CASE LAW UPDATE

DAVID A. WEATHERBIE, *Dallas*
Cramer Weatherbie Richardson Oliver LLP
dweatherbie@cwrolaw.com

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CASE UPDATE

DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON OLIVER LLP
DALLAS, TEXAS

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 595 S.W.3d and Supreme Court opinions released through November 6, 2020.

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.

Case Law Updates dating back to 2009 are posted on my firm's website, cwrolaw.com. Most are also posted on reptl.org as well.

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PART I
MORTGAGES AND FORECLOSURES

Mulvey* v. *U.S. Bank National Association, 570 S.W.3d 355 (Tex.App.—El Paso 2018, no pet.). Among other issues in this foreclosure case was whether Mulvey had properly tendered payment. Mulvey was behind in his payments on his loan. Wells Fargo was the loan servicer and the note required payments to be made to a specific post office box or other place designated by the noteholder. Instead, Mulvey tried to make payments at a Wells Fargo bank, in amounts less than what was owed.

Tender must be at the place provided in the contract for performance. Failure to tender at the place designated by the contract belies a proper tender. Even though Mulvey swore that he'd tendered payment at a Wells Fargo bank, he never established that the physical bank location was allowed or required by note holder.

Mulvey swore that he tried to make one monthly payment around July or August of 2009 (though the payment was due on the 1st of July). He does not claim to have made tender of any additional monthly payments, nor does his response or briefing explain how a refusal to accept that single payment excused his performance for all the subsequent payments. U.S. Bank's summary judgment was premised on a default of all the payments from July 1, 2009 through November 22, 2010 when the note was accelerated. Mulvey does not show that the improper refusal of a single payment excused all the subsequent payments not made under the loan.

Pitts* v. *Bank of New York Mellon Trust Company, 583 S.W.3d 258 (Tex.App.—Dallas 2018, no pet.). Castle borrowed a loan from Home Savings, which was secured by a deed of trust on a house. Castle made its last payment on the loan on September 15, 2010, and the servicer of the loan at that time sent Castle a letter accelerating the debt. Castle didn't pay the debt, but the lender didn't foreclose.

In 2013, Ocwen became the servicer and started sending delinquency notices to Castle, telling Castle that it was late on making payments. The notices told Castle what he had to do to make the loan current, and that amount was less than the full balance of the loan. On March 31, 2015, Ocwen sent Castle a notice of intent to accelerate the loan, and on January 2, 2016, Ocwen sent Castle a notice of acceleration.

Pitts, who had acquired the house, filed this suit seeking a declaratory judgment that the foreclosure was barred by limitations. The lender and servicer claimed that foreclosure was not time-barred because the acceleration was rescinded.

Default alone does not start limitations running on a note. Instead, the holder's cause of action accrues when the note reaches its maturity date or the holder exercises its option to accelerate the note's maturity date. The holder may abandon the acceleration. If acceleration is abandoned before the limitations period expires, the note's original maturity date is restored and the noteholder is no longer required to foreclose within four years from the date of acceleration. There is no single form an abandonment may take. In the absence of an express notice of rescission of acceleration, the lender may show abandonment of acceleration by conduct.

Abandonment of acceleration is based on the law of waiver. Under Texas law, the elements of waiver include: (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right.

The lender argued the monthly statements and delinquency notices demanded payment of only the amount of the missed payments, charges, and fees and not the full accelerated amount of the loan, therefore, the monthly statements and delinquency notices constituted conclusive evidence of abandonment of the 2010 acceleration.

A noteholder that has accelerated the maturity date of a loan may unilaterally abandon that acceleration and return the note to its original terms. It may do that through notice to the borrower that expressly states the holder is abandoning the acceleration. A noteholder can abandon acceleration if the holder continues to accept payments without exacting any remedies available to it upon declared maturity. However, the supreme court has not addressed whether a holder establishes abandonment of acceleration as a matter of law when the borrower does not make any payments, the holder does not expressly abandon the earlier acceleration, and the only evidence of abandonment is the holder's notice to a borrower that the amount currently due is less than the full accelerated balance.

In this case, the lender's monthly statements and delinquency notices indicated that the lender would accept payment of an amount less than the full accelerated balance. But the statements and notices contained no language stating that if Castle did not pay the amount demanded, then the loan would be accelerated. Language stating that the loan would be accelerated is inconsistent with an earlier notice of acceleration and clearly establishes the noteholder's abandonment of the earlier acceleration because, if the noteholder intended to rely on the earlier notice of acceleration, it would not state that acceleration could occur in the future. Without that language, the monthly statements and delinquency notices in this case lack one of the two bases for the conclusion in that the notices to the borrower conclusively established the noteholder's abandonment of an earlier acceleration.

