty deed. The facts are complicated and relate to oil and gas interests, so this summary includes only a discussion of various aspects of deed construction.

As the term pertains to real property, any "appurtenance" to land is any right or obligation that attaches to and is tied to ownership of a particular parcel of land. Appurtenances include all rights and interests necessary for the full enjoyment and beneficial and necessary use of property. The word "appurtenances" in a deed covers only what is legally appurtenant to the land described. It does not, without particular mention, convey any rights which do not naturally and necessarily belong to the thing granted in the hands of the grantor. Because it is necessary to its use, an appurtenance attaches to the land that requires it and cannot be separated from it. Under this understanding, an appurtenance to land typically includes such things as improvements, buildings, littoral rights, and use of water or sewer lines.

The surface-estate and mineral-estate interests of land are generally not considered an appurtenance, but rather the fee, itself. However, a mineral estate can be severed from the surface estate and may be held by an owner different from the owner of the surface estate. Even so, the mineral estate belongs to, or is part of, the respective land and cannot be separated from the land. Going further, any of the five attributes of a mineral estate, including the royalty interest, can be separated from the mineral estate and held by a different owner. However, when any of the five attributes of a mineral estate is separated, these attributes remain appurtenant to the mineral estate from which they originated. Similarly, the grant or reservation of minerals carries with it, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved. Thus, while a mineral estate can be separated from the surface estate and further separated from its attributes, all still remain attached to the land from which they originate and derive their source.

An appurtenance to a particular property can include rights or interests in other property (servient property) if the right or interest is necessary for the full enjoyment of the property (dominant property) and is used as a necessary incident. In such an event, the right or interest becomes an appurtenant benefit to the dominant property and an appurtenant burden to the servient property. Such an appurtenance that includes a right or interest in other property typically comprises rights such as easement of access or right of way and water rights.

Because they attach to the land, itself, appurtenant benefits and burdens to land can be divided between different owners, but cannot be separated from the land or otherwise assigned or transferred off of the land, or fee, itself. Therefore, to be appurtenant to land, a right or obligation must benefit or encumber the property to which it is attached; it cannot be separated from the land to which it is attached. As attached to the land, an appurtenance automatically passes when the property is conveyed and remains with the owner or possessor of the property and/or the dominant and servient estates.

A benefit or burden related to property that is not tied to ownership or possession of the property is a personal interest, or an interest "in gross." Because an interest in gross is personal, it attaches to the holder, and the holder must specifically pass or convey the interest.

A general warranty deed passes to the grantee all the rights, appurtenances and interests the grantor holds in the conveyed land unless there is language in the instrument that clearly shows an intention to convey a lesser interest. A reservation by implication in favor of the grantor is not favored by courts. Therefore, any appurtenance (benefit or burden) to the conveyed land passes to the grantee even if not specified. To retain an appurtenance, a grantor must specifically reserve it for himself. A general warranty deed does not pass any right held by the grantor that is personal. Such a personal, interest in gross must be specifically granted.

Gause* v. *Gause, 496 S.W.3d 913 (Tex.App.-Austin 2016, no pet.). A deed or other document is not made ineffective by its destruction or loss. Production of the original document is excused when it is established that the document has been lost or destroyed. Other evidence of the contents of a writing is admissible if the original has been lost or destroyed. Loss or destruction of the document is established by proof of search for this document and inability to find it.

PART VI VENDOR AND PURCHASER

KIT Projects, LLC* v. *PLT Partnership, 479 S.W.3d 519 (Tex.App.-Houston [14th Dist.] 2015, no pet.). The Buyer and Seller had a contract for the sale of some real estate. The Buyer asked the Seller for an extension of the closing date. In consideration for the extension, the Buyer agreed to pay a $10,000 extension fee. It was to be non-refundable and not applicable to the purchase price. When the Buyer delivered the check for the extension fee it was returned because funds hadn't yet been deposited in the Buyer's account to cover it. Buyer sent an email promising to make good on the check in a few days. The Buyer signed the extension and sent another check, but it also bounced. About a week later the Buyer obtained a cashier's check for the extension fee, but never delivered it. The Seller then informed the Buyer that the deal was off.

The Buyer asserts the consideration for the amendment was the Buyer's promise to pay the $10,000 extension fee. The Seller asserts that the consideration for the amendment was either the payment of the $10,000 fee or the valid tender of the $10,000 fee. Essentially, the Seller equates a promise to pay with making payment. The Buyer asserts a promise to pay is not the same as making payment. Though the Seller does not expressly argue that the Buyer's payment of the $10,000 fee was a condition precedent to the Seller's obligation to extend the closing, parts of the Seller's argument seem to suggest that the Seller is asserting the non-occurrence of the payment was an unsatisfied condition to the extension of the closing date.

The words the parties chose are the best indicators of an intent to create a condition precedent. To make performance specifically conditional, a term such as "if," "provided that," "on condition that," or some similar phrase of conditional language normally must be included. If no such language is used, the terms typically will be construed as a covenant, to prevent a forfeiture. Though there is no *per se* requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made, rather than a condition imposed. In construing a contract, courts seek to avoid forfeiture and so when another reasonable reading of the contract is possible, courts will steer clear of finding a condition precedent. When the intent of the parties is doubtful, courts will interpret the agreement as creating a covenant rather than a condition. Because conditions tend to be harsh in operation, conditions are not favored in the law.

