CASE LAW UPDATE

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CHAPTER 1

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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 530 S.W.3d and Supreme Court opinions released through May 25, 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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CASE LAW UPDATE

PART I
MORTGAGES AND FORECLOSURES

Carmel Financial Corporation* v. *Castro, 514 S.W.3d 291 (Tex. App.—Houston [14th Dist.] 2016, pet. denied), Carmel Financial claimed that its security interest in a single-family house water treatment system was a valid lien against the entire real property. Though the financing statement in favor of Carmel Financial preceded the first lien mortgage on the house, super-priority lien status as to the real property was not granted to Carmel.

The court construed the language of the security interest to relate solely to the water treatment system and not to the home, refuting Carmel's reading of UCC § 9.334(d) and 9.604(b). Under UCC § 9.334(d), the perfected purchase money security interest, which arises before the goods become fixtures, takes priority over a conflicting lien on the real property. UCC § 9.604(b) provides that goods that are or are to become fixtures allow for a secured party to foreclose under either the UCC or in accordance with real property rights. The court noted that the security agreement and financing statement did not describe the real property but limited the collateral to the water treatment system, and that neither of such UCC sections "operates independently to create a security interest in real property that the underlying security agreement did not authorize." Therefore, Carmel's fixture filing did not create a lien on real property and was not prior to the interest of first lienholder in the real property.

Villanova* v. *Federal Deposit Insurance Corporation, 511 S.W.3d 88 (Tex. App.—El Paso 2014, no pet.), concerned the sufficiency of a summary judgment motion and affidavit in connection with an alleged wrongful foreclosure. Villanova obtained a loan from HSOA in the amount of $693,000, secured by the property being acquired, the Frisco Home, and by an additional piece of collateral being a home in Corpus Christi. The closing documentation, typical for a home loan, included an affidavit of intent to permanently occupy the Frisco Home as Villanova's residence, and covenants in the deed of trust to occupy the Frisco Home as his primary residence and not to transfer an interest in the home without HSOA's approval. In breach of these covenants, Villanova conveyed the Frisco Home to Christina Roth, a woman he had met months earlier on an internet dating site, www.sugardaddyforme.com, with Roth agreeing to pay Villanova $66,000 at maturity of a note she executed in favor of Villanova. HSOA eventually discovered the breach and filed for foreclosure, which was suspended upon reaching a settlement agreement between Villanova and HSOA requiring Villanova to make certain payments, agree to refinance the house by a certain date and failing that, to sell the house by a later date. Villanova breached all of those requirements and HSOA eventually foreclosed all of its collateral, being the Frisco Home and the Corpus Christi Home.

Villanova sued; HSOA filed for summary judgment and supported that motion for summary judgment with an affidavit of Paula Chin, the Vice President of Loan Servicing and Default Operations for HSOA. An affidavit in support of a summary judgment motion must be based on personal knowledge of the affiant, but the court concluded that Chin did not have the requisite personal knowledge. Therefore, HSOA was not entitled to a summary judgment since it could not prove damages, which were supported only by the Chin affidavit, which was defective due to lack of information concerning her personal knowledge and qualifications for damage calculations. This case is instructive to practitioners on what type of personal knowledge must be proved to be an effective affidavit in support of a summary judgment motion. A mere recitation of facts is not sufficient, in and of itself, and the title or position of a person does not carry with it an implied level of personal knowledge. The court required that statements in such an affidavit "need factual specificity such as place, time, and exact nature of the alleged facts." In other words, the affidavit must explain how such person became familiar with the facts in the affidavit. Also, the affidavit in this case did not specify whether Chin was the applicable vice president during the relevant time period or how her job duties in that role afforded her the knowledge about the specific facts in the case.

PART II
HOME EQUITY LENDING

Morris* v. *Deutsche Bank National Trust Company, 528 S.W.3d 187 (Tex.App.-Houston [14th Dist.] 2017, no pet.). Non-compliant home equity loans are void, not merely voidable, and therefore, the statutes of limitations do not apply.

Kyle* v. *Strasburger, 522 S.W.3d 461 (Tex. 2017). The home equity loan closed in 2004. Wendy claimed that her then-husband, Mark, forged her signature on the closing documents without her consent to obtain the $1.1 million home-equity, secured by a deed of trust on the couple's homestead. She also alleges that she was induced by various misrepresentations regarding the loan's purported validity, and the commencement of foreclosure proceedings, into agreeing to convey her interest in the property to Mark in their divorce. Wendy sued Mark and the lender, seeking forfeiture of principal and interest paid on the loan under Texas Constitution Article XVI, section 50(a)(6)(Q)(xi). The trial court ruled in favor of Mark and the lender. The Court of Appeals affirmed, holding that the defect in the loan (i.e., Wendy's failure to join) was curable under section

50(a)(6)(Q)(xi), that the loan was thus "voidable" not "void," and that limitations on Wendy's cause of action had run.

After the Court of Appeals issued its opinion and judgment, the Supreme Court issued its opinions in ***Garofolo* v. *Ocwen Loan Servicing, L.L.C.***, 497 SW 3d 474 (Tex. 2016) and ***Wood* v. *HBC Bank USA, N.A***, 504 S.W.3d 542 (Tex. 2016). ***Wood*** held that a non-compliant home equity loan is void, not voidable, and that the four-year statute of limitations does not apply, so here, the court held that limitations had not run. ***Garofolo*** held that section 50(a), which limits the types of loans that may be secured by a homestead and places particularly strict parameters on foreclosure-eligible home-equity loans, does not create substantive rights beyond a defense to foreclosure of a lien securing a constitutionally noncompliant loan.

Section 50(a)(6) of the Texas Constitution requires that home-equity loans contain certain enumerated terms and conditions, including a provision mandating that the lender forfeit all principal and interest for uncured failures to comply with its loan obligations. Those terms and conditions are not constitutional rights unto themselves, nor is the forfeiture remedy a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure-eligible. In other words, the absence of constitutionally mandated terms and conditions in a home-equity loan can act as a shield to foreclosure, but a lender's uncured failure to comply with its loan obligations does not give rise to a constitutional cause of action. It can, however, give rise to a breach-of-contract claim.

PART III PROMISSORY NOTES, LOAN AGREEMENTS, LOAN COMMITMENTS

Great Northern Energy, Inc.* v. *Circle Ridge Production, Inc., 528 S.W.3d 644 (Tex.App.-Texarkana 2017, pet. denied). If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them.

The negotiability of an instrument is a question of law. Chapter 3 of the Business and Commerce Code only "applies to negotiable instruments.

"Negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, if it does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain:

(A) an undertaking or power to give, maintain, or protect collateral to secure payment;
(B) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or
(C) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

A promissory note is not a negotiable instrument if the rights and obligations of the parties with respect to the note are stated in another agreement. The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment.

In this case the note incorporated a deed of trust by reference for all purposes as if fully set forth in the note. Because the promissory note contains the incorporation of the deed of trust, it cannot be a negotiable instrument.

PART IV
GUARANTIES

Kartsotis* v. *Bloch, 503 S.W.3d 506 (Tex. App.—Dallas, 2016, pet. denied), involved contribution between co-guarantors pursuant to a Contribution and Indemnity Agreement, which had two primary operative provisions. Section 1 provided "if any Guarantor makes a payment in respect of the Obligations such Guarantor shall have the rights of contribution and reimbursement set forth below…" The triggering provision was Section 2 which provided "if any [Paid Guarantor] makes a payment upon or in respect of the Obligations that is greater than it's Pro Rata Percentage [1/3] of the Obligations, the Paid Guarantor shall have the right to receive from the other Guarantors who have not paid their Pro Rata Percentage … an amount such that the net payments made by the Paid Guarantor in respect of the Obligations shall be shared by Guarantors pro rata in proportion to their Pro Rata Percentage."

The three principals, who were guarantors subject to the CIA, entered into a number of financing transactions involving the Black Bull Run Development, a Montana golf course community, including a construction loan with La Jolla Bank (transferred to OneWest Bank), which had been guaranteed by Bloch, an indemnity from Bloch in favor of Commonwealth Title to indemnify against mechanics liens on the property, and a golf equipment lease with Wells Fargo Financial Leasing, which Bloch had guaranteed. Also involved was an additional loan to CLB Capital (the partnership in which the three partners participated) from Guaranty Bank, guaranteed by each of the three parties; however, it is not clear that this loan is related to the Black Bull Run Project which is the subject of the loan from La Jolla Bank BLACK BULL RUN Loan.

Ultimately the Black Bull Run project was

unsuccessful and filed for bankruptcy. The BLACK BULL RUN Loan was settled by Bloch and another guarantor, Cureton, by the payment of money. The Commonwealth Title indemnity and the Wells Fargo leasing equipment loan were subjects of lawsuits which were also settled by Bloch (collectively, "BLACK BULL RUN Settlements"). The Guaranty Bank loan was extended twice and then finally matured. Kartsotis paid his share of the guarantor's debt on the Guaranty Bank loan, and when Bloch refused to pay his share, Kartsotis paid Bloch's share for him in order to retire the Guaranty Bank loan. The parties sued each other under the CIA, and upon review of a summary judgment, the court interpreted the meaning of the CIA.

The crux of this decision involved the interpretation of "Obligations". Bloch's interpretation was that the CIA covered any payments made by one of the guarantors in connection with the related financings; on the other hand, Kartsotis interpreted the CIA to only refer to payments made in excess of the designated percentage of the primary obligations related to the financing transactions. The payment by Bloch for the BLACK BULL RUN Settlement was less than one-third (1/3) of the debt owed on the primary obligation. The court interpreted Section 2, the triggering clause, to be triggered only upon a payment of the Obligations, in an amount that exceeded the threshold test before being entitled to a reimbursement or contribution. The CIA defined Obligations as both "Future Obligations" and "Existing Obligations", which such Existing Obligations were set forth on Exhibit A to the CIA (which specified the BLACK BULL RUN Loans and the Wells Fargo lease, but not the Commonwealth Title indemnity). Consequently, the Court concluded that since Bloch's payment with respect to the BLACK BULL RUN Settlement was less than 1/3 of the outstanding Obligations, then the triggering event (being a payment greater than 1/3 of the total debt) was not activated, and no contribution was required.

This case presents a lesson for practitioners in the drafting of indemnity or contribution agreements, particularly as it relates to the description of both the obligations for which a contribution or indemnity is applicable, and the threshold at which contributions begin. Further, in interpreting the definition of "Obligations", the court held the provisions in the contract's recitals were somewhat inconsistent with the provisions in the body of the contract and that contract recitals are not deemed strictly part of the contract and will not control over the operative provisions in the body of the contract. General contract construction favors the specific provisions (such as in the body of the contract) over general recital provisions. As a drafting lesson, specific and important defined terms should probably be dealt with in the body of the contract as opposed to recitals.

Chahadeh* v. *Jacinto Medical Group, P.A., 519 S.W.3d 242 (Tex.App.—Houston [1st Dist.] 2017, no pet.). Chahadeh guarantied payment of two loans from Jacinto to University General Hospital. UGH defaulted on the loans and filed bankruptcy. Jacinto filed a proof of claim in the UGH bankruptcy, then separately sued Chahadeh on his guaranties. Chahadeh claimed that the filing of the proof of claim by Jacinto vested the bankruptcy court with exclusive jurisdiction over its claims against him as guarantor.

Bankruptcy courts have original and exclusive jurisdiction over all cases under title 11, but have only original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11. Thus, the only aspect of a bankruptcy proceeding over which the bankruptcy court has exclusive jurisdiction is the bankruptcy petition itself. State courts have concurrent jurisdiction over any other matters that arise in or relate to cases under title 11.

While Jacinto's suit against Chahadeh is arguably related to UGH's bankruptcy petition, the bankruptcy court does not have exclusive jurisdiction over a suit that is merely related to a bankruptcy petition. Chahadeh also contends that his liability under the guaranty agreements could not be conclusively established until the bankruptcy court determines UGH's liability on the underlying promissory notes. Chahadeh contends that his liability could be reduced or discharged if UGH's liability on the underlying promissory notes is reduced or discharged by the bankruptcy court. But Chahadeh's liability under the guaranty agreements is a separately enforceable obligation. The guaranties provide that: "Guarantor hereby agrees that its obligations under this Guaranty Agreement shall not be released, discharged, diminished, impaired, reduced, or affected for any reason or by the occurrence of any event, including . . . any disability of [UGH], or the dissolution, insolvency, or bankruptcy of [UGH]." Under the terms of the guaranty agreements, Chahadeh may be held independently liable for the amount of the outstanding debts under the promissory notes without regard to the outcome of the bankruptcy proceeding.