Further, the monthly statements and one of the delinquency notices in this case contain language that is consistent with continued reliance on the earlier acceleration. Each of the monthly statements stated, "Our records indicate that your loan is in foreclosure." The language in the monthly statements and first delinquency notice that the loan was in the process of foreclosure indicated that the loan's maturity date had already been accelerated and that the noteholder did not intend to abandon the prior acceleration.

The court ultimately held that the trial court erred in granting summary judgment for the lender, finding that a genuine issue of material fact exists as to whether acceleration had been abandoned.

Swoboda* v. *Ocwen Loan Servicing, LLC, 579 S.W.3d 628 (Tex.App.—Houston [14th Dist.] 2019, no pet.). A lender must bring suit to foreclose on a real property lien not later than four years after the day the cause of action accrues. As a general rule, the accrual date is the maturity date of the note, rather than the earlier date of the borrower's default. But there is an exception to that rule: If the real property lien contains an optional acceleration clause, as the deed of trust does here, then the cause of action accrues when the lender exercises its option to accelerate the maturity date of the note.

Once a lender has accelerated the maturity date of the note, the lender can restore the original maturity date— and therefore reset the running of limitations— by abandoning the acceleration as though it had never happened. Abandonment is based on the concept of waiver, which requires the showing of three elements: (1) the party has an existing right; (2) the party has actual knowledge of the right; and

(3) the party actually intends to relinquish the right, or engages in intentional conduct inconsistent with the right. Intent is the critical element, and its manifestation must be unequivocal.

The best means of achieving an abandonment is through written notice of rescission. But that method is not exclusive. Abandonment can also be accomplished through an agreement between the parties or through other joint actions. For example, abandonment is considered complete when the borrower resumes making installment payments after an event of default and the lender accepts those payments without exacting any remedies available to it despite a previously declared acceleration.

Whether a lender has abandoned an acceleration is generally a question of fact. But when the facts are admitted or clearly established, abandonment may sometimes be determined as a matter of law.

Cheniere Energy, Inc.* v. *Parallax Enterprises, LLC, 585 S.W.3d 70 (Tex.App.—Houston [14th Dist.] 2019, pet. dismissed). A security interest in collateral is enforceable against a debtor if (1) value has been given, (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and (3) one of four other conditions is met. UCC § 9.203(b).

The statutory requirement for describing collateral are that the description is sufficient, whether or not it is specific, if it reasonably identifies what is described. It can be by specific listing, category, type of collateral defined in the UCC, or any other method if the identity of the collateral is objectively determinable. A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral. UCC § 9.108(a)-(c), (e). This type of "super-generic" description is inadequate for purposes of a security agreement.

The collateral securing the Note in this case included several types not at issue, but also included "All other tangible and intangible property and assets of such Loan Party." The secured party argued that "all other . . . intangible property" includes the borrower's equity interest it sought because the UCC defines "general intangibles" which is a type of collateral defined by the UCC. The court said that, if the Note had listed general intangibles, it would have been sufficient, but it did not. It used the term "intangible property" which is not a term defined in the UCC. Moreover, intangible property is broader than general intangibles, for it includes intangibles that are specifically excepted from the definition of general intangibles.

PART II
HOME EQUITY LENDING

Alexander* v. *Wilmington Savings Fund Society, FSB, 555 S.W.3d 297 (Tex.App.—Dallas 2018, no pet.). Pamela claimed that Wilmington's home equity lien on the house owned by her and her husband was void because she did not sign the note. On the same day the note was signed, Pamela did sign a Texas Home Equity Security Instrument.

Pamela's argument was based up Texas Constitution art. XVI, § 50(a) (6)(Q)(xi), which says that a lender forfeits all principal and interest of the extension of credit "if the lien was not created under a written agreement with the consent of each owner and each owner's spouse. . ." Unfortunately for Pamela, the constitution's plain language merely requires that each spouse consent to the lien, and she had signed the document creating the lien. Section 50(a) (6)(Q)(xi) does not require an owner's spouse to consent to a home equity note.

Perry* v. *Cam XV Trust, 579 S.W.3d 773 (Tex.App.—Houston [1st Dist.] 2019, no pet.). Perry borrowed a home equity loan from the Trust. After payments were missed, the Trust sent Perry a letter on September 3, 2010, that the note "will be accelerated" if he didn't cure the payment default by October 3. When Perry failed to cure, the Trust sent a notice on October 3, 2010 accelerating the debt. [Note that later in the case, the opinion states that this notice was given October 20.]

In 2012, Perry sued the Trust for DTPA violations, alleging that it had made misrepresentations about modifying the terms of the loan. Judgment was entered in favor of the Trust on a no-evidence basis. In 2014, the Trust filed suit for foreclosure of the home equity lien. Perry claimed that the 2014 foreclosure suit was barred by res judicata because the Trust had failed to raise foreclosure in the 2012 suit.