The text of the amendment does not point to a condition. There is no language in which the parties state that the closing date will be extended "if," "provided that," or "on condition that," the Buyer pays the extension fee. Rather, the parties state that they amend their agreement to change the closing date. This phraseology typifies covenant language, not condition-precedent language. The parties state that in consideration for this extension the Buyer "agrees to pay" the extension fee. After considering the amendment instrument under the applicable legal standard, the court concluded that, under the unambiguous language of that instrument, payment of the $10,000 is not a condition precedent to the extension of the closing date.

The Seller argued that, because the $10,000 was not paid, there was no consideration for the extension. The court held that under the clear wording of the amendment instrument, the consideration for the extension of the closing date was the Buyer's agreement to pay the $10,000 extension fee rather than the Buyer's payment of the extension fee or the Buyer's valid tender of the fee.

The Seller also argued that there was a failure of consideration so there was never a binding agreement to extend. This argument raises a legal issue regarding the effect of an alleged failure of consideration. Though courts have described the "failure of consideration" affirmative defense in various ways, courts agree that this defense is distinct from "lack of consideration." A "failure of consideration" does not mean that there never was any binding amendment. Instead, the failure-of-consideration defense comes into play when a party does not receive the promised performance under a binding contract. Therefore, to the extent that the trial court granted summary judgment based on a conclusion that the amendment was never binding on the parties due to a failure of consideration, the trial court erred.

Thomas* v. *Miller, 500 S.W.3d 601 (Tex.App.-Texarkana 2016, no pet.). Bobby and Thomas entered into an oral agreement that would allow Bobby to purchase the property in question. The agreement was that if Bobby paid off the mortgage, the property would be his. Bobby claimed they even shook hands to confirm their agreement.

The property contained two water wells and a house, described as "condemned." Nevertheless, Bobby decided to repair the dilapidated home, and he spent approximately $30,000.00 on that endeavor. He also repaired the water wells on the property. Bobby testified that he took these actions based on his oral agreement with Thomas and that the home renovation was completed in 2006. The evidence at trial demonstrated that Thomas, who owned a barbecue restaurant near the property and accepted shipments of materials for Bobby during the renovation, was well aware of the work being done on the property.

Bobby testified that he was overseas for two years and that his wife Thyra took care of making the monthly payments on the home during that time. Thomas attempted to evict Bobby and Thyra from the property. Feeling harassed, Thyra moved out of the house while Bobby was away. When she moved out, she quit making the mortgage payments and there was a balance of some $3,100 left on the mortgage.

After Thyra moved out, Thomas deeded the property to Clay Jiles, prompting Bobby and Thyra to file suit. Their petition alleged that they had made payments on the note and substantial improvements to the property in reliance on the oral agreement. They asserted causes of action for breach of contract, promissory estoppel, and fraud. In his answer to the lawsuit, Thomas asserted the statute of frauds.

A contract which is for the sale of real estate or which is not to be performed within one year after the agreement's formation is not enforceable unless it is (1) in writing and (2) signed by the person to be charged with the promise. It is uncontroverted that this was an oral contract for the sale of real property and was not to be performed within a year. Also, the adequacy of a property description in any instrument transferring an interest in real property is a question of law within the purview of the statute of frauds.

Thomas argues that the property description was insufficient for there to be a meeting of the minds and that it did not satisfy the requirements of the statute of frauds. The purpose of a written land description is not merely to identify the property, but also to provide an actual means of identification.

Undoubtedly, the oral contract did not satisfy the statute of frauds because (a) it was not made in writing and (b) it did not contain a sufficient property description. Nevertheless, the failure to meet the statute of frauds does not end the court's inquiry. Since Thomas met his initial burden to demonstrate that the statute of frauds applies, the burden shifted to the Bobby and Thyra to establish an exception that would remove the oral contract out of the statute of frauds.

Partial performance is an exception to the statute of frauds. The partial performance exception is enforced only when denial of enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit.

In order to establish the partial performance exception, Bobby and Thyra had to show that (1) they had performed acts unequivocally referable to the agreement (2) that the acts were performed in reliance on the agreement (3) that as a result of the acts they had experienced substantial detriment (4) that they have no adequate remedy for their loss and (5) that Thomas would reap an unearned benefit such that not enforcing the agreement would amount to a virtual fraud. The partial performance must be 'unequivocally referable to the agreement and corroborative of the fact that a contract actually was made.

The court held that there was sufficient evidence to uphold the jury's finding that Bobby and Thyra met the partial performance exception to the statute of frauds.

Rancho Esperanza, Ltd.* v. *Marathon Oil Company, 488 S.W.3d 354 (Tex.App.-El Paso 2015, no pet.). It is a well-established rule in Texas that a cause of action for injury to land is a personal right belonging to the person who owns the property at the time of injury, and that a mere subsequent purchaser does not have standing to recover for injuries committed before his purchase. The right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action. A subsequent landowner may assert a cause of action for pre-existing injuries only if there is an express assignment of the cause of action.