Julka* v. *U.S. Bank National Association, 516 S.W.3d 84 (Tex.App.—Houston [1st Dist.] 2017, no pet.). Copperfield Timberlake borrowed a loan from Prudential, which was later assigned to the Bank. The loan was non-recourse except for "bad boy" carve-outs. Julka guarantied the carve-outs and also committed to full recourse on the loan up to $250,000.00. Copperfield Timberlake defaulted, and the Bank sued it and also sued Julka on his guaranty. Julka asserted the affirmative defenses of payment and quasi-estoppel. Julka contended that he has satisfied his obligations under the guaranty because he had provided more than $250,000 of his personal funds to Copperfield

Timberlake, which in turn allowed Copperfield Timberlake to continue making payments on the note for nearly two years before the event of default occurred.

Julka relied on bank statements that showed he had advanced more than $250,000 to Copperfield Timberlake, which was used to make payments on the debt. Those contributions, however, are not evidence that raises a fact issue as to Julka's defense of payment on the guaranty, because that agreement required personal payment to the Bank, not payment from Copperfield Timberlake on the underlying note that the guaranty secured. Although Julka transferred personal funds to Copperfield Timberlake for it to make payments, Copperfield Timberlake made those payments to the Bank on behalf of the corporation, not in satisfaction of Julka's personal obligation. As a result, those payments are attributable solely to Copperfield Timberlake, and not to Julka.

PART V
LEASES

Shields Limited Partnership* v. *Bradberry, 526 S.W.3d 471 (Tex. 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 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.

FP Stores, Inc.* v. *Tramontina US, Inc., 513 S.W.3d 684 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). This case is important for the practitioner because it is the first time a court has addressed the "bad faith" element of §93.011 of the Texas Property Code and only the sixth time a court had provided guidance on §93.011. §93.011 imposes liability on a commercial landlord who retains a security deposit in bad faith. In this case, the tenant sued the landlord for breach of contract and retaining a security deposit in bad faith. The applicable provision of the sublease provided that "within 60 days after Sublesee surrenders the leased premises and provides written notice to Sublessor of

Sublessees forwarding address, Sublessor will refund the security deposit less any amounts applied toward amounts owed by Sublessee or other charges authorized by this sublease." The provisions in the sublease are very similar to §93.011, which includes a presumption of bad faith if a landlord fails to act within such sixty (60) day period and allows for a tenant to receive an "amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld and reasonable attorney's fees." §93.011 places the burden on the landlord to prove that the retention of the security deposit was reasonable and not in bad faith. Because the landlord had clearly not returned to security deposit within the required sixty (60) day period the trial court granted summary judgment in favor of the tenant. The landlord appealed, and the Houston Court of Appeals agreed that there was sufficient evidence presented at trial that the landlord acted in good faith and, therefore, summary judgment was inappropriate. The appeals court relied on court interpretations of Property Code §92.109 (a parallel statute that applies only to residential leases) to hold that under §93.011 of the Texas Property Code "a commercial landlord retains a tenant's security deposit in bad faith if it retains the security deposit in honest disregard of the tenant's rights or with the intent to deprive the tenant of a lawful refund." The courts will presume that the landlord acted in bad faith if the tenant shows that the landlord failed to timely provide a refund of the security deposit or an accounting. To rebut the presumption the landlord must "present more than a scintilla of evidence that it acted in good faith" which the landlord in the present case had done.

UDR Texas Properties, L.P.* v. *Petrie, 517 S.W.3d 98 (Tex. 2017). Petrie was assaulted and robbed at the Gallery apartment complex. In his suit against the owner, the trial court concluded Gallery owed no duty to Petrie to protect him but the court of appeals reversed, holding there was evidence Gallery knew or should have known of a foreseeable and unreasonable risk of harm.

Generally, property owners have no legal duty to protect persons from third-party criminal acts. But a property owner who controls the premises does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. A risk must be both foreseeable and unreasonable to impose a duty on a property owner. This approach is not peculiar to premises-liability cases; it is essential to the determination of duty in all of tort law. Foreseeability is a prerequisite to imposing a duty. But once foreseeability is established, the parameters of the duty must still be determined.

The court of appeals acknowledged that unreasonableness plays a role in the duty inquiry but concluded that an evaluation of the factors we laid out in ***Timberwalk Apartments, Partners, Inc.* v. *Cain***, 972 S.W.2d 749 (Tex. 1998) is dispositive of whether the risk of criminal conduct is both foreseeable and unreasonable. The Supreme Court disagreed. It conceived the ***Timberwalk*** factors as a means to aid courts in determining foreseeability specifically. The factors of foreseeability include proximity (there must be evidence that other crimes have occurred on the property or in its immediate vicinity), recency and frequency (how recently and how often criminal conduct has occurred in the past), similarity (The previous crimes must be sufficiently similar to the crime in question as to place the landowner on notice of the specific danger), and publicity (The publicity surrounding the previous crimes helps determine whether a landowner knew or should have known of a foreseeable danger).

When the court first applied these factors in ***Timberwalk***, it concluded only that the risk that a tenant would be sexually assaulted was in no way foreseeable. Because the lack of foreseeability was dispositive in that case, further consideration of the unreasonableness of the risk was unnecessary.

Gallery argues the court should render judgment in its favor because Petrie offered no evidence of, and did not argue that he faced, an unreasonable risk of harm. He never offered any such evidence and is without excuse for not doing so. Although we have not disposed of a post- ***Timberwalk*** case on unreasonableness grounds, our precedents are unambiguous: the foreseeability and unreasonableness inquiries are distinct. Moreover, Petrie has been on notice at every stage of this case that he must argue and offer evidence of unreasonableness. On multiple occasions, Gallery argued to the trial court that it must conclude the crime against Petrie was both foreseeable and the risk unreasonable.

Based on Gallery's arguments in both courts below and before the court and the standard set forth by its precedents, Petrie was at least on notice that in addition to establishing foreseeability he might be required to put on evidence and argue that he faced an unreasonable risk of harm. He chose to stand on the position that the ***Timberwalk*** factors were dispositive of both foreseeability and unreasonableness, and further chose not to offer any evidence on Gallery's burden to prevent or reduce the risk from violent crime. Because he presented no evidence and made no argument on an essential element in the determination of whether a legal duty exists, judgment should be rendered in Gallery's favor.

Phillips* v. *Abraham, 517 S.W.3d 355 (Tex.App.—Houston [14th Dist.] 2017, no pet.). Phillips leased a house from the Abrahams. During the term of the lease, Phillips fell while walking up the driveway. He claimed it was because the driveway was in disrepair with many loose and broken rocks. Phillips stated that

he knew of these defects, but he did not know of the specific area or stone that may come loose at any time at the end of the drive.

In the premises-liability context, a landowner owes an invitee a negligence duty to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not. Ordinarily, the landowner need not do both; the landowner can satisfy its duty by providing an adequate warning even if the unreasonably dangerous condition remains. This general rule comports with the rationale for imposing a duty on landowners in the first place. The landowner typically is in a better position than the invitee to know of hidden hazards on the premises, so the law mandates that the landowner take precautions to protect invitees against the hazards, to the extent the landowner knows or should know of them.

When the condition is open and obvious or known to the invitee, however, the landowner is in no better position to discover it. When an invitee is aware of an unreasonably dangerous condition on the premises, the condition, in most cases, no longer will pose an unreasonable risk because the law presumes that the invitee will take reasonable measures to protect against known risks, which may include a decision not to accept the invitation to enter onto the landowner's premises.

A landowner's duty to invitees is not absolute. A landowner is not an insurer of a visitor's safety. Instead, a landowner owes a duty to exercise ordinary, reasonable care. Thus, a defendant has no duty to take safety measures beyond those that an ordinary, reasonable landowner would take. In most circumstances, a landowner who provides an adequate warning acts reasonably as a matter of law, and because there is no need to warn against obvious or known dangers, a landowner generally has no duty to warn of hazards that are open and obvious or known to the invitee. The court held that the alleged unreasonably dangerous condition on the premises was known to Phillips before his injury.

There are two exceptions to the general rule under which an invitee's awareness of the risk does not relieve the landowner of its negligence duty to make the premises reasonably safe. The first exception, not applicable here, may arise when a dangerous condition results from the foreseeable criminal activity of third parties.

The second exception may arise when the invitee necessarily must use the unreasonably dangerous premises, and despite the invitee's awareness and appreciation of the dangers, the invitee is incapable of taking precautions that will adequately reduce the risk. This necessary-use exception applies when (1) it was necessary for the invitee to use the portion of the premises containing the allegedly unreasonably dangerous condition and (2) the landowner should have anticipated that the invitee was unable to avoid the unreasonable risks despite the invitee's awareness of them. Phillips asserts that today's case falls within this necessary-use exception.

The court held that it was unnecessary for Phillips to walk over or through the portion of the premises containing the allegedly unreasonably dangerous condition, so this exception did not apply.

Phillips knew of the alleged unreasonably dangerous condition on the premises before the occurrence made the basis of this suit and that neither the criminal-activity exception nor the necessary-use exception applies.

City of El Paso* v. *Viel, 523 S.W.3d 876 (Tex.App.-El Paso 2017, no pet.). Viel was injured when an overhead door at a cargo warehouse space leased by the City, as the landlord, fell on his head. He sued the City. The City claimed that sovereign immunity barred the action.

As a political subdivision of the State of Texas, the City is generally protected by governmental immunity from lawsuits for money damages unless immunity has been clearly and unambiguously waived by statute. Governmental immunity from suit defeats a trial court's subject matter jurisdiction and thus it is properly asserted in a plea to the jurisdiction.

The threshold question in determining whether governmental immunity applies is whether the City engaged in a governmental or proprietary function in leasing the cargo warehouse where Viel allegedly sustained his injuries. Whether the City engaged in a proprietary or governmental function is a question of law reviewed de novo.

The Texas Tort Claims Act (Civil Practice and Remedies Code § 101.0215) provides that a city is not protected by immunity when performing proprietary functions as compared to governmental functions. Also, the Texas Constitution authorizes the Legislature to define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law. Based on this grant of authority, governmental functions include airport activities, broadly described as "planning, acquisition, establishment, construction, improvement, equipping, maintenance, operation, regulation, protection, and policing of an airport or air navigation facility under this chapter, including the acquisition or elimination of an airport hazard"

There was no argument that the cargo warehouse was located appurtenant to the airport. Viel claimed, though, that the City used its cargo warehouse to generate revenue from non-public activities thereby engaging in a function that is construed as proprietary, not governmental. The court disagreed. The lease

agreement narrowly restricts the City's tenant's use of the leased premises to "Aviation Related Operations only." The lease allows the tenant to access roadways of the airport property and provides that the tenant's employees' may enter onto the premises labeled the "restricted area of the Airport," if employees first receive security clearance from the City. The City retains the right to come onto the leased premises to address any obstructions or interference to air navigation and to eliminate any use of the premises that would constitute an "airport hazard." The court held there was sufficient evidence to show that the cargo warehouse constituted a governmental function.

Range* v. *Calvary Christian Fellowship, 530 S.W.3d 818 (Tex.App.-Houston [14th Dist.] 2017, pet. pending). The lease contained three provisions dealt with in this case. First, it gave Reliant a first right of refusal if Calvary decided to sell the property. The purchase right was on terms specified in the lease. Second, it gave Reliant a first right of refusal to lease the additional space on the same terms on which it leased the original space, except for the length of the term. And third, the lease provided for attorneys' fees to be paid by the losing party in any litigation related to transactions described in the lease.

At some point, Sam Range (erroneously thought by Calvary to be the owner of Reliant) began negotiating to buy the building. He discussed on terms with Calvary that differed from the terms provided for in the lease. The lease provided that, if Calvary decided to sell the building, Reliant could buy it for $1,200,000 with 20% down with 5% interest with a 30 year amortization with a 5 year balloon. The terms described in an email between Reliant and Calvary provided for the same purchase price, 30-year amortization and 5-year balloon, but changed the interest rate to 6% and did not include the 20% down payment. Calvary had its lawyer draft a contract, which Reliant sent back with a number of changes. Calvary did not accept the changes and negotiations ended.

Once the purchase fell through, the parties began discussing expansion of Reliant's space. The lease provided that Reliant's ROFR was to be on the same terms as the existing lease, but Reliant asked that the new space be separately metered. When Calvary declined to do so, the expansion negotiations ended.

Reliant sued Calvary, claiming, among other things, that Calvary had breached the agreement to sell the building as described in the email. Reliant argued that the email is a contract and its enforceability is a question of law. It further argued that the evidence conclusively establishes that the email was a binding offer, which was accepted. Reliant claimed to be entitled either to specific performance of Calvary's promise to sell the property on the terms stated in the email or to an award of damages for breach of that promise. At trial, the jury found that the email was not a contract.