Res judicata ordinarily bars a party from asserting claims that were or could have been raised in a prior suit between the same parties or their privies that resulted in a final judgment on the merits. But home-equity loan security instruments that provide the lender with alternate foreclosure remedies are an exception to res judicata. When these instruments allow a lender to pursue either judicial foreclosure— a claim that could be asserted as a counterclaim in a suit brought by the borrower— or non-judicial foreclosure under a power-of-sale provision in the instrument— a claim that is subject to special procedures and cannot be asserted as a counterclaim— res judicata does not bar the lender from asserting a foreclosure claim that it did not assert in a prior suit filed by the borrower.

Another provision of the home-equity security instrument further buttressed the court's conclusion that res judicata does not bar the Trust's foreclosure claim. The instrument provides that any forbearance by the Trust "in exercising any right or remedy ... shall not be a waiver of or preclude the exercise of any right or remedy." Holding that res judicata bars the Trust from foreclosing would be tantamount to holding that the Trust's decision to refrain from asserting its foreclosure rights at an earlier time, standing alone, resulted in the waiver of these rights, contrary to the terms of the instrument.

Melton* v. *CU Members Mortgage, 586 S.W.3d 26 (Tex.App.—Austin 2019, pet. denied). Melton claimed that there is a genuine issue of material fact as to whether he was personally liable for the loan, in contravention of Article XVI, section 50(a)(6)(C). Without citing legal authority, Melton alleges that Appellees' reporting his failure to repay the loan to credit agencies as "personal credit" provides evidence that he is personally liable for the loan. Generally, a nonrecourse note has the effect of making the note payable out of a particular fund or source, namely, the proceeds of the sale of the collateral securing the note, rather than having the maker of the note personally guarantee repayment. The lender did not waver from the position that Melton's leasehold is the collateral securing the lien. Additionally, the provisions of the loan documents contemplate that the leasehold serves as collateral for the loan. Under the circumstances, the court would not agree that reporting delinquent payments to a credit agency is equivalent to claiming that a person is exposed to personal liability.

PART III
PROMISSORY NOTES

Perry* v. *Cam XV Trust, 579 S.W.3d 773 (Tex.App.—Houston [1st Dist.] 2019, , no pet.). Perry borrowed a home equity loan from the Trust. After payments were missed, the Trust sent Perry a letter on September 3, 2010, that the note "will be accelerated" if he didn't cure the payment default by October 3. When Perry

failed to cure, the Trust sent a notice on October 3, 2010 accelerating the debt. [Note that later in the case, the opinion states that this notice was given October 20.]

The trust sued for judicial foreclosure on October 20, 2014. Perry claimed that the suit was barred by the four-year statute of limitations. Civil Practice & Remedies Code § 16.035(a). He argued that his debt was accelerated on October 3, 2010 and that the Trust had to file suit within four years of that date.

The trust claimed that the September 3 letter was merely a notice of default and intent to accelerate the maturity of Perry's debt. According to the Trust, it did not exercise its right to accelerate until October 20, 2010, when it sent Perry a notice of acceleration that stated it had not received payment of the past-due balance and therefore "elected to accelerate the maturity of the debt." The Trust therefore maintained that the four-year statute of limitations began to run when it gave its October 20 notice, not on October 3. The Trust argued that when a security instrument gives a lender the option of accelerating the debt, the lender must provide separate notices of default and acceleration and that limitations begins to run only when the latter notice is given.

The provision in the security instrument specified what the contents of a default notice should contain: "The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice will result in acceleration of the sums secured by this Security Instrument and sale of the Property.... If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law."

Perry contends that this acceleration provision gave the Trust the right to accelerate his debt without further notice if he did not cure any default identified in the September 3 notice by the date specified— October 3. He further contends that the Trust did so by the plain terms of its September 3 letter. The court disagreed.

A debtor ordinarily has a right to separate notices of the intent to accelerate a debt and the actual acceleration of that debt. He may waive the right to these notices, but any such waiver must be clear and unequivocal and therefore must reference "notice of intent to accelerate" to waive the former and "notice" or "notice of acceleration" to waive the latter. The acceleration provision in the home-equity security instrument lacks a clear and unequivocal waiver of Perry's right to either notice. Accordingly, the Trust was required to provide both notice of the intent to accelerate and a separate notice of acceleration upon Perry's failure to cure the default.