PART VII EASEMENTS

Staley Family Partnership, Ltd.* v. *Stiles, 483 S.W.3d 545 (Tex. 2016). Two tracts of land are involved – the Stiles Tract and the Staley Tract. Both properties were once part of a single tract the State granted to Thompson Helms in 1853. In 1866, after Helms and his wife died, a probate court partitioned the tract among their six children. Three children received tracts relevant to this suit. The three properties were generally rectangular in shape; their long axes ran in an east-west direction, and they were "stacked" from north to south. Axia Ann Helms received the northernmost tract; James Helms, the tract immediately to the south of hers; and Frances Helms, the tract immediately to the south of James's. Except for the Staley Tract in the northwest corner of his portion, Frances conveyed his land to James in the 1870s, with the last conveyance being in 1876.

The Staley Tract is landlocked amidst the Stiles Tract. The Staley Family Partnership acquired the Staley tract, then sued for a declaratory judgment that an easement runs across the Stiles tract to the county road, either by necessity, estoppel, or implication. The trial court ruled that there was no easement.

Staley appealed, claiming only an easement by necessity. The court of appeals upheld the trial court's judgment. The court of appeals held that an essential element of an easement by necessity is that, at the time the alleged dominant property was severed from the alleged servient property, the easement was necessary for the landlocked dominant property to have roadway access to a public road. It held that there was no evidence of necessity at the time of severance.

Staley argues that it proved, and Stiles does not dispute, that the Staley and Stiles Tracts were part of the Thompson Helms Tract until they were partitioned in 1866; Honey Creek and its tributary forming the western, southern, and eastern borders of the Staley Tract are impassable by vehicles and have been in the same condition at all times relevant to this matter; and the only possible overland access to the Staley Tract has been and is to the north through the Stiles tract. Staley

says that is all it was required to prove. It is not, said the court.

Establishing the "necessity" part of an easement by necessity requires, in part, proof that at the time the dominant and servient estates were severed, the necessity arose for an easement across the servient estate in order that the dominant estate could in some manner gain access to a public road. But a right of way that does not result in access to a public roadway is not, under long-standing precedent, necessary because it does not facilitate use of the landlocked property.

Because Staley did not prove that a public roadway existed at severance where the county road now exists, Staley could not have an easement by necessity.

United States Invention Corporation* v. *Betts, 495 S.W.3d 20 (Tex.App.-Waco 2016, no pet.). In the deed from Thomas to the Hoggs, Thomas purportedly reserved a thirty-foot wide public utility easement adjacent to the northwest property line of the property being conveyed. The easement was contained within property owned by the Bettses. The Hogg property and the Betts property derived from a common source, and were separated by a 1915 partition judgment.

US Invention bought the Hogg property and filed suit seeking a declaration that it had an implied easement appurtenant to the Hogg property or that it had an express easement. The Bettses claim that the reservation of the easement was ineffective because Thomas didn't own the property where the easement was purportedly located. The Bettses were granted a directed verdict and a judgment for trespass damages and attorneys' fees. US Invention appealed, claiming it had proved an implied easement and an express easement.

An implied easement attaches to the dominant estate when it is severed from the servient estate if the use of the servient estate is apparent and necessary to the use of the dominant estate. Use of the servient estate by the dominant estate must be: (1) apparent and existing at the time of severance of the two estates; (2) continuous enough that the parties must have intended its use to pass with the dominant estate; and (3) reasonably necessary to the comfortable enjoyment of the dominant estate. Whether these requirements are met is determined at the time of the severance of the estates.

At trial, US Invention presented evidence of unity of ownership between the dominant and servient estates just prior to the 1915 partition judgment. However, it produced no probative evidence that the alleged road that constituted the easement existed and was in apparent use in 1915, or that the road had been continuously used since the 1915 partition. The surveyor testifying for US Invention said that there had been a roadway there that dated back around forty or fifty years, but that would have shown only that the road was there in the mid-fifties. The court held that US Invention had not provided more than a scintilla of evidence and that the evidence in support of an implied easement was no more than mere surmise or suspicion.

In the alternative, US Invention claimed an express easement. Even though US Invention had abandoned that on appeal, the court said it was still not persuaded by the argument. A reservation or exception in favor of a stranger to a conveyance is inoperative and cannot operate as a conveyance to the stranger of an interest in land. Here, there is no evidence in the record indicating that Thomas owned an interest in appellant's property, nor is there evidence that appellant owned an interest in the Hogg Property. In other words, if Thomas was attempting to reserve an easement for appellant, such a reservation would have failed because appellant was a complete stranger to the transaction.