When parties anticipate signing a formal contract, the question of whether they intended to bind themselves before the formal contract is executed is usually a question of fact. The face of the email shows that Calvary intended there to be a later formal contract, because its officer stated in the email, "I will have the contract drawn up and get it to you as quickly as possible." Thus, whether Calvary intended the email to be binding in advance of the contract is a question of fact. It therefore was appropriate for the trial court to submit that issue to the jury. The court reviewed the evidence and ultimately held that it supported the jury's finding.

Reliant also claimed that Calvary breached the lease by failing to lease it the additional space. The lease provided that the lease of the additional space would be on the same terms as the original lease. The proposed amendment to the lease adding the additional space, drafted by Reliant's lawyer, required the space be separately metered. But, Calvary was required only to offer the additional space on the same terms as those stated in the existing lease; it was not required to place the additional space in the same condition as the originally leased space. Thus, Calvary did not breach the lease by refusing to agree to have the additional space separately metered.

PART VI
EVICTIONS

Trimble* v. *Federal National Mortgage Association, 516 S.W.3d 24 (Tex.App.—Houston [1st Dist.] 2016, pet. denied). There are at least two rights at issue when a mortgagor defaults on his financial obligations: a right to title to the property and a right to possession. A justice court has jurisdiction to determine the right of possession through a forcible detainer action, but the forcible detainer action cannot "resolve any questions of title beyond the immediate right to possession. The existence of a title dispute does not deprive a justice court of jurisdiction over the forcible detainer action; it is only deprived of jurisdiction if the right to immediate possession necessarily requires the resolution of a title dispute. The justice court's determination of possession in a forcible detainer action is a determination only of the right to immediate possession of the premises, and does not determine the ultimate rights of the parties to any other issue in controversy relating to the realty in question.

Because a forcible detainer action's purpose is not to establish title, a plaintiff bringing a forcible detainer action is not required to prove title, but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession. When there is a landlord-tenant relationship between the purchaser at

foreclosure and the current possessor of the property, such a relationship provides a basis for the trial court to determine the right to immediate possession, even if the possessor questions the validity of a foreclosure sale and the quality of the buyer's title. The validity of the foreclosure sale can be challenged in an adjudication of title regardless of the resolution of the forcible detainer action; parties have the right to sue in the district court to determine whether the trustee's deed should be cancelled, independent of the award of possession of the premises in the forcible detainer action.

Because the borrower can still challenge the foreclosure in an adjudication of title, the purchaser at foreclosure who brings a forcible detainer action must only show sufficient evidence of ownership to demonstrate a superior right to immediate possession by establishing that: (1) it has a landlord-tenant relationship with the borrower; (2) it purchased the property at foreclosure; (3) it gave proper notice to the occupants of the property to vacate; and (4) the occupants refused to vacate the premises.

A provision in the borrower's mortgage creating a landlord-tenant relationship after a foreclosure sale satisfies the first element to give the purchasing bank a superior right to immediate possession, even if the borrower is simultaneously challenging the validity of the foreclosure sale. Trimble, who had obtained the property from Henderson, the borrower, argues that Fannie Mae cannot rely on the deed of trust's provision that the Hendersons would become tenants at sufferance after a foreclosure sale because Fannie Mae was not a party to the deed of trust. But the mortgage provides that the Hendersons "shall immediately surrender possession of the Property to the purchaser at the sale." Fannie Mae was the purchaser at the foreclosure sale, and, thus, the Hendersons were required to "immediately surrender possession" to Fannie Mae.

As to the requirement for proper notice, Trimble argued that Fannie Mae did not satisfy that element because it did not give the borrower the required notice under Section 24.005 of the Property Code. Fannie Mae mailed notice to the Hendersons via both certified mail with return receipt requested and first-class mail. When a letter containing notice is properly addressed and mailed with prepaid postage, a presumption exists that the notice was received by the addressee. The presumption may be rebutted by an offer of proof that the addressee did not receive the letter but, in the absence of any proof to the contrary, the presumption has the force of a rule of law. To overcome this presumption and support his argument that neither he nor the borrowers received notice, Trimble relies on the certified-mail envelope, which indicates that it was returned to Fannie Mae's attorney and contains a stamp stating "Return to Sender Attempted Unable to Forward." Trimble also relies on his affidavit that he did not receive notice. But the certified-mail envelope and Trimble's affidavit that he did not receive notice are insufficient to raise a question of fact regarding whether a mortgage holder who intends to foreclose on a property has fulfilled the Property Code's notice requirements. Section 24.005 requires that, when notice to vacate is given by mail, notice be given to the premises in question. It does not require receipt by any particular person. On the contrary, even when notice is given in person, such notice may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older. Fannie Mae mailed notice via both certified mail with return receipt requested and first-class mail. Both notices were addressed to "Mildred Henderson, I.B. Henderson And/Or All Occupants." There is no evidence in the record that the first-class-mail envelope was not delivered as addressed, that is, to the premises.

Lenz* v. *Bank of American, N.A., 510 S.W.3d 667 (Tex. App.—San Antonio 2016, no pet.), involved a forcible detainer action after a foreclosure. In the forcible detainer action, the attorney for the owner of the property after foreclosure attached an affidavit signed by the attorney in support of the eviction. The tenant in sufferance claimed the affidavit was insufficient under Rules of Civil Procedure 510.3(a)(West), which provided in relevant part that "a petition in an eviction case must be sworn to by the plaintiff …." Relying on the rationale of Rule 500.4, allowing a third party agent or attorney to represent them, the court held that an attorney could verify an eviction petition filed on behalf of a corporate client.

Borunda* v. *Federal Nat. Mortg. Association, 511 S.W.3d 731 (Tex. App.—El Paso 2015, no pet.), was a reminder that a suit for forcible detainer does not require proof of title to the property. After the foreclosure sale under a deed of trust containing a provision making the holdover owner a tenant at sufferance, a forcible detainer action was ripe for adjudication without proof that title was vested in the foreclosing mortgagee. Therefore, in this case, Borunda was not able to allege title defects in the foreclosure sale (such as the foreclosing mortgagee having failed to honor various accommodations provided to Borunda). Those would have to be brought in another suit, and would not be a defense against the forcible detainer action.

Paselk* v. *Bayview Loan Servicing, LLC, 528 S.W.3d 790 (Tex.App.-Texarkana 2017, no pet.). To prevail on its forcible detainer action, Bayview was required to prove that (1) it owned the Property by virtue of the substitute trustee's deed, (2) Paselk became a tenant at sufferance when the Property was sold under the terms of the deed of trust, (3) it gave Paselk and the other occupants notice to vacate the premises, and (4) Paselk and the other occupants refused to vacate the premises. Paselk's pro se brief does not appear to argue

that Bayview failed to meet its burden. Instead, Paselk relies on arguments affecting title. Specifically, Paselk attempts to challenge the propriety of the underlying foreclosure.

In a suit for forcible entry and detainer, the right to actual possession of property, not title, is the sole issue for the court to decide. The right to immediately possess real property is not necessarily contingent on proving full title, and the Texas legislature has specifically bifurcated the questions of possession and title and placed jurisdiction for adjudicating those issues in separate courts.

Where the issue of the superior right of possession can be determined separately from title issues, the justice court has jurisdiction to decide the case. Here, the deed of trust specifically provided that Paselk would be considered a tenant at sufferance in the event of a foreclosure sale. Where foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property.

Tehuti* v. *Bank of New York Mellon Trust Company, National Association, 517 S.W.3d 270 (Tex.App.—Texarkana 2017, no pet.). Where, as here, foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property.

Hernandez* v. *U.S. Bank Trust N.A., 527 S.W.3d 307 (Tex.App.-El Paso 2017, no pet.). The bank prevailed in its eviction action against Hernandez. Hernandez appealed to the County Court. The bank filed a motion for the trial court to require Hernandez to make use and occupancy payments into the registry of the court during the pendency of the case. Following a hearing, the trial court granted the motion and required Hernandez to pay $800 per month into the court's registry. Hernandez attempted to appeal the order, but the appeal was dismissed for lack of jurisdiction. The County Court held in favor of the bank. Hernandez wanted to appeal to the Court of Appeals and asked the County Court to determine the amount of the supersedeas bond. A hearing was held to set the amount of the supersedeas bond, which the court set at $1,480 per month. Hernandez then filed his notice of appeal, but did not deposit the amount of the supersedeas bond.

Hernandez asked the Court of Appeals to reduce the amount of the bond. The bank argued that Hernandez had failed to perfect his appeal because he had not posted the bond.

As a general rule, a judgment debtor is entitled to supersede the judgment while pursuing an appeal. When the judgment is for the recovery of an interest in real property, the trial court determines the type of security that the judgment debtor must post, and the amount of security must be at least the value of the property interest's rent or revenue. A trial judge is given broad discretion in determining the amount and type of security required. A trial court abuses its discretion when it renders an arbitrary and unreasonable decision lacking support in the facts or circumstances of the case, or when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles.

A final judgment of a County Court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. A judgment of a County Court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the County Court. If a supersedeas bond in the amount set by the trial court is not filed within ten days after the judgment awarding possession is signed, the judgment may be enforced and a writ of possession may be executed evicting the defendant from the premises in question.

The trial court signed the final summary judgment on September 23. Under Property Code § 24.007, Hernandez was required to supersede the judgment no later than October 3. While Hernandez filed his motion to determine the supersedeas bond within that ten-day period, the trial court did not conduct the hearing or sign the order setting the supersedeas amount until October 7, 2016, fourteen days after the summary judgment was signed. There is no evidence in the record showing that Hernandez sought to have his motion heard earlier. In fact, at the hearing, the trial court raised the issue whether the supersedeas order was timely under Section 24.007, and Hernandez argued that he was only required to file his motion within the ten-day period. Hernandez did not make the first supersedeas payment until October 17, 2016. The court concluded that the trial court's supersedeas order, and Hernandez's payments under that order, are ineffective to stay the judgment.

In re *Invum Three. LLC*, 530 S.W.3d 748 (Tex.App.-Houston [14th Dist.] 2017, no pet.). Invum sought to evict Ricks. It obtained judgment in the Justice Court, which Ricks appealed to the County Court. Ricks failed to appear at the County Court hearing and judgment was granted to Invum. Invum obtained a writ of possession which it had posted at the property. The same day, Ricks filed a motion to stay the writ of possession or alternatively to recall the writ of possession, and filed a motion for new trial. The following day, the trial court held a hearing on the motion to recall the writ of possession, and signed an order staying the writ of possession. Invum filed this mandamus action, asking the court to require the trial judge to set aside his order.

To obtain mandamus relief, a relator generally must show both that the trial court clearly abused its discretion and that relator has no adequate remedy by appeal. A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts.

Here, Invum has no adequate remedy by appeal because the rules do not provide for a right to appeal an order staying the execution of a writ of possession.

Texas Rule of Civil Procedure 510.13, applicable here,[1] states: "The writ of possession, or execution, or both, will be issued by the clerk of the county court according to the judgment rendered, and the same will be executed by the sheriff or constable, as in other cases. The judgment of the county court may not be stayed unless within 10 days from the judgment the appellant files a supersedeas bond in an amount set by the county court pursuant to Section 24.007 of the Texas Property Code."

Consistent with Rule 510.13, a writ of possession was issued in accordance with the judgment rendered. Rule 510.13 prohibits a stay of the judgment in a forcible-entry-and-detainer action, absent the filing of a supersedeas bond within ten days of the judgment. Ricks did not file a supersedeas bond within ten days of the judgment or thereafter. Accordingly, the trial court's order staying the writ of possession, through which Relator seeks to execute the judgment granting it possession, violates Rule 510.13's unambiguous language, and therefore constitutes a clear abuse of discretion.

PART VII
DEEDS AND CONVEYANCES

Davis* v. *Mueller, 528 S.W.3d 97 (Tex. 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 deeds 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 by Grantee 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.

The court held 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.

Tanya L. McCabe Trust* v. *Ranger Energy, 508 S.W.3d 828 (Tex. App.—Houston [1st Dist.] 2016, pet. denied), construed the relatively new "correction instruments" statutes pursuant to Property Code §§ 5.027, 5.028, 5.029 and 5.030. The issue addressed was whether the addition of new property in a corrected deed of trust constitutes a non-material or material correction.

The Trust obtained a conveyance of overriding royalty interests of various percentages in various different assignments in 2011, some excluding and some including the disputed McShane Fee and Bruce Lease; however, a correction instrument in November 2011 included these disputed tracts. The prior owner, Mark III, of the overriding royalty interests had obtained same from a third party, Tomco, in 2008. The assignment of overriding royalty interests to the Trust included eight different properties including the disputed McShane fee and the Brice lease, as well as six other properties. The assignment from Tomco to Mark III included only six properties, excluding the McShane and Brice properties. Mark III, obtained a mortgage in late 2008 from Peoples Bank, which covered only the original six properties, omitting McShane and Brice. Ultimately when these errors were discovered, Tomco and Mark III executed a correction assignment in December, 2011, which was after the conveyances to the Trust. Mark III defaulted on the Peoples Bank loan and entered into a 2012 settlement agreement with a renewal deed of trust containing only the six properties, omitting McShane and Brice; however, the error was eventually discovered by Peoples Bank and a corrected deed of trust was filed by Peoples Bank in January, 2013. Thereafter, Mark III defaulted and Peoples Bank foreclosed under its corrected deed of trust claiming that such foreclosure wiped out the Trust's overriding royalty interests, to which the Trust objected and brought suit.

At issue was the effect of the various correction instruments on the state of title concerning the overriding royalty interests of the Trust. The correction instruments statues divide correction instruments into those dealing with non-material corrections and material corrections. The court majority concluded the correction instruments were material based on Property Code § 5.029(a), providing in relevant part, that a material correction includes one where the correction adds "land to a conveyance that correctly conveys other land." Property Code § 5.029(a)(1)(C). By contrast, a non-material correction includes, the correction of "a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted from the original instrument". Property Code § 5.028(a)(1). As to a material correction, the statute requires the corrected instrument to be executed by each party; in the subject case, Peoples Bank had independently made the correction, filed it and provided a copy and notice to the debtor. Therefore, the Trust alleged the correction instrument was invalid and not effective since it did not comply with the statutory requirement. The court found the correction instrument invalid.

Further, such statutes provide that the correction instrument replaces and is a substitute of the original instrument and may be relied upon by a bona fide purchaser, but the correction instrument is subject to the interests of an intervening creditor or subsequent purchaser for valuable consideration without notice acquired after the date of the original instrument but prior to the date of the correction instrument. Property Code § 5.030(b), (c). Since the court determined that the correction instrument was invalid, it did not reach the test of whether the Trust was a bona fide purchaser. Consequently, the overriding royalty interests of the Trust was deemed not to have been extinguished by the Peoples Bank foreclosure.

There was a strongly worded dissenting opinion by Justice Evelyn Keyes, who viewed the correction instruments as being non-material, as opposed to material. Justice Keyes' basic premise was that the addition of the McShane and Brice properties was immaterial and could have been corrected by a knowledgeable person under the statute (in lieu of both parties signing the correction deed of trust), based on the rationale that because the original conveyance of the properties contained all eight properties (including McShane and Brice), the omission of the McShane and Brice properties in the subsequent mortgages was a clerical error; apparently, the Justice does not consider it feasible that not all of the properties would be mortgaged. Continuing that reasoning, Justice Keyes thought the assignee should have known the deed of trust should have included all of the property acquired by the assignee (Trust). By the same token, Justice Keyes finds that the Trust could not be a bona fide purchaser since it could not prove that it had no notice that it's overriding royalty interests in McShane and Brice should have been included in the original deed of trust to Peoples Bank; somehow ignoring the fact that

record title, as reflected the original deed of trust, did not include those two properties.

Tregellas* v. *Carl M. Archer Trust No. Three, 507 S.W.3d 423 (Tex. App.—Amarillo 2016, pet. pending). This case concerns a right of first refusal with respect to a mineral interest. In June 2003, a warranty deed transferred the surface of certain property located in Hansford, County Texas to the Archer Trustees. In a separate agreement entered into simultaneously the Archer Trustees were granted a "Right of First Refusal" to purchase the minerals under the surface. The ROFR specifically provided that it was subordinate to mortgages and other encumbrances. Unfortunately, although the property description in the ROFR was otherwise correct, it contained the incorrect county, listing the county as Ochiltree instead of Hansford. The Archer Trustee's attorney prepared a correction and sent it to the grantors for signature but only two of the many grantors signed and returned the correction. The correction was filed of record in Hansford County in September 2004. Two of the original grantors sold their mineral interests on March 28, 2007 to Tregellas. The Archer Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011.

To further complicate matters, in 2008, heirs of one of the original grantors, the Smiths, sold their interest to Tregellas. After they learned of the Archer Trustee suit, the Smith transaction was restructured into a loan secured by a deed of trust with a note payable in ninety days. In August 2012, Tregellas acquired the Smith interest at a non-judicial foreclosure sale.

Upon finding out about the foreclosure transaction, the Archer Trustees amended their petition and alleged that Tregellas "obtained the Smith minerals by subterfuge, artifice, or device." The trial court granted specific performance to the Archer Trustees with respect to both the Farber and Smith ROFR interest.

Tregellas appealed and argued, among other issues, that the correction instrument did not comply with the requirements of the Property Code. §5.028 allows individuals with personal knowledge of facts to prepare and execute an instrument to make a non-material change that results from an inadvertent error. The correction of a county name is included in the list of non-material corrections permitted to be made. Tregellas argues the correction instrument did not substantially comply with the requirements of §5.028 because: (1) the instrument does not state the basis for the the affiant's, Tidwell's, personal knowledge; (2) a signed copy was not sent to the property owners and (3) a copy was not filed in the original incorrect county (Ochiltree) but instead was filed only in Hansford County.

Although the instrument did not state the basis for the Tidwell's knowledge, the court found that because the Tidwells were among the list of grantors one could infer their personal knowledge and that the instrument, therefore, substantially complied with the personal knowledge element of §5.028.

The court also found substantial compliance with the notice requirement because the Archer Trustees had sent the unsigned notice to all of the Grantors.

Finally the court found that the correction complied with the recording requirements. Although a literal reading of §5.028(d)(1) requires the correction to be filed in all counties where the original was filed, because the correction contained the recording information for the original document, the court found substantial compliance. [Note: substantial compliance was all that is required for documents recorded prior to September 1, 2011 when the law was revised. It was further revised in 2013.]

The next argument put forth by Tregellas was that the Archer Trustee's claim for specific performance of the ROFR was barred by the statute of limitations. Generally, when a grantor of a ROFR sells property in breach of a ROFR "there is created in the holder an enforceable option to acquire the property according to the terms of the sale." However, Civil Practice and Remedies Code §16.004(a)(1) requires "a suit for specific performance of a contract for conveyance of real property to be brought no later than four years after the cause of action accrues." The court held that the breach occurred on March 28, 2007, when the Farbers sold their property to Tregellas and that the suit for specific performance was barred because it was filed outside the four year statute of limitations period. The court relied on ***S.V.* v. *R.V.***, 933 S.W.2d 1 (Tex. 1996), where the Texas Supreme Court's stated "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."

The Archer Trustees argued unsuccessfully, that, with respect to rights of first refusal, the right is dormant until the holder is notified of a potential sale. The court disagreed and said that supporting the Archer Trustee's argument would result in profound uncertainty that was "inconsistent with the purpose of the statutes of limitation" which is to "establish a point of repose and to terminate stale claims."

The Archer Trustees then argued for application of the discovery rule which tolls the accrual of a cause of action until the party learns of the injury or, through reasonable due diligence, could have learned of the injury. The court dismissed the Archers Trustees' arguments and relied on the Texas Supreme Court's holding in ***Cosgrove* v. *Cade***, 468 S.W.3d 32, 36 (Tex. 2015), which limits application of the discovery rule to injuries that are "inherently undiscoverable" and not ones that are discoverable by the exercise of "reasonable

due diligence" such as a search of public records such as the county clerk's real property records or the tax rolls. Furthermore, the appeals court emphasized that the Texas Supreme Court has specifically held that there are only rare instances where the discovery rule should be applied to breach of contract cases as each party to a contract is required to protect their own interests and "diligent contracting parties should generally discover any breach during a relatively long four-year limitations period."

In response, the Archer Trustees argued that it is well settled in Texas that "owners of property are under no duty routinely to search the deed records for later-filed documents impugning their title." The appeals court distinguished the case at hand because the Archer Trustees did not own the mineral interest they only owned an option to acquire a mineral interest. The appeals court reversed the trial court with respect to the Farber interest and upheld the trial court with respect to the Smith interest.

Harkins* v. *North Shore Energy, L.L.C., 501 S.W.3d 598 (Tex. 2016). This is a complex and long running dispute between a landowner and a well operator whereby the landowner argued that an oil well drilled by the operator trespassed on the landowner's property. The crux of the case involves construction of ambiguous legal descriptions attached to an option agreement for oil and gas leases drafted by the operator. The description in question stated "Being 1,210.8224 acres of land, more or less, out of the 1,673.69 acres out of the Caleb Bennett Survey, A-5, Goliad County, Texas and being the same land described in the [Export Lease]." The land description in the Export Lease stated "being all of the 1,673.69 acre tract … SAVE AND EXCEPT a 400.15 acre tract described in the [Hamman Lease]." The oil well operator believed the option agreement gave them the right to select up to 1,210.8224 acres out of the entire 1,673.69 acres and that the option agreement was ambiguous because the Export Lease described a 1,273.54 acre tract and not a 1,210.8224 acre tract. The landowner argued that the description specifically excluded the approximately 400.15 acres where the operator had drilled the well. The trial court held for the operator on summary judgment. The appeals court reversed and remanded, holding that the description was ambiguous and, therefore, a question of fact for a jury which made summary judgment inappropriate. The case wound its way up and down through the Texas court system for six years before finally being settled in October 2016 by the Supreme Court of Texas.

The court held that the option agreement was not ambiguous and in doing so, relied on various cases where the court has previously held that a contract is not ambiguous if "the contract's language can be given a certain or definite meaning." The court stated that merely because parties argue that certain language has a different meaning does not, in and of itself, make language ambiguous. A contract is only ambiguous if both interpretations given to specific language are reasonable. The court found that accepting the operator's argument required one to ignore the "plain and express wording of the Option Agreement" which clearly excluded the 400.15 acres. In contrast, because the description attached to the Option Agreement included the phrase "more or less", the two slightly different acreages contained in the property descriptions could be harmonized which prevented the descriptions from being ambiguous. The court held that because there was "only one reasonable interpretation of the Option Agreement, the Option Agreement is not ambiguous."

Richardson* v. *Mills, 514 S.W.3d 406 (Tex. App.—Tyler 2017, pet. denied). This case involves interpreting two ambiguous old documents filed of record in Nacogdoches County. The first instrument is a July 9, 1906 instrument whereby the Mills family granted to the Lindsey family certain rights concerning minerals under the subject property. The issue is whether those rights were temporary, in the form of a mineral lease, or permanent, in the form of a mineral deed. The second instrument is a 1908 instrument that the Mills argue released the 1906 instrument. The trial court found that the two instruments were ambiguous when read together and, therefore, allowed extrinsic evidence of the intent of the parties to be introduced to clarify the ambiguity. Based on the evidenced introduced, the trial court concluded that the first instrument was a lease and the second instrument released the lease. The appeals court disagreed and found that both instruments were unambiguous on their face and refused to permit parol evidence regarding the parties' intent.

The appeals court went on to hold that the first instrument was unambiguously a deed because it used the word "forever" in both the habendum clause and in the warranty making it very clear that it was not intended to grant temporary rights to develop the property but something more permanent.

The Mills next tried to argue that there was an implied covenant in the first instrument that the Lindseys would develop the land and when they failed to do so the first agreement expired. The Tyler Court of Appeals relied on the Texas Supreme Court's holding in ***Danciger Oil & Refining Co. of Texas* v. *Powell***, 137 Tex. 484, 154 (1941), where the court held "that there is no implied covenant for development when there is language of an unconditional conveyance and the instrument is silent about whether grantee is required to either explore the land for oil and gas or develop it in any manner after the discovery thereof."

The appeals court then turned to its analysis of the 1908 instrument. Unfortunately, the 1908 release stated it was releasing a July 9, 1907 instrument. The Mills argued this was a "latent ambiguity" and a mere mistake which could be clarified by parol evidence. However, the court found there were many other discrepancies which pointed to the 1908 instrument being a release of another instrument and not the 1906 deed. For example, the 1908 release states that "by the terms of said contract or lease the time for said development has expired rendering null and void such lease." The 1906 instrument contains no references to any time frame for performance of work to be conducted. The 1908 instrument also states that it was delivered to "the Nacogdoches Land Company." The 1906 instrument makes no reference to the "Nacogdoches Land Company." The appeals court ultimately concluded that 1906 instrument was an unambiguous mineral deed and the 1908 agreement was an unambiguous document releasing another instrument and not the 1906 deed.

Savering* v. *City of Mansfield, 505 S.W.3d 33 (Tex. App.—Fort Worth 2016, pet. denied). In November 1995, a joint venture filed a Plat Revision in the Tarrant County records for the development of a residential community called the Arbors of Creekwood. The Plat divided the lots into RI, which were intended for residential use and R2, which were "intended for public recreation use."

On December 11, 1995, the same joint venture filed a Declaration of Covenants, Conditions and Restrictions for the Arbors of Creekwood. The Declaration stated the HOA would "hold record fee simple title to the Common Properties." The Common Properties are defined as including "[a]ny and all greenbelt areas, bicycle and/or jogging paths, landscape easements, floodways, creeks, drainage ways…or other similar areas shown on the Plat…" The HOA's articles of incorporation were not filed until four days later, December 15, 1995.