PART VIII ADVERSE POSSESSION, TRESPASS TO TRY TITLE, AND QUIET TITLE ACTIONS

Nac Tex Hotel Co., Inc.* v. *Greak, 481 S.W.3d 327 (Tex.App.-Tyler 2015, no pet.). The DeWitts leased a building to operate a KFC franchise, and later purchased the building and the land it stood on. The landlord/seller also granted the DeWitts an access easement allowing access to Chestnut Street. Sometime in the early 1980s, the DeWitts added a drive-through, paved the parking lot, and built a bridge over a triangular shaped piece of property between the KFC land and the easement area. The triangle was owned by Temple. The DeWitts used the triangle for access and employee parking, landscaping it and otherwise maintaining it.

In 1988, the DeWitts sold the business and its real estate to a Corporation owned by their daughter. The daughter continued to use the triangle as if she owned it. She never discussed the triangle with Temple because she didn't think there was anything to discuss. She further stated, "I wouldn't never [sic] intentionally take anything from that man."

In 2007, Temple sold his property to a Partnership controlled by Greak. In 2009, Greak contacted the daughter and told her that her employees were parking on his property. They were actually parking on the easement area. However, by 2012, the use of the triangle became an issue. When the parties could not reach an agreement on the Corporation's use of the triangle, the Corporation filed a trespass to try title action against the Partnership alleging that it had acquired title to the triangle by adverse possession. The Partnership filed an answer stating that it was not guilty as to the trespass to try title claim, making a general denial, and seeking attorney's fees pursuant to Section 16.034 of the Texas Civil Practice and Remedies Code. The trial court ruled in favor of Greak's Partnership. The Corporation appealed.

Adverse possession means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with

and hostile to the claim of another person. To prevail on a claim of adverse possession, a claimant must establish, by a preponderance of the evidence, (1) the actual and visible possession of the disputed property; (2) that is adverse and hostile to the claim of the owner of record title; (3) that is open and notorious; (4) that is peaceable; (5) that is exclusive; and (6) that involves continuous cultivation, use, or enjoyment throughout the statutory period. To satisfy a limitations period, peaceful and adverse possession does not need to continue in the same person or entity, but there must be privity of estate between each holder and his successor.

To prevail pursuant to the ten-year statute, a person must bring suit not later than ten years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

Of the six above-named elements required to prove adverse possession, a discussion of the element of hostile intent is dispositive here. The test for hostility is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property. Mere occupancy of land without any intention to appropriate it will not support the statute of limitations. No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by intent on the part of the occupant to make it so. There must be an intention to claim the property as one's own to the exclusion of all others.

The Corporation argues that when a claimant believes that it owns the land, it is not required to prove an intention to remove the legal owner or even know if someone else owns the land.

Here, the daughter testified that she thought she owned the property. She then created a fact issue when she testified that she would ""never intentionally take anything" from the record owner of the property. Where the evidence in an adverse possession case is conflicting, its weight is a question of fact for the court or jury. Other evidence showed that, while the Corporation made some improvements to the disputed area, it was not included in the Corporation's deed, and the Corporation made no attempt to keep anyone off that property. In short, the evidence supports a finding of no hostile intent.

PART IX HOMESTEAD

Hankins* v. *Harris, 500 S.W.3d 140 (Tex.App.-Houston [1st Dist.] 2016, no pet.). Roy and Norma owned a home in Houston that they used it as their primary residence. Hankins obtained a judgment against Norma and another party in an action for slander. Hankins recorded an abstract of the judgment against Norma. After the abstract was recorded, Roy and Norma separated. Norma moved to Brownsville and said she was not moving back to the house. Roy and Norma divorced, and in their settlement agreement, the house was given to Roy and Norma was paid some money.

Hankins sought a writ of execution to foreclose his judgment lien on the house. Despite the fact that Roy filed bankruptcy and that the bankruptcy court issued an order specifically prohibiting Hankins's scheduled execution sale of the house, the constable proceeded with the sale where Hankins purchased what he claimed was Norma's interest in the house.

Roy and his family continued to live in the house. Roy and Norma eventually reconciled and Norma moved back in. Over the years, Hankins sent demand letters asserting his interest in the house, and each demand letter was repudiated by Roy's lawyers. Roy died and his daughter Sarah inherited it. When Hankins sent another demand letter, Sarah sued to quiet title. The trial court held that Sarah owned the house, that Hankins had no interest in it, and that the constable's sale was void.

On appeal, Hankins claimed that Sarah failed to establish as a matter of law that the homestead exemption invalidated the execution sale. Hankins argued that after the divorce, Norma possessed a co-tenancy in the property that she abandoned, allowing his lien to attach. Hankins claimed Roy no longer had a family homestead but rather a single-adult homestead that would protect only his half-interest in the community property. Hankins also argued that Roy did not own the entire property on the execution date, because the marital settlement agreement anticipated only a future transfer rather than a final division of the property.

Sarah responded that Norma did not abandon her interest in the property, and Roy's homestead interest alone was able to protect the entire property from levy and foreclosure. In the alternative, she argued that at the time of the levy, Norma owned no interest in the property that she could abandon or that Hankins could purchase.

When an abstract of judgment is recorded and indexed it constitutes a lien and attaches to any real property owned by the defendant that is not exempt. Generally, a lien may not attach to property that is held as the debtor's homestead, because the Texas Constitution provides that homestead property is exempt from forced sale to pay debts, except for certain specified categories of debts.