On December 22, 1995, the joint venture executed a warranty deed that conveyed the R2 lots to the Communities Foundation of Texas, Inc. (the "Foundation").

In December 2012 the Foundation conveyed the R2 lots to the Mansfield Park Facilities Development Corporation (the "City").

In 2013 the City constructed a bridge over a creek which connected the jogging trails within the Arbors of Creekwood to a public park located on the opposite side of the creek.

Several residents of the Arbors of Creekwood then filed litigation seeking injunctive relief to prevent the opening of the bridge and to quiet title in the R2 lots. The residents claimed that the R2 lots had been conveyed to the HOA by the Declaration as part of the Common Properties. The City made many unpersuasive arguments as to why the R2 lots were not included within the definition of Common Properties before finally arguing that even if they were included that "the Declaration could not have conveyed the R2 lots to the HOA because the HOA didn't exist at the time the Declaration was filed." The City, and the dissent opinion, rely on the rule that "a deed is void if the grantee is not in existence at the time the deed is executed." The Fort Worth Court of Appeals disagreed with the City and entered judgment in favor of the residents.

The dissent in the case argues succinctly that the "attempted conveyance was a day late and a dollar short." The City filed a petition for review on January 13, 2017 and it remains to be seen whether we have heard the end of this case.

Jackson v. Wildflower Production Company, 505 S.W.3d 80 (Tex. App.—Amarillo 2016, pet. denied). In this case, following a bank foreclosure, two different parties were granted a mineral interest by the bank seven days apart. The first grant, to Jackson, was "a Mineral Deed Without Warranty" dated November 23, 1993 and recorded on December 3, 1993. The second grant, to Wildflower Production, was also a "Mineral Deed Without Warranty" dated November 30, 1993 and recorded on December 14, 1993. The trial court found that Wildflower "acquired a superior claim of title' by virtue of being an innocent purchaser for value without actual or constructive notice of Jackson's ownership interest." The appeals court reversed the trial court's decision. The case turned on the difference between the title conveyed by a deed versus a quitclaim. According to the appeals court, "[i]f, when taken as a whole, the instrument discloses a purpose to convey the property itself, and not merely a transfer of the grantor's interest, it will be given the effect of a deed, even though it may have some characteristics of a quitclaim. Conversely, if the instrument, taken as a whole, indicates the grantor's intent to merely transfer whatever interest the grantor may own, it will be treated as a quitclaim deed." Under the Texas recording system, "the grantee under a later deed will prevail over the grantee in a prior unrecorded deed of the same property, unless the purchaser had notice of the prior unrecorded conveyance." However, a very important caveat to this general rule is that a "party receiving a quitclaim deed to land cannot avail himself of the defense of innocent purchaser for value without notice." Essentially, the courts feel that the very essence of quitclaim deed "conveys upon its face doubts about the grantor's interest and a buyer is necessarily put on notice as to those doubts." The recipient of a quitclaim deed is "deemed to be on notice of all legal or equitable claims, recorded or unrecorded, existing in favor of a third party at the time the quitclaim deed was delivered" and takes the property subject to those adverse legal claims. The appeals court goes on to

discuss what makes a document a quitclaim and takes great pains to clarify that the mere use of quitclaim words, such as "all of my right, title and interest, is not the litmus test for determining whether a particular instrument is a quitclaim."

Wildflower argued that the Texas Supreme Court's decision in ***Bryan* v. *Thomas***, 365 S.W.2d 628 (Tex. 1963), where Justice Culver stated "[t]o remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor's undivided interest in a particular tract of land, if otherwise entitled, will be accorded the protection of a bona fide purchaser" supported their argument that the instrument was a deed and not a quitclaim. The appeals court distinguished the holding in Bryan by explaining that: (1) the deed in Bryan contained a warranty clause; and (2) to be a quitclaim an instrument must have other indicators of the grantor's intent, such as "the absence of a covenant of seisin or a warranty of title." The appeals court concluded that the Wildflower Deed was a quitclaim because it (1) conveyed only the "grantor's right, title, interest, and estate," (2) contained no covenant of seisin, (3) included no warranty of title, and (4) otherwise did not express and intent to convey the property itself."

Greer* v. *Shook, 503 S.W.3d 707 (Tex. App.—El Paso 2016, pet. pending). This case deals with conflicting interpretations of a 1927 instrument from Lynn Eddins to John Bordon whereby Eddins granted Borden a series of interests that appear upon first impression to be contradictory. The instrument contained the following grants:

In paragraph 1 of the instrument "an undivided one sixteenth (1/16) interest in and to all of the oil, gas and other minerals [which] may be produced…"

In paragraph 4 of the instrument it stated "[b]e it expressly understood between the parties that the vendor is the owner of all of the royalty and that the grantee is purchasing one half (1/2) of the royalty [] one half (1/2) of the minerals, produced in and from wells or other operations…"

In paragraph 5 the instrument went on to provide that "[s]aid land being now under an oil and gas lease executed in favor of John Ross, … this sale is made subject to the terms of said lease, but covers and includes one half (½) of all the oil royalty…"

Under the terms of the lease referred to in paragraph 5 Eddins retained a 1/8 royalty interest in the production.

Finally, in paragraph 6, the instrument provided that in the "event the above described lease for any reason becomes cancelled or forfeited, than and in that event an undivided one sixteenth (1/16) of the lease interest and all future rentals on said land ... shall be owned by said Grantee, he owning one sixteenth of all oil, gas and other minerals in and under said lands…"

At some point the original lease expired and Eddins successors entered into a new lease with Patriot Resources, Inc. with an average royalty of approximately ¼. In 2013 Patriot determined the deed was ambiguous and it was unclear whether the Borden successors were entitled to: (1) 1/16 of all production regardless of the size of the royalty interest or (2) ½ of any royalty interest established pursuant to the terms of a lease. Patriot filed an interpleader to have the court settle the matter. Eventually both the Bordons and the Eddins filed motions for partial summary judgment. The trial court found that the successors of John Borden were entitled to a ½ mineral interest in any production. The successors of Eddins appealed. The El Paso Court of Appeals affirmed the finding of the trial court.

The El Paso Court of Appeals carefully laid out some very helpful rules of interpretation for the practitioner faced with interpreting an old mineral deed. These rules, along with the historical color provided by the court make the case helpful reading for any practitioner faced with a similar dilemma. The first rule of construction the appeals court referred to as the "Double Fraction Problem and the Legacy of the 1/8 Royalty." The court explained, referring to the Texas Supreme Court's discussion of the issue in ***Hysaw* v. *Dawkins***, 483 S.W.3d 1, 9 (Tex. 2016), that historically the royalty in virtually all oil and gas leases was 1/8. Therefore, when granting a portion of their retained interest parties would tend to either use a double fraction (1/2 of 1/8) or simply say the "single fraction of 1/16, to express that he was actually giving the grantee ½ of his entire royalty interest." Another related concept is what the court referred to as the "estate misconception doctrine." Under this doctrine, the court explained that many land owners who "leased their minerals to an operator [thought] they only retained 1/8 of the minerals in place, rather than a fee simple determinable with the possibility of reverter in the entirety of the mineral estate." The court found that when applying these two doctrines to the conveyance at issue in this case one can easily resolve all of the apparent contradictions and it was clear that the instrument conveyed a ½ mineral interest which "included a corresponding royalty interest." Furthermore, the court stated that the arguments put forth by the Bordens would require one to ignore all but two sentences of the instrument which ignores years of Texas Supreme Court guidance on the interpretation of mineral instruments. As stated by the court, the Texas Supreme Court has repeatedly held that a mineral deed must be interpreted in its entirety by "construing each and every provision in the deed and harmonizing any apparent conflicts found in the deed as a whole" and without rendering any provision meaningless. Although the analysis of the court is sound and appears well grounded in the law, this case may not be over yet as the parties have appealed to the

Supreme Court of Texas.

BNSF Railway Company* v. *Chevron Midcontinent, L.P., 528 S.W.3d 124 (Tex.App.-El Paso 2017, no pet.). The deed in question conveyed property to the grantee "for a right of way," and included the right to use wood, water, stone, timber and other materials useful to construct and maintain a railway line. After oil was discovered under the railroad tracks, BNSF sued for trespass to try title, arguing that the deed granted to BNSF's predecessor gave the company not just a right of way easement, but the entire strip of land. The question for the court was whether the deed conveyed a fee estate in the tract or merely an easement.

While use of the phrase "right of way" in a railroad deed may answer the easement versus fee question conclusively in other states, it does not answer the question in Texas. The term "right of way" is not a legal term of art with a set definitive meaning when used in a deed, but rather may be used in two senses. Sometimes it is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Accordingly, use of the term "right of way:" in a deed or other document does not necessarily define or limit the estate conveyed.

The court held that the deed conveyed only a surface easement, based on the following factors: (i) the opening recitals recognized a benefit to the grantor of having a railroad crossing over the described property; (ii) the phrase "right of way" appears in front of the words "that strip of land" which limits the nature of any subsequently described conveyance; (iii) the clauses describing the conveyance reference a line traced by surveyors for the right of way that went over, through and across various tracts of land. The words "over, through and across" suggest that the conveyance was intended to be an easement; and (iv) the provision allowing the use of timber, etc., to construct a railway line would not be necessary in the conveyance of a fee simple estate because those rights would pass with the fee.

PART VIII
VENDOR AND PURCHASER

Sommers* v. *Sandcastle Homes, Inc., 521 S.W.3d 749 (Tex. 2017). Pending the outcome of an action involving proper title to, establishing an interest in, or enforcing an encumbrance against real property, the party seeking relief may file a notice of lis pendens in the county's real-property records. A notice of lis pendens broadcasts to the world the existence of ongoing litigation regarding ownership of the property. When the notice is properly filed, even a subsequent purchaser for value does not take the property free and clear.

A lis pendens functions to provide constructive notice, avoid undue alienation of property, and facilitate an end to litigation. Through the years, the courts of appeals have held the same. The latter two purposes are particularly implicated when the court addresses the ability to expunge a notice of lis pendens.

The trial court may expunge a notice of lis pendens if (1) the pleading on which the original order rests does not include a real-property claim; (2) the claimant does not appropriately establish the probable validity of his real-property claim; or (3) the claimant fails to serve a copy of the record notice on all entitled to receive it. Tex. Prop. Code § 12.0071(c)(1)-(3). Here, Sandcastle obtained the first expunction order because the trial court found Cohen's pleadings did not include a real-property claim, while the second order was based on Cohen's inability to establish the probable validity of his claim.

This case involves one basic question: When a notice of lis pendens is expunged, is all notice--no matter the sort and no matter its source--extinguished with the expunction order?

The court of appeals had rejected what it saw as a narrow view of the statute and instead advanced a bright-line rule that the expunction of notice includes any notice of the claims involved in the underlying suit covered by the lis pendens. But the Supreme Court said that the court of appeals reads the plain text of the statute too broadly. The statute simply doesn't address the circumstance of a purchaser who receives notice of a third-party claim by some means other than a recorded notice of lis pendens.

Property Code section 12.0071(f) provides that a purchaser cannot be charged with record notice, actual or constructive, following a proper expungement. But the extent of that protection is expressly limited to "the notice of lis pendens" and "any information derived from the notice." By negative implication, expunction is given no effect with respect to the universe of other information, not included in the scope of section 12.0071(f), that is neither (a) the 'notice of lis pendens' itself nor (b) 'information derived from the notice' of lis pendens.

To the extent the recorded lis pendens puts a potential buyer on inquiry notice to look to the actual lawsuit before the notice's expunction, that buyer could claim protection under the statute. Any actual awareness obtained by review of the facts referred to in the lis pendens cannot be used to rebut that purchaser's status as a bona-fide purchaser or to continue to burden the property. But that does not mean the expunction statute can be read so far as to eradicate notice arising independently of the recorded instrument expunged. We are confined by a statute's text as written.

Expunction of the lis pendens is a restoration of the chain of title free of the record notice of a potential claim

of interest associated with the lis pendens. It is not an adjudication of a later purchaser's status as a bona-fide purchaser under any set of circumstances. Such an overbroad interpretation of the statute risks imbuing an expungement of a notice of lis pendens with the claim-preclusive effect of a full-blown adverse judgment on the merits. That means persons claiming an interest in property may be left in a worse position for having filed a lis pendens that is later expunged than had they not filed one. That result runs counter to longstanding Texas law encouraging the recording of real-property interests, including the filing of a lis pendens.

Zaragoza* v. *Jessen, 511 S.W.3d 816 (Tex. App.—El Paso 2016, no pet.). The Jensens entered into negotiations with the Zaragoza to buy a house for their daughter. Mrs. Jensen and Mrs. Zaragoza prepared a document outlining the terms of the transaction, but it was never signed. Under the terms of the unsigned agreement the Jensens were to pay the Zaragozas a down payment of $73,010; and to assume payment of the first mortgage with a balance of $33,990.00. The Zaragozas were to use the down payment to pay off a second mortgage. Once the first mortgage was paid off, the Zaragozas agreed to deed the property to the Jensens. The Jensens paid the down payment and the Zaragozas turned over possession on the house on June 18, 2007.

The Jensens then made over $9,717.41 in improvements to the house. In September of 2009 the Jensens paid the first mortgage in full. The Zaragozas refused to sign over the deed to the house and they also failed to pay off the second mortgage. The Jensens sued for breach of contract and the Zaragozas claimed that the statute of frauds prevented enforcement because the contract was never signed.

The El Paso Court of Appeals held that the statute of frauds is subject to a "well-recognized exception under the doctrine of partial performance." Under this exception, if a contract has been partly performed it may be "enforced in equity if 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 unearned benefits." The appeals court went on to outline the elements required for a purchaser to enforce an oral contract: (1) payment; (2) possession and (3) improvements or other facts that would create a fraud on the purchaser if the contract were not enforced. The Jensens were clearly able to establish every element of the three prongs laid out by the appeals court.

Another case involving oral contracts and partial performance is ***Burrus* v. *Reyes***, 516 S.W.3d 170 (Tex.App.—El Paso 2017, pet. denied).

Capcor at Kirby Main, L.L.C.* v. *Moody Nat'l. Kirby Houston S, L.L.C., 509 S.W.3d 379 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In this case, a prospective purchaser of commercial property sued the vendor for breach of the sales contract and the escrow agent for tortious interference with the contract and breach of fiduciary duty with respect to a failed closing. The trial court had awarded the seller attorney fees, the escrowed funds and contractual liquidated damages and the prospective purchaser appealed. At issue in the case was the title company's refusal to accept a cashier's check delivered after 5:00 on the day of closing when the escrow agent had informed the purchaser's lawyer the day before the transaction, and the purchaser on the morning of the closing, that a wire would be required. The contract at issue was the standard Texas "Unimproved Property Contract" promulgated by the Texas Real Estate Commission. The contract contained a specific closing date and stated "[a]t closing … Buyer shall pay the Sales Price in good funds acceptable to the escrow agent." The contract went on to provide that failure to close on the closing date entitled the other party "to exercise its contractual remedies, which included terminating the contract and receiving the earnest money as liquidated damages." Although the Texas Title Manuel considers a cashier's check to be a form of good funds, Fidelity National Title had a policy not to accept cashier's checks because of the increase in the number of fraudulent checks. Furthermore, cashier's checks are subject to a three day recall which meant that the transaction could not close and fund the day the agent received the check. The day after the scheduled closing, the purchaser offered to send a wire but the seller refused and instead cancelled the contract. The purchaser sued. In addition to the arguments against the agent, the purchaser claimed that failure to deliver good funds on the day of closing was not a material breach. The appeals court reiterated that it is well accepted that a material breach of a contract by one party excuses the other from performance and although time is not "ordinarily of the essence," "[t]imely performance may be a material term if "it is clear the parties intend that time be of essence..."" A contract must either explicitly state that time is of the essence or there must be something about the deal that makes it apparent to the parties that time is of the essence. Generally, if a party has the right to cancel a contract if it is not consummated at a certain date and time, the courts will usually find that time was of the essence. In this case, the terms of the contract clearly allowed the seller to terminate the contract and retain the earnest money if the purchaser failed to deliver good funds acceptable to the escrow agent by the closing date.

Ifiesimama* v. *Haile, 522 S.W.3d 675 (Tex.App.-Houston [1st Dist.] 2017, pet. denied). The Ifiesimamas, who are husband and wife, decided to sell their home.

Nothing in the record shows that Mrs. Ifiesimama had an interest in the property. Rather, the evidence shows that all documents relating to the property were in Mr. Ifiesimama's name and that Mrs. Ifiesimama waived any right she may have had to the property via a community property interest by signing such a waiver in the deed of trust when the Ifiesimamas mortgaged the property.

Haile and Alemu made an offer to purchase the property for $193,000. Mr. Ifiesimama signed the sales contract, which provided for specific performance or any other relief provided by law if Seller breached. The buyers obtained an appraisal that fell $14,000 shy of the purchase price. They sought an amendment of the contract to reduce the purchase price. Both Haile and Alemu signed a document amending the contract, and a signature appeared above the printed name of Tamuno Ifiesimama. Mr. Ifiesimama later argued, during the course of this litigation, that he never signed this document and that this signature was a forgery. Mrs. Ifiesimama's name was not listed on the amendment, and she did not sign this document.

Haile, Alemu, and Mr. Ifiesimama all attended the closing and signed numerous documents to finalize the transaction. Mr. Ifiesimama signed the documents both in his own name and as "attorney in fact" for his wife. However, he later revealed at the closing that he did not actually have power of attorney for his wife, and as a result, the title company refused to close the sale. Haile and Alemu therefore did not receive title to the property. Haile filed suit against both of the Ifiesimamas, seeking specific performance of the sales contract as well as injunctive relief prohibiting the Ifiesimamas from selling the property to another buyer.

The essential elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. A breach of contract occurs when a party to the contract fails or refuses to do something that he has promised to do.

Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract. Specific performance is not a separate cause of action but is instead an equitable remedy that is used as a substitute for monetary damages when such damages would not be adequate To be entitled to specific performance, the plaintiff must show that it has substantially performed its part of the contract, and that it is able to continue performing its part of the agreement. The plaintiff's burden of proving readiness, willingness and ability is a continuing one that extends to all times relevant to the contract and thereafter.

The Ifiesimamas argue that there was not a meeting of the minds to sell the property at the amended price of $179,000 and that neither of them signed the document purportedly amending the sales contract. They argue that the signature that appears above Mr. Ifiesimama's name on the amendment is fictitious, and they point out that this signature is different from his signature on the original sales contract. However, the Ifiesimamas offered no evidence at trial concerning the validity of the signature on the amendment. However, Mr. Ifiesimama went to the closing and signed a number of documents that provided circumstantial evidence that he had agreed to the price reduction in the amendment. The court thus held that factually sufficient evidence supports the trial court's findings that Mr. Ifiesimama breached the amended sales contract by failing to convey a general warranty deed and that Haile and Alemu are entitled to specific performance of the amended sales contract as a result.

Mrs. Ifiesimama had signed nothing. The Ifiesimamas argued that because the property was their community property, Mr. Ifiesimama lacked the authority to sell or encumber Mrs. Ifiesimama's interest in the property.

Family Code section 3.003 provides that property possessed by either spouse during marriage is presumed to be community property. Section 3.102(a) provides that during marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single. The Ifiesimamas purchased the property during their marriage. A deed of trust executed when they financed the purchase included a provision disclaiming any rights in the property. The Ifiesimamas did not introduce any evidence at trial indicating that Mrs. Ifiesimama had an interest in the property or that the property was subject to their joint management, control, or disposition.

The court concluded that Haile and Alemu presented evidence that the property was subject to Mr. Ifiesimama's sole management, control, and disposition and that they did not have notice that Mr. Ifiesimama lacked authority to sell the property on Mrs. Ifiesimama's behalf. It also concluded that the Ifiesimamas did not demonstrate that Mrs. Ifiesimama was a necessary party to the sales contract and that the contract was not valid without her signature. It therefore held that the trial court did not err in concluding that Haile and Alemu entered into a valid and enforceable contract with Mr. Ifiesimama.

PART IX
EASEMENTS

Horse Hollow Generation Tie, LLC* v. *Whitworth-Kinsey #2, Ltd., 504 S.W.3d 324 (Tex. App.—Austin 2016, no pet.). This case involves a 180 foot easement corridor along a 200 mile transmission route connecting Horse Hollow's wind farms near Abilene with a substation in San Antonio. Horse Hollow contends that there was a mutual mistake in the easement agreements signed by the landowners regarding how the landowners

would be paid and that the easement agreements should be reformed to correct the mutual mistake. The trial court refused to reform the easement to reflect the mutual agreement of the parties and Horse Hollow appealed.

The appeals court stated that "reformation requires two elements: (1) an original agreement and (2) a mutual mistake made after the original agreement in reducing the original agreement to writing." The trial transcript was clear that both parties understood that the first payment for the easement would be based on an estimated length and the second on the actual surveyed length. Unfortunately, the actual agreement stated that both payments would be made based on the estimated length which would have resulted in a significant windfall to the Whitworths. The appeals court found that the mutual mistake was clear, overturned the trial court, and reformed the easement.

Houston Laureate Assoc.* v. *Russell, 504 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Houston Laureate is the owner of an office building that is surrounded by a green belt and walking paths. Houston Laureate entered into an easement agreement granting a permanent, non-exclusive easement to use the green belt land for recreational purposes to the residents of an adjoining subdivision. At some point, Houston Laureate started charging fitness instructors who were instructing residents a licensing fee and demanded that all parties stay on the paths and off the grass. The residents sued. The trial court granted partial summary judgment to the residents and found that Houston Laureate breached the easement by requiring the residents to stay on the paths and by charging a licensing fee. Although the appeals court overturned part of the trial court's ruling, it agreed with the trial court that the Easement Agreement allowed the residents to use the land without charge. The appeals court found that Houston Laureate had the right to impose reasonable rules on the use of the greenbelt but denying all use of the greenbelt was unreasonable.

Lindemann Properties, Ltd.* v. *Campbell, 524 S.W.3d 873 (Tex.App.-Fort Worth 2017, pet. pending). Smith conveyed an easement to Campbell's father "for the installation of a radio-transmission tower." The easement did not specify the tower's height or size, but it stated the following regarding its location, which was to be located in a 500 foot square area to be determined after installation of the tower. Some years later, Campbell began constructing a new tower. The original tower was left in place during construction of the new tower, so the new tower was not located in the exact place as the old tower. Lindemann owns the land where the towers were built. It sued seeking a declaration that the easement had terminated because Campbell had built a new tower and had abandoned the old tower and subsequently removed it.

An easement is a nonpossessory interest that authorizes a holder's use of property for only a particular purpose. A court will apply basic principles of contract construction and interpretation when considering an express easement's terms. A court will give the terms their plain and ordinary meaning when they are not expressly defined, and we read the terms of an easement as a whole to determine the parties' intentions and to carry out the purpose for which the easement was created.

Referring to the easement's use of the terms "a" and "said," Lindemann argues that by its plain terms, the easement only authorized the placement of a single tower on the Property--the original tower. The court agreed that the words "a" and "said" are singular, but the problem with Lindemann's construction is that it focuses exclusively on the meaning and effect of only those terms while completely disregarding the meaning and effect of other, potentially relevant terms. Lindemann's contention that the easement "automatically terminated upon removal or abandonment of the Original Tower" is similarly premised upon a reading of only part of the easement contract (the habendum clause). This erroneous approach patently conflicts with the well-established requirements that a court must examine contracts as a whole and assume that the parties intended for every clause to have some effect--indispensable rules that have been a component of contract-construction standards for decades.

If the facts of this case were that Campbell had removed the original tower and done nothing else, then Lindemann's simple argument that the easement terminated pursuant to the habendum clause would control the outcome. But the facts are not that clear-cut, nor is the analysis. Not only did Campbell remove the original tower--something the ingress/egress clause expressly permitted--he also constructed a replacement tower within the same fenced area that enclosed the original tower. The question then is whether the easement afforded Campbell the right to replace the original tower with the new tower.

The easement expressly grants the holder the right to maintain the tower. The question was whether the right to maintain includes the right to replace. The court held that, in this case, the term "maintaining" is broad enough to include the right to replace the tower when necessary.

Lindemann also claimed the easement terminated because the replacement tower exceeded the scope of the original easement and because Campbell operated both towers simultaneously for a brief period. The court held that Campbell did not exceed the scope of the easement.

PART X
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Rife* v. *Kerr, 513 S.W.3d 601 (Tex. App.—San Antonio 2016, pet. denied). In this case, a trespass to try title action regarding an undivided ½ mineral interest, the trial court granted the Kerrs no evidence summary judgment motion and the Rifes appealed. The appeals court agreed that the Rifes had produced some evidence that "they have superior title to the mineral estate" and reversed and remanded the case for further proceedings. The case is helpful to the practitioner because the appeals court thoroughly outlined the law on trespass to try title cases. As stated by the San Antonio Court of Appeals "[t]o prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned." The Rifes' claim rested on item two, above, superior tile through a common source. The Kerrs and the Rifes both claim title from L.A. Kerr who held title to certain lots as a trustee for the express purposes of "expediting and simplifying the sale of lots" on behalf of the original owners of the lots. Subsequent agreements between the parties specifically stated that the "[l]ots that remained in the hand of L.A. Kerr, Trustee" were "set aside for the joint use and benefit of L.A. Kerr and A.H. Rife." Under well-established law, "[t]itle, to trust property vests immediately in the beneficiaries if an express trust becomes dry or passive." Where, as in this case, the "purpose of a trust is to hold property 'for the use and benefit of another', then the trust is a dry passive trust" and the property immediately vests in the beneficiaries. As a result, the property at issue was arguably vested in Rife and Kerr, and not with Kerr as trustee.