A homestead can belong to either a family or to a single adult person. The constitutional family homestead exemption applies to the entire family, and not to either spouse individually. Therefore, so long as real property is a family homestead due to one spouse's intention and use, that property is protected by the homestead exemption, unless full abandonment has

been pleaded and proved.

Once a property has been established as a homestead, the property remains exempt unless it ceases to be a homestead due to abandonment, alienation, or death. Abandonment of a homestead occurs when the homestead claimant ceases to use the property and intends not to use it as a home again.

In Texas, spouses may divide their community property through a marital property settlement agreement that can direct the payment of money as consideration for the conveyance of an interest in real estate. When such an agreement is reached, even though incorporated into a final divorce decree, it is treated as a contract and governed by the law of contracts rather than the law of judgments. As in a contract for a sale of land, when a property settlement agreement directs the payment of money as consideration for the conveyance of an interest in real estate, this creates a purchase-money vendor's lien for the spouse who sells her share of the property. The holder of the vendor's lien no longer has title to the property, but she can use it as an encumbrance against the property to satisfy the debt.

Here, the divorce agreement that was incorporated into the final decree included stipulations that the entire property would be transferred to the other spouse in exchange for financial consideration. Before the divorce, each spouse had an undivided homestead interest as a family member. So long as real property is a family homestead by virtue of one spouse's intention and use, that property is protected by the homestead exemption, unless abandonment is pleaded and proved. After the divorce, the remaining spouse received the full homestead interest pursuant to the divorce decree and transfer of land.

Therefore, both before and after the divorce, the spouse that received the transfer had an undivided, possessory homestead interest that prevented a judgment lien from attaching, The court concluded that Roy's undivided homestead interest protected the property at all relevant times and prevented Hankins's lien from attaching, rendering the foreclosure sale and execution deed unconstitutional and void.

PART X CONDEMNATION

Caffe Ribs, Incorporated* v. *State of Texas, 487 S.W.3d 137 (Tex. 2016). The Texas Constitution provides that " [n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. The supreme court has effectuated this constitutional imperative by requiring payment of the "market value" of the condemned property--that is, "the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying." An impending condemnation project, however, can distort the value of property. The inflationary effects of such a project are referred to as "project enhancement, while the deflationary effects are referred to as "condemnation blight" or project diminishment. Since neither project enhancement nor project diminishment reflects true "market value, the project-influence rule has evolved to ensure that such components of value are removed from the market-value determination. The rule thus provides that any change in property value that results from the government manifesting a definite purpose to take property as part of a governmental project must be excluded from an award of adequate compensation. The rule ensures that the condemnee is made whole, not placed in either a better or worse position than he or she would have enjoyed had there been no condemnation.

While the project-influence rule may be neatly stated, it is not always so neatly applied, as precedent recognizes. The supreme court has previously instructed trial courts that they, not the jury, must make the preliminary determinations that the evidence warrants application of the rule and, if applicable, the date the government manifested a definite purpose to take the condemned property (i.e., the date after which any change in value attributable to the governmental project should be disregarded). The court has not, however, instructed trial courts on the exact manner in which the project's influence on the condemned property's value must be corrected, because that depends on the facts of the particular case.

City of Floresville* v. *Starnes Investment Group, LLC, , 502 S.W.3d 859 (Tex. App.-San Antonio, 2016, no pet.). Starnes asserted the City's wrongful delay in approving its zoning application and delay in providing water and sewage services constituted a taking and deprived it of its reasonable investment backed expectations. Starnes contended it was denied all economically beneficial or productive use of its property from March 29, 2012—when the City zoning applications were originally filed—until September 12, 2013—when the applications were approved.

There is a clear and unambiguous limited waiver of immunity for valid claims under article I, section 17 of the Texas Constitution, the "takings clause," which provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made ...." If the government appropriates property without paying adequate compensation, the owner may bring an inverse condemnation claim to recover the resulting damages. An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development.

To plead a valid inverse condemnation claim and establish waiver of immunity under the takings clause, a plaintiff must allege that the governmental entity (1)

intentionally performed certain acts in the exercise of its lawful authority (2) that resulted in taking, damaging, or destroying the plaintiff's property (3) for public use. A governmental entity does not have immunity from a valid takings claim. If, however, the plaintiff fails to allege a valid takings claim, the governmental entity retains its immunity from suit.

In a takings case, the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. It is not enough that the act causing the harm be intentional—there must also be knowledge to a substantial certainty that the harm will occur. A taking cannot rest on the mere negligence of the government. When damage is merely the accidental result of the government's intentional act, there is no public benefit and the property cannot be said to have been taken or damaged for public use.

In this case, Starnes was initially told that the City's zoning ordinances did not apply to his development, but was later told that the ordinances did apply. There is no dispute that the information intentionally provided by the City's attorney the first time was incorrect. However, Starnes alleges no facts that the information was the result of anything more than either a mistake or negligence on the City attorney's part. Starnes alleges no facts that the City knew to a substantial certainty that harm would occur as a result of the delay in its mapping project or the incorrect information it provided while the mapping project was ongoing. As a result, there is no public benefit and the property cannot be said to have been taken or damaged for public use. So there was no inverse condemnation.

In re *Tarrant Regional Water District*, 495 S.W.3d 296 (Tex.App.-Tyler 2015, no pet.). The trial court signed an order refusing to appoint special commissioners during the administrative phase of the condemnation proceeding. The order provided further that the court would only do so, if at all, after a hearing was set and held on the Plea to the Jurisdiction of Defendant Lazy W District No. 1 and a ruling is made by the Court on that Plea. The District filed a petition for a writ of mandamus challenging that order.

Generally, mandamus relief is appropriate only when the trial court clearly abuses its discretion and there is no adequate appellate remedy. A trial court has no discretion in determining what the law is or in applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in the issuance of a writ of mandamus.

A condemnation proceeding is not within the general jurisdiction of the court; any power to act is special and depends upon the eminent domain statute. When an entity with eminent domain authority wants to acquire real property for public use but cannot agree with the landowner on the amount of damages, that entity must file a condemnation petition in the proper court, either district court or county court at law, of the county in which the land is located. The judge of the court in which a condemnation petition is filed or to which an eminent domain proceeding is assigned is required to appoint three disinterested property owners who reside in the county as special commissioners. These special commissioners must promptly schedule an evidentiary hearing on the amount of damages due the property owners, assess the amount of damages, and file their decision with the trial court.

From the time the condemnor files the original statement seeking condemnation up to the time of the special commissioners' award, the proceeding is administrative in nature. The administrative phase is completely separate from any judicial proceeding that may later take place, and the Property Code says nothing about giving a trial court power to oversee this initial phase. During the administrative phase, the trial court's jurisdiction is limited to appointing the commissioners, receiving their opinion as to value, and rendering judgment based upon the commissioners' award. Any judgment or order made outside of the statutory authority is void.

When the District filed its condemnation petition, the trial court had a statutory duty to appoint three special commissioners. The court held that the trial court was without jurisdiction to refuse to appoint special commissioners in this condemnation proceeding.

Padilla* v. *Metropolitan Transit Authority of Harris County, 497 S.W.3d 78 (Tex.App.-Houston [14th Dist.] 2016, no pet.). The Texas Constitution provides that no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. Thus, the Texas Constitution waives governmental immunity from suit for the taking, damaging, or destruction of property for public use and requires compensation for such destruction. To prove an inverse condemnation claim, a claimant must show that a governmental actor intentionally performed acts that resulted in the taking, damaging, or destruction of its property. For purposes of article I, section 17, a governmental entity acts intentionally if it knows either that a specific act was causing identifiable harm or that specific property damage was substantially certain to result from the entity's action. A governmental entity is substantially certain that its actions will damage property when the damage is necessarily an incident to or necessarily a consequential result of the governmental entity's action. An awareness that damage is a mere possibility is not evidence of the governmental entity's intent. The government's knowledge must be determined as of the time it acted, not with the benefit of hindsight.

Not all damage caused by government construction projects is compensable. Property owners may not

recover for injuries sustained in common with the community where the property is situated, such as damage from noise, dust, increased traffic, diversion of traffic, circuity of travel, and other inconveniences incident to road or highway construction.

Damages peculiar to a property owner, such as impaired access, are not barred by the concept of community injury. To obtain compensation for impairment of access, a plaintiff must establish that the governmental entity materially and substantially impaired access rights to his property. More specifically, the plaintiff must show that there has been: (1) a total but temporary restriction of access; (2) a partial but permanent restriction of access; or (3) a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed. If the plaintiff does so, the property owner is entitled to be compensated for the lost profits arising from the denial of access. Whether there has been a material and substantial impairment of access is a question of law for the court.

PART XI LAND USE PLANNING, ZONING, AND RESTRICTIONS

Elbar Investments, Inc.* v. *Garden Oaks Maintenance Organization, 500 S.W.3d 1 (Tex.App.-Houston [1st Dist.] 2016, pet. denied). The relevant restrictive covenant states: " No residence shall be erected on a lot or homesite of less frontage than seventy-five (75) feet." The disputed property was part of a Garden Oaks lot that originally had a frontage of 75 feet. A multi-family duplex residence was constructed on the lot in 1979. When built, this residence fully complied with the Garden Oaks deed restrictions. A prior owner split the lot in half, resulting in the two halves of the duplex separately occupying the two new lots. Each new lot had a frontage of 37 1/2 feet.

Garden Oaks sued the Elbar for violation of the restrictive covenant. At trial, the president of the HOA admitted that the structure was in compliance when it was built and that Elbar had done no new construction. The trial court ruled against Elbar, specifically finding that Property that is initially in compliance with deed restrictions can nevertheless fall into noncompliance by the act of subdividing the lot, even if the deed restrictions do not explicitly prevent subdividing lots.

Elbar contended that no violation of the deed restrictions has been demonstrated, because the only relevant prohibition is that no residence shall be erected on a lot or homesite of less frontage than seventy-five (75) feet, and it did not construct anything new on the property. The commonly accepted meaning of the word "erect" at the time the covenant was imposed on the subdivision was "to raise, as a building; build; construct."