To further complicate matters, in 1932, Kerr, in his individual capacity, and not as trustee, conveyed via deed to his wife a series of lots which included the lots to which the Rifes' claim an undivided ½ interest in the mineral estate. If the trust was indeed a "dry trust" Kerr could only have conveyed to his wife his ½ interest in the properties not Rifes' ½ interest. The chain of title is further complicated by the fact that in 1937 L.A. Kerr, as Trustee, conveyed to A.H. Rife a full undivided ½ interest in the "unsold" lands held by "in my name as trustee".

If things weren't complicated enough, the Kerrs added another wrinkle to the case by claiming that they have adversely possessed the property since the 1932 deed. Because the Kerrs and Rifes are arguably co-tenants in the property, the Kerrs have a much higher burden to establish adverse possession. The standard that applies to co-tenants is "ouster-unequivocal, unmistakable, and hostile acts the possessor took to disseize other cotenants." This more stringent requirement can be met in two ways: (1) conveyance of the property by one co-tenant purporting to convey the entire property "and record of such conveyance, followed by possession, constitutes notice of repudiation" and (2) continuous long-term possession of the land under the claim of ownership by one co-tenant without repudiation by the other cotenant. The appeals court held that the Kerrs produced some evidence of ouster and remanded the case to the trial court for further proceedings. Although there was some evidence presented to the trial court supporting ouster of the surface estate, it will be interesting to see whether the Kerrs can also prevail on a claim of ouster with regards to the mineral estate.

Brown* v. *Snider Industries, LLP, 528 S.W.3d 620 (Tex.App.-Texarkana 2017, no pet.). Under Section 16.026 of the Civil Practice and Remedies Code, "[a] person must bring suit not later than 10 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." Civil Practice and Remedies Code § 16.026. The limitations period commences on the date the adverse possessor actually and visibly appropriates the claimed land.

However, the enclosed land exception, Section 16.031 of the Civil Practice and Remedies Code, provides that:

> (a) A tract of land that is owned by one person and that is entirely surrounded by land owned, claimed, or fenced by another is not considered enclosed by a fence that encloses any part of the surrounding land.
> (b) Possession of the interior tract by the owner or claimant of the surrounding land is not peaceable and adverse possession as described by Section 16.026 unless:
>
> (1) the interior tract is separated from the surrounding land by a fence; or
> (2) at least one-tenth of the interior tract is cultivated and used for agricultural purposes or is used for manufacturing purposes.

Here, Section 16.031 does not apply to the property in dispute, because the 8-acre tract at issue is not entirely surrounded by land owned, claimed, or fenced by another as required by the statute. Although owns or claims the property to the tract's west, east, and south, Snider does not own or claim the property north of and abutting the 8-acre tract. Therefore, Section 16.031 does not apply to the exclusion of recovery under the ten-year statutory period.

Roberson* v. *Odom, 529 S.W.3d 498 (Tex.App.-Texarkana 2017, no pet.). The elements of a suit to quiet title are: (1) the plaintiff has an interest in a specific property; (2) title to the property is affected by the defendant's claim; and (3) the defendant's claim, although facially valid, is invalid or unenforceable. A suit to quiet title is an equitable proceeding, and the principle issue in such suit is the existence of a cloud on the title that equity will remove. The purpose of a suit to quiet title is to remove an encumbrance or defect from a plaintiff's title to the property.

On the other hand, a trespass to try title action is the method for determining title to lands, tenements, or other real property. To maintain an action of trespass to try title, the person bringing the suit must have title to the land sought to be recovered. Unlike a suit to quiet title, a trespass to try title is a purely statutory creation and embraces all character of litigation that affects the title to real estate.

Regardless of the form the action takes or the type of relief sought, when a plaintiff's pleadings and the evidence show that the dispute between the parties involves a question of title, the trespass to try title statute governs the substantive claims. Any suit that involves a dispute over the title to land is, in effect, an action in trespass to try title, whatever its form and regardless of whether legal or equitable relief is sought.

The only substantive issue in this case was whether title to the property belonged to Odom. Thus, the underlying nature of Odom's action as a trespass to try title is not altered by the fact that the parties and the trial court may have referred to it as a suit to quiet title. The reality in this suit is that it involves solely the issue of title. The court concluded, therefore, that the substance of Odom's claims was a trespass to try title action, rather than a suit to quiet title.

Here, Odom sought to recover judgment pursuant to the five-year statute of limitations, which has no requirement that the claimant be in good faith. There is no requirement (such as in one of the twenty-five-year statutes of limitations) that the claimant be in good faith. Because the doctrine of unclean hands does not apply in a suit such as this one, Clemons' defense is not applicable in this case and, thus, the trial court acted within its discretion when it struck that portion of Clemons' pleading.

PART XI
CONDEMNATION

County of El Paso* v. *Navar, 511 S.W.3d 624 (Tex. App.—El Paso 2015, no. pet.). Navar had owned a mobile home park for years and petitioned the County to issue a Certificate of Compliance (regarding water, sewer, gas and electric services) for additional lots to be leased to new tenants. The Certificate of Compliance was sought by Navar on April 1, 2008, and was still not issued as of May 11, 2010. Pursuant to Tex. Loc. Gov't Code Ann. § 232.028(e), the County Commissioners Court must make a determination within 20 days after the date of receipt of the request and issue the Certificate, if appropriate, within 10 days after its determination is made. The lead planner for the County denied issuance of the Certificate because the "residences … were not in compliance with statutory authority", but without identifying any statutory authority on which such statement was based. Navar sued the County and, later, the County issued the Certificate of Compliance. Even though he received the Certificate, Navar continued the lawsuit alleging a wrongful taking of personal property, as well as other causes of action. In reviewing the plea to the jurisdiction of the court, based on a governmental immunity theory, the court considered whether the evidence raised a fact question on jurisdiction; if so, the plea would be denied. Although a governmental subdivision is immune from suit for money damages, there is an exception for a regulatory taking, which the court found to exist. Although Navar alleged a regulatory taking under the Nollan/Dolan exaction test, ***Nollan* v. *Calif. Coastal Comm'n***, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); ***Dolan* v. *City of Tigard***, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and the Penn Central unreasonable interference test, ***Penn Cent. Transp. Co.* v. *City of New York***, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The court looked to the unreasonable interference test as established by ***Penn Central***, which held that a regulatory taking occurs when government action unreasonably interferes with a landowner's use and enjoyment of the property. The court cited three factors or elements: (1) the economic impact of the regulation on the claimant, (2) the extent the regulations interfered with distinct investment-backed expectations, and (3) the character of the government action. Navar had pled each of the appropriate elements, alleging that he was unable to lease new mobile homes, had lost rental income from such activities, and the County's refusal to issue the Certificate of Compliance without a legitimate basis. Therefore, the court found the County had effected a regulatory taking by improperly relying on zoning standards to revoke the property's "grandfathered" non-conforming status. Having proven at least one type of regulatory taking, the court concluded that other types of regulatory taking were not necessary to be proven. But, in a concurring opinion Justice Hughes noted that the government immunity provision would not be applicable to the extent that Navar was complaining about the County's misapplication of the law to his property or with respect to the timeliness of the County's determinations, since a challenge based upon the infirmity of the process would not constitute a regulatory taking.

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.

PART XII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Tarr* v. *Timberwood Park Owners Association., No. 16-1005 (Tex. May 25, 2018). In a case that is of interest to many in the age of Airbnb, a homeowner entered into thirty-one short term rental arrangements which totaled 102 days over five months. The deed restrictions for the Timberwood Park Owners Association provided that homes should be "used solely for residential purposes." The HOA notified Tarr that renting out his home was a commercial use and a violation of the deed restrictions. Tarr filed a declaratory judgment action seeking a declaration that leasing the house was a residential purpose and there was no "durational" requirement in the deed restrictions. Tarr and the HOA both filed motions for Summary Judgment and the trial court granted the HOA's motion. The Court of Appeals affirmed, holding that short-term renters were not residents but "transients, and relying on Property Code § 202.003(a), which requires that "a restrictive covenant be liberally construed to give effect to its purpose and intent." The Supreme Court reversed.

The court first dealt with the conflict between the common law maxim that restrictive covenants are to be strictly construed and Property Code § 202.003(a) which requires certain covenants to be liberally construed. After more than seven pages of learned discussion on the matter, the court basically punted, stating "We have not yet deliberated section 202.003(a)'s effect, if any, on the construction principles we have long employed to interpret restrictive covenants. Nor do we reach that decision today. We don't have to reconcile any potential conflict between section 202.003(a) and the common-law principles—or whether those common-law standards can ever again be appropriately employed—because our conclusion today would be the same regardless of which interpretative standard prevails." The court held that the unambiguous covenants simply did not address the use on the property in this case. "No construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation."

The HOA's arguments were, first, that the rentals violated the restriction that only "single family residences" could be constructed on the property, and, second, that the use violated the restriction that the property be used only for "residential purposes."

The HOA contended that, because Tarr often rented to groups that included members of more than one family, that such a use violated the single-family residence restriction. Its argument was based on reading two provisions together—the one that restricted what could be constructed on the property and one that restricted the use of the property. The court held that "to combine those provisions into one mega-restriction is a bit of a stretch." The court held that the single-family residence restriction merely limits the structure that can properly be erected upon Tarr's tract and not the activities that can permissibly take place in that structure.

The court also held that the use did not violate the residential purposes restriction. The covenants in the Timberwood deeds fail to address leasing, use as a vacation home, short-term rentals, minimum-occupancy durations, or the like. They do not require owner occupancy or occupancy by a tenant who uses the home as his domicile. Instead, the covenants merely require that the activities on the property comport with a "residential purpose" and not a "business purpose." The court declined to add restrictions to the Timberwood covenants by adopting an overly narrow reading of "residential." The court expressly disapproved of the cases that impose an intent or physical-presence requirement when the covenant's language includes no such specification and remains otherwise silent as to durational requirements. Affording these phrases their general meanings and interpreting the restrictions as a whole, the court held that so long as the occupants to whom Tarr rents his single-family residence use the home for a "residential purpose," no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants in the Timberwood deeds.

Western Hills Harbor Owners Association* v. *Baker, 516 S.W.3d 215 (Tex.App.—El Paso 2017, no pet.). A declaration containing restrictive covenants in a subdivision defines the rights and obligations of property ownership, and the mutual and reciprocal obligation undertaken by all purchasers in a subdivision creates an inherent property interest possessed by each purchaser. Restrictive covenants are subject to the general rules of contract construction. Section 202.003 of the Property Code expressly states that a restrictive covenant shall be liberally construed to give effect to its purposes and intent.

The Association filed an amendment to its Declaration, raising the amount of annual assessments. The Lot Owners sought a declaration that the amendment was not properly adopted and was therefore void and invalid, and further sought damages based on the additional assessments the Association had improperly collected in violation of the original Declaration. Here, the original Declaration, which contains the original restrictive covenants governing the subdivision, did not provide either the right to amend or a method for doing so. Instead of relying on the Declaration, the Association contends the right to amend and the method for doing so can be found in the subdivision's Amended Bylaws, and it further contends the Amended Bylaws should be considered.

The Association's argument that the Amended Bylaws should be considered part of the subdivision's "dedicatory instrument," is based almost exclusively on the fact that the Association filed the Amended Bylaws in the county deed records, albeit almost 20 years after they were purportedly adopted, apparently believing that this filing was all that was required to demonstrate their validity.

However, the Association here did not provide a copy of any original bylaws that allegedly were adopted or filed at or near the same time the Declaration was adopted, which could be considered as part of an "overall scheme" by which the subdivision was to be governed. Nor did the Association assert that any such contemporaneous original bylaws exist. Further, the Declaration itself does not indicate that the subdivision was to be governed by any bylaws, and the Association presented no evidence to support any conclusion that the subdivision's developer intended for the subdivision to be governed by any such bylaws. The Association made no effort to explain the authority by which any of the subdivision's bylaws were purportedly adopted, or the manner in which any such adoptions took place. The court thus concluded that the Association failed to carry its burden of establishing that the Amended Bylaws were properly adopted or that they were intended to be part of the subdivision's dedicatory instrument.

Chapter 209 of the Texas Property Code, which applies to residential subdivisions that are governed by declarations that authorize a homeowners' association to collect regular or special assessments on all or a majority of the property in the subdivision, provides that a residential subdivision requiring "mandatory" membership of its property owners in such a homeowners association may amend its restrictive covenants upon a 67 percent of the total votes allocated to property owners entitled to vote on the amendment of the declaration, in addition to any governmental approval required by law. So, the question was whether the Declaration made membership mandatory.

The Declaration does not expressly state that membership in the Association is mandatory; however, the Declaration nevertheless imposes mandatory assessments on all lot owners, giving the owners no choice but to pay those assessments. Further, the Declaration provides that those assessments are for the construction of improvements in the subdivision, which were to be utilized solely by members of the Association and their families. From this language, the court

concluded that the subdivision developer made clear its intent to create a mandatory-membership association for the benefit of its members, as opposed to one that was simply voluntary.

The Declaration gives the Association the discretion to refuse membership to a particular lot owner and to expel the lot owner from membership. The Lot Owners content that this means membership cannot be considered mandatory. This position is incorrect. The fact that a subdivision's declaration gives a homeowner's association the discretion to refuse membership to a property owner or to expel an owner from membership in accordance with its internal rules and regulations, does not render membership in the Association any less mandatory, where an individual purchasing property within the subdivision otherwise agrees to pay those assessments in accordance with the subdivision's restrictive covenants.

Yeske* v. *Piazza Del Arte, Inc., 513 S.W.3d 652 (Tex. App.—Houston [14th Dist.] 2016, no pet.). In this case, the owner of a condominium unit, Yeske, filed an action against the HOA, members of the board of directors of the HOA and related defendants seeking a declaratory judgment that the HOA lacked authority to collect assessments or foreclose on his unit and asserting a wide variety of other claims. Although the case was complex and focused largely on procedural matters there were two nuggets of interest to the practitioners regarding the Texas Uniform Condominium Act (the "Act").

One of the many claims made by Yeske against the HOA was that the HOA did not have that authority because the HOA was never properly incorporated. The HOA was named "Piazza Del Arte Homeowners Association, Inc." but that entity did not legally exist. Instead, an entity named "PDA HOA 5801 Winsome" had been registered with the Secretary of State since 2006. An assumed name certificate was not filed with the Secretary of State until 2013 (10 days after Yeske had filed his second amended petition in the case at hand). Yeske argued that §82.101 of the Act required a certificate of incorporation be issued by the State of Texas for an HOA prior to an HOA conveying any units. The appeals court held that a technical violation of the Act does not excuse payment of condominium assessments. The appeals court relied on a 2007 case, ***Plano Parkway Office Condominiums* v. *Bever Properties, LLC***, 246 S.W.3d 188, 195 (Tex. App.—Dallas 2007, pet. denied), where the Dallas Court of Appeals held that the "defining event in the creation of a condominium regime is the filing of a declaration under section 82.051(a) and 82.055 of the Texas Property Code, not the incorporation of the unit owner's association."

In the other claim of interest, Yeske asserted a claim for breach of fiduciary duty against the treasurer of the HOA. The treasurer argued that as a matter of law officers and directors of a HOA do not owe individual unit owners a fiduciary duty. The appeals court overturned the trial court and found that §82.103(a) of the Act "specifically provides that an officer or director of an association is not liable to the association or any unit owner for monetary damages for an act or omission occurring in the persons capacity as an officer or director unless: (1) the officer or director breached a fiduciary duty to the association or the unit owner; (2) the officer or director received an improper benefit; or (3) the act or omission was in bad faith, involved intentional misconduct, or was one for which liability is expressly provided by statute." (emphasis added).

PART XIII
TAXATION

Sorrell* v. *Estate of Carlton, 504 S.W.3d 379 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Sorrell acquired certain property, previously owned by the Estate of Carlton, at a tax sale. The Estate attempted to redeem the property, in accordance with Tex. Tax Code § 34.21, approximately a month prior to the deadline for redemption. The statutory redemption provision requires payment of: (i) the amount bid for the property, (ii) the amount of deed recording fees, (iii) the amount paid for taxes, penalties, interest and costs, and (iv) a redemption premium of 25% of the aggregate total. The tender by the Estate did not include the amount for taxes, penalties, interest and costs, and the tender included a letter requiring execution of a redemption deed and a statement to notify the Estate if there were any additional claimed expenses, which would be "paid, upon review."

The court majority considered whether the tendered amount was substantial compliance under the redemption statute and concluded the amount was not small or insignificant and, therefore, was not in substantial compliance. The court reviewed other authority on whether payments would constitute substantial compliance, noting that the determination was based, on a case by case basis, on the size of the amount paid and the size of the amount left unpaid as well as the promptness of the late payment. Other courts have concluded there was substantial compliance in payment where the amount of shortage was $172.72, and another where the amount was less than 1% of the amount owed; however, in other cases the payment amount was not in substantial compliance when the tender was short by $7,782 and $6,076. In the subject case, the shortage in payment by the Estate was approximately $11,700. Nevertheless, the court noted that it could not stop its analysis based solely on the amount tendered, but must consider other factors for substantial compliance. The Estate had written a letter requesting an itemization of additional expenses, to

which Sorrell responded four days after the redemption deadline. To effect a redemption after the tax sale, the prior owner must make an unqualified tender of the required amounts within the statutory time period; however, the Sorrell court would not view the Estate's tender as conditional merely for asking for the quitclaim deed allowed by statute. The court distinguished ***Bluntson* v. *Wuensche Servs., Inc.***, 374 S.W.3d 503 (Tex. App.—Houston [14th Dist.] 2012, no pet.), because the tendering party asked for the tendered checks to be held in trust pending the resolution of other costs. On the other hand, in Sorrell, the Estate did not condition its offer on the resolution of any issue, nor did it threaten to dispute any itemization by Sorrell by reason of the language that such other costs would be paid "upon review".

Justice Frost dissented noting that the statutory payment amounts were clear and required and should be strictly construed, pointing out that if the purchaser at the tax sale refused to provide itemization, the statutory regime provided an alternative means to determine the exact amount needed to be tendered. Further, Justice Frost took issue as to whether the term "upon review" represented an unconditional tender, concluding that such language was not an unconditional agreement to pay the statutory requirements and, therefore, would not constitute an unconditional tender.

Bosque Disposal Systems, LLC* v. *Parker County Appraisal District, No. 17-0146 (Tex. May 25, 2018). The plaintiffs are taxpayers who own land in Parker County. Each tract at issue in this case contains a saltwater disposal well, in which wastewater from oil and gas operations can be injected and permanently stored underground. When valuing these tracts for property tax purposes, PCAD assigned one appraised value to the wells (creating distinct appraisal accounts for "saltwater disposal facilities" apart from the existing appraisal accounts for the surface land) and another appraised value to the land itself. PCAD estimated the wells' market value based on the income generated from their commercial operation.

The taxpayers contend that separate appraisal of the wells and the land amounts to illegal double taxation of the wells as a matter of law. The trial court rendered summary judgment for the taxpayers, but the court of appeals reversed.

The parties do not dispute that the taxpayers own taxable land in the district. Nor do the parties dispute that the taxpayers' land contains functioning saltwater disposal wells that have significant market value. Importantly, the taxpayers do not claim that land containing a valuable saltwater disposal well has the same market value as a comparably sized tract of land with no such well on it. Instead, the taxpayers complain that PCAD appraised the wells as separate units of real property apart from the land. This, the taxpayers contend, violated the Tax Code's definition of "real property" and amounted to double taxation of the wells in violation of the Texas Constitution. According to the taxpayers, the wells themselves do not fit within any of the categories of "real property" listed in the Tax Code, and appraising the wells separately from the land effectively appraises (and taxes) the wells twice—once on the value of the land, and once on the separate value of the wells. The taxpayers rely heavily on the fact that the wells have never been severed from the surface land and remain part of the taxpayers' fee simple ownership of these properties.

PCAD responded that it appraised the surface land in one account based on comparable tracts of raw land, and it appraised the wells in another account based on the income method of appraisal. According to PCAD, its appraisal of the land did not take into account the value of the wells, and that the sum of the two appraisals approximates the market value of the entire property, wells and all. In the District's view, the Tax Code requires it to appraise these properties based on their market value, and splitting each property into two accounts—one for the land and one for the well—was one lawful way of estimating the properties' overall market value.

The court found nothing legally improper in PCAD's decision to separately assign and appraise the surface and the disposal wells. The Tax Code expressly contemplates that taxing districts may separately appraise "separately taxable estates or interests in real property." Tax Code § 25.02(a)(3). Generally, a tract of land and its improvements are appraised together and assigned a single value. But appraisal districts are permitted to divide a tract and its improvements into separate components, each with its own tax account number, and appraise them individually.

Further, the Tax Code does not prohibit the use of different appraisal methods for different components of a property. In fact, the Code suggests otherwise, requiring the chief appraiser to consider each method and to select "the most appropriate method" when "determining the market value of property." Tax Code § 23.0101.

The taxpayers offered several objections to this result, but the court found none of them persuasive. The taxpayers contended that a separately appraisable "estate or interest" under the Tax Code arises only from "transfers, conveyances, and reservations." They argued that the "estate or interest" taxed here "simply does not exist" because it has not been severed from the surface land. But the court has held that different "aspects of real property can be taxed separately" and that "[t]his rule does not depend on whether each aspect is separately owned." ***Matagorda County Appraisal District* v. *Coastal Liquids Partners, L.P.***, 165 S.W.3d 329 at 332 (Tex. 2005).

The taxpayers also argued that the wells cannot be taxed because they are "intangible" and "permit dependent," and amount to nothing more than a "right to inject." Intangible property, such as a legal right, generally is not taxable. But any suggestion that the disposal wells are non-taxable intangibles ignores the wells' physical existence. The Tax Code defines "intangible personal property" as "a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document." Tax Code § 1.04(6). The injection facilities are hardly incorporeal; they consist of physical, underground rock and stored liquids, a well bore, down-hole tubing, and surface equipment. They are as tangible as any taxable mineral estate. The Code's definition of "intangible" does not describe these wells.

The taxpayers pointed out that they need a permit to operate the wells. But to accept that argument would have to ignore economic realities and a plain reading of the statute to conclude that the facilities at issue here, despite all their substantial physical aspects, are in reality intangibles because a permit may be required to operate them. By this reasoning a refinery would be a non-taxable intangible, as would valuable mineral estates, because permits are required to operate refineries and extract minerals.

PART XIV CONSTRUCTION

El Paso County* v. *Sunlight Enters. Co., 504 S.W.3d 922 (Tex. App.—El Paso 2016, no pet.). This case is of particular interest to the construction industry because it interprets §16.071(a) of the Texas Civil Practice and Remedies Code which provides that a "contract stipulation requiring a claimant to give notice of a claim for damages as a condition precedent to the right to sue on a contract is not valid unless it is reasonable, and that a stipulation requiring notification within less than 90 days is void." Although the language of §16.071(a) has been in its current form since 1891, no court has ever addressed whether §16.071(a) specifically applies to the notice of claims provisions which are typically found in construction contracts. In the case at hand, Sunlight entered into a construction contract with El Paso County (the "County"). The County terminated the contract for lack of performance. Sunlight sued for breach of contract claiming that it had incurred costs as a direct result of the County's actions to delay and/or hinder Sunlight's performance under the Contract. The Contract in question had a clause requiring Sunlight to file any claims regarding additional compensation within seven days or they would be deemed waived. Sunlight argued that the deadlines imposed by the contract were voided by §16.071(a) and the trial court issued a partial summary judgment in favor of Sunlight.

The El Paso Court of Appeals reversed the trial court and held that §16.071(a) does not apply to the conditions of a contract requiring notice of requests for extensions of time or additional compensation because these are not the same as a "claim for damages." The appeals court reasoned that §16.071(a) must "be strictly construed because it is restrictive and in derogation of the common-law right to freely contract." The appeals court went on to state that despite the fact that many construction contracts provide broad notice provisions that require notice as a condition precedent to the right to sue on the contract, and are often times related to conditions that may lead to a claim for damages, these provisions are not the same as a "notice of a claim for damages."

Vast* v. *CTC Contractors, LLC, 526 S.W.3d 709 (Tex.App.-Houston [14th Dist.] 2017, no pet.). Vast claimed that the trial court erred in awarding CTC attorneys' fees under Civil Practice and Remedies Code § 38.001. Section 38.001 provides that "[a] person may recover reasonable attorney's fees from an individual or corporation . . . if that claim is for . . . an oral or written contract." Section 38.001 does not authorize the recovery of attorney's fees in a breach of contract action against a limited liability company.

Legislation was proposed to amend §38.001 to reflect that a person may recover reasonable attorneys' fees from "organizations," including limited liability companies, but the bill did not pass. See Tex. H.B. 744, 85th Leg., R.S. (2017).