The court of appeals held that the covenant at issue in this case does not, by its terms, suggest that a conforming structure later may come to violate the restriction if a subdivision of the property causes a change to the frontage. The Garden Oaks covenant prohibits a residence from being erected under a specific circumstance, when the lot or homesite has less frontage than 75 feet. Based on the language of the covenant, when a new residence is built, it must conform to the frontage requirements, but the covenant does not provide that later subdivision of the lot without erecting another residence will cause a previously conforming residence to fall into violation of the frontage requirement.

The deed restrictions anticipate the construction of duplex residences and do not prohibit subdivision of lots. By requiring the initial construction to comply with the deed requirements, the restrictions ensure an aspect of uniformity of appearance without prohibiting a future division of ownership of a conforming duplex. Any future new construction would remain subject to the architectural restrictions, and would be a proper subject for an enforcement suit such as this one.

Based on the commonly accepted meaning of "erected" and the context of the other subsections of the deed's architectural restrictions, the court concluded that the covenant in this case is unambiguous, and that the division of the duplex's ownership did not cause a violation of the restrictive covenant prohibiting residences from being "erected" on a lot with less than 75 feet of frontage.

Happy Endings Dog Rescue* v. *Gregory, 501 S.W.3d 287 (Tex.App.-Corpus Christi 2016, pet. denied). The Gregories sued Happy Endings for violating a deed restriction that prohibited operating of a veterinary clinic. In the suit, they sought damages of $200 a day for each day of violation, citing Property Code § 202.004, which provides the trial court discretion to award up to $200 per day of violation to property owners associations in a planned development.

During trial, the Gregories admitted that their claim did not fall within the rule of Property Code § 202.004 and that they were therefore not eligible to collect $200 per day in statutory penalties provided by that section. However, they asserted that they were entitled to damages in this amount "by analogy" to the statute.

The Gregories produced no authority supporting their claim for statutory damages "by analogy." Instead, Texas canons of construction disfavor this position under the facts of this case. The doctrine of expressio unius est exclusion alterius --that is, expression of one implies the exclusion of others--is not an absolute rule, but it is a useful aid to determine legislative intent. By statutory definition, chapter 202 of the Property Code applies only in a residential subdivision, planned unit development, condominium or townhouse regime, or similar planned development. The fact that the Legislature made civil damages expressly available in specific instances suggests that the Legislature did not

intend for them to be available, by analogy, in this unrelated instance.

Moseley* v. *Arnold, 486 S.W.3d 656 (Tex.App.-Texarkana 2016, **). For at least the last twenty-four years, the five-acre tract at the southeast corner of Interstate Highway 20 and Texas Highway 43 in Harrison County, on which was once located a business known as Moseley's Truck Stop, has been unimproved property. But, back in 1985, when the five-acre tract and its personal property had been sold as a package by Moseley it had hosted the truck stop. As part of the sale, the five acres was benefitted by a restrictive covenant on the 6.379 acres located at the northeast corner of the same intersection and owned by Moseley. That covenant provided that the Retained Tract may not be developed and used as a truck stop and fuel stop. Now, three decades after the sale, a dispute has arisen between Moseley and the current owner of the five acres, Arnold concerning the restrictive covenant's enforceability against the Retained Tract.

The trial court granted Arnold summary judgment that the restrictive covenant was enforceable against the Retained Tract. Moseley's appeal argues that Arnold lacked standing to enforce the covenant and that fact issues on the presence of changed conditions make Arnold's summary judgment improper.

Moseley argues that, under the terms of the restrictive covenant agreement, Arnold is not one of the intended beneficiaries of the restrictive covenant, Moseley reasons that the transaction with the people he sold to, the Gormans, gave them two separate and distinct rights as expressed in the two separate documents delivered to them at closing. The warranty deed gave them their ownership rights in the five-acre tract, and the restrictive covenant agreement gave them the right to restrict the use of the Retained Tract. Moseley emphasizes that the warranty deed did not reference the restrictive covenant and points to the language in the operative clause of the restrictive covenant agreement stating that the restrictive covenant is "for the benefit of Robert T. Gorman, and wife, Nancy S. Gorman, and their successors and assigns." This, he argues, shows the clear intent of the parties to limit the right of enforcement of the restrictive covenant to the Gormans and their successors and assigns of the restrictive covenant agreement. In other words, Moseley contends that only those persons who received a specific, written assignment of the restrictive covenant agreement from the Gormans have standing to enforce the restrictive covenant. Since there is no evidence of an assignment of the restrictive covenant agreement, and since none of the deeds in Arnold's chain of title reference the restrictive covenant, Moseley reasons that there is no privity of estate that would entitle Arnold to enforce the restrictive covenant.

Arnold argues that the intent of the parties was that the intended beneficiaries of the restrictive covenant are the five-acre tract and any person owning an interest in the five-acre tract. Therefore, she argues, since she owns the five-acre tract, she is an intended beneficiary and has standing to enforce the restrictive covenant.

Standing is a constitutional prerequisite to maintaining suit. The lack of standing deprives a court of subject-matter jurisdiction to hear a case. In suits over restrictive covenants, a person has standing to enforce the restriction only on showing that the restriction was intended to inure to his or her benefit.

Generally, a restrictive covenant may be enforced only by the parties to the restrictive covenant agreement and those parties in privity with them. Privity of estate exists when there is a mutual or successive relationship to the same rights of property. Further, any person entitled to benefit under the terms of a restrictive covenant may enforce it. The summary judgment evidence establishes that Arnold is the successor of the Gormans' interest in the five acres. The resolution of this issue, then, requires us to construe the intent of the parties, as expressed in the restrictive covenant agreement, to determine whether Arnold, as the successor of the Gormans' interest in the five-acre tract, is an intended beneficiary who is entitled to benefit under the terms of the restrictive covenant agreement.

The operative clause of the restrictive covenant agreement contains three clauses relevant to determining the parties' intent regarding its intended beneficiaries. First, it states that the purpose of the restrictive covenant is to benefit the Gormans, their successors and assigns. Second, it provides that the restrictive covenant is given to protect the value and desirability of the five-acre tract being purchased by the Gormans. Finally, the operative clause expresses the parties' intent that the restrictive covenant run with the land and binds all parties owning any interest in the Retained Tract.

Moseley's construction requires us to consider the first clause only and renders the remaining clauses meaningless. However, when the clauses are read together, it is clear that the restrictive covenant is meant to benefit the five-acre tract the Gormans were purchasing, and that the Gormans and their successors and assigns are meant to be beneficiaries only to the extent of their ownership interest in the five-acre tract. Since the summary judgment evidence establishes that Arnold owns the five-acre tract and is a successor to the Gormans' interest in the five-acre tract, she is a beneficiary under the plain terms of the restrictive covenant agreement and may enforce the restrictions.

In re *Keenan*, No. 15-0777 (Tex. Sept. 30, 2016). Keenan lives in the River Oaks subdivision in Houston. Her home is subject to deed restrictions enforced by a homeowners' association, River Oaks Property Owners, Inc. (ROPO). In 2014, ROPO sued Keenan seeking an injunction requiring Keenan to remove improvements that allegedly violated a limit on impervious cover. The

limit is found in 2006 "Amended Restrictions" that purported to amend the neighborhood's deed restrictions. Keenan filed a declaratory judgment counterclaim asserting that the Amended Restrictions were "not properly enacted" and were "unenforceable."

Keenan served a discovery request for production of the homeowner ballots on the 2006 Amended Restrictions. ROPO objected that the ballots were confidential and privileged voting records and were irrelevant to the dispute. The trial court signed an order granting Keenan access to the ballots. But the order stated that only Keenan's counsel could review the ballots and that Keenan could not copy the ballots; it also provided that the contents of the ballots could not be disclosed "to anyone else" without further court order.

Keenan's counsel inspected the ballots and asked for modification of the January 27, 2015 order that would remove the restrictions on access to the ballots and order production of the ballots to Keenan. The trial court refused to order production of the ballots. Keenan sought mandamus relief.

A writ of mandamus will only issue if the trial court clearly abused its discretion and relator has no adequate remedy by appeal. The court thought a key issue is whether ROPO obtained sufficient votes to enact the 2006 Amended Restrictions. Keenan is entitled to challenge the sufficiency of the votes, but the trial court has so restricted Keenan's ability to do so that mandamus relief is warranted.

Under the trial court's rulings, Keenan cannot introduce the ballots themselves to prove an insufficient vote to approve of the amendment in issue, nor will the ballots be a part of the record for purposes of appellate review. Keenan's attorney cannot reveal the contents of the ballots at trial under the January 27, 2015 order. Assuming no hearsay or best evidence problem, Keenan's counsel could in theory testify on this key factual dispute, if the trial court allows it, because he reviewed the ballots. But Keenan's counsel should not be forced to do so.

Under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct, "A lawyer shall not . . . continue employment . . . if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client." Keenan's lawyer should not be forced to withdraw because the trial court's discovery rulings have made his knowledge the only means of presenting the factual support on a key issue. Rule 3.08 "should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice."

ROPO cites section 209.00594 of the Property Code in support of its claim that the ballots should be treated as confidential, though ROPO concedes that the ballots are not statutorily protected as confidential, per se. Section 209.00594(c) states that only a person qualified to tabulate votes in a property owners' association election may be given access to the ballots.

The court would not foreclose the trial court from entering an appropriate protective order if it determines that the confidentiality of the ballots is an interest that should be protected in these circumstances. Such measures might include an order sealing the ballots, providing that only selected persons such as jurors, parties, attorneys, and experts are allowed to examine the ballots, requiring that the identity of the voters be redacted, or requiring that persons with access to the ballots not disclose their contents except as specified in the order.

The court conditionally granted mandamus relief directing the trial court to permit Keenan to copy the ballots and disclose them for purposes of discovery, expert analysis, trial preparation, and trial. The ballots should be included in the record. The court may order redaction of names of the voters or require the ballots to be filed under seal, or impose some other appropriate protective order to protect confidentiality.