PART IV
GUARANTIES

Wyrick* v. *Business Bank of Texas, N.A., 577 S.W.3d 336 (Tex.App.—Houston [14th Dist.] 2019, no pet.). The Bank made a loan to the Borrower, which was supposed to be secured by some leasehold assignments. The Guarantors guarantied the loan pursuant to a written guaranty that contained the typical bank guaranty provisions. The guaranties stated that the Guarantors "unconditionally, irrevocably, and absolutely" guarantied payment and performance of the Borrower's obligations. It also contained broad waivers and stated that the Guarantors' obligations "shall not be affected by any circumstances, whether or not referred

to in this Unconditional Guaranty, which might otherwise constitute a legal or equitable discharge of a surety or guarantor." The guaranties specifically stated that the Guarantors waived "all rights to require Lender to (a) proceed against the borrower; (b) proceed against or exhaust any collateral held by Lender to secure the payment of the indebtedness or (c) pursue any other remedy it may now or hereafter have against the borrower."

When the Borrower defaulted, the Bank did not foreclose on its collateral but proceeded against the Guarantors. The Guarantors objected. They contended that the Bank had assured them it would proceed against the collateral first. They noted that the Bank didn't foreclose on the collateral because it failed to secure the leasehold assignments and landowner consents contemplated by the note.

The Guarantors claimed that they were fraudulently induced into signing the guaranties by the Banks's representation to them that it would obtain valid security interests in the collateral. In order to show fraudulent inducement, the Guarantors were required to prove that they had justifiably relied upon the Bank's representations. Although justifiable reliance usually presents a fact question, it may be negated as a matter of law when circumstances show that the reliance cannot be justified. Texas courts have repeatedly held, a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms. Reliance on oral representation that is directly contradicted by express terms of written agreement not justified as a matter of law.

The guaranties state explicitly that appellants' obligations would be unconditional irrespective of the genuineness, validity, regularity, or enforceability of the loan. By signing the guaranties, the Guarantors waived the benefit of all principles or provisions of law, statutory or otherwise that contradict the terms of the guaranties and agreed that their obligations would not be subject to any legal or equitable discharges. The Guarantors further agreed that "any security for the Debt may be modified, exchanged, surrendered[,] or otherwise dealt with," and that in any event the Bank was not required to proceed first against the Borrower or exhaust any collateral before enforcing the guaranties. Because the guaranties' express terms make clear that the Bank could have abandoned or "surrendered" the collateral altogether, whether the Bank actually secured the collateral or whether the collateral is actually available is immaterial.

The Guarantors' argument about reliance also failed because they knew at the time they signed the guaranties that the Bank did not have valid security interests in the collateral. A party may not rely justifiably on a fraudulent misrepresentation when "he knows that it is false or its falsity is obvious to him.

The Guarantors also claimed that the guaranties were unenforceable because of a mutual mistake. According to the Guarantors, the alleged mutual mistake was that neither the Guarantors nor the Bank was aware that there was no collateral. The Bank challenged this defense, asserting that the Guarantors assumed the risk of any mistake under the guaranties' terms. Here, the Guarantors assumed the risk that the Bank's acts or omissions would leave the Bank without collateral, or that the Bank could enforce the guaranties without first proceeding against any secured collateral, because all parties agreed the Guarantors would be liable on the guaranties "irrespective of the genuineness, validity, regularity[,] or enforceability of the Note, the Assignment, or any other circumstance which might otherwise constitute a legal or equitable discharge."

PART V
LEASES

***Rohrmoos Venture* v. *UTSW DVA Healthcare, LLP*,** 578 S.W.3d 469 (Tex. 2019). Rohrmoos leased a building to UTSW for a dialysis clinic. At some point UTSW began experiencing water penetration in the building's concrete foundation and installed ceramic floor tiles because of the moisture problems. Because UTSW viewed the commercial building as unsuitable for its intended commercial purpose, UTSW terminated its lease early, vacated the premises, and relocated, while still allegedly owing approximately $250,000 in unpaid rent.

UTSW then sued Rohrmoos and the joint-venturers behind it for breach of contract and breach of the implied warranty of suitability. Rohrmoos answered with various affirmative defenses and counterclaimed for negligence and breach of contract. The case was submitted to a jury. The jury found that UTSW and Rohrmoos both failed to comply with the lease, that Rohrmoos failed to comply first, and that Rohrmoos breached the implied warranty of suitability. The court of appeals affirmed.

Rohrmoos argues that the court of appeals incorrectly assumed that a material breach of a commercial lease can justify termination, resulting in a holding that is contrary to our decision in ***Davidow* v. *Inwood North Professional Group-Phase 1***, 747 S.W.2d 373, 376-77 (Tex.1988). There was a question whether this issue was properly preserved on appeal, and the Supreme Court held that it was. The availability of termination as a remedy did not become an issue until the trial court entered judgment authorizing termination. When that happened, Rohrmoos promptly filed a motion to reform the judgment or, alternatively, for a new trial. In that motion, Rohrmoos asserted that under Texas law, a tenant claiming material breach of lease is not entitled to terminate the lease unless the lease expressly provides for that remedy. This gave the trial court notice of Rohrmoos's complaint that the verdict and judgment were at least partially based on a theory of recovery that Rohrmoos contends did not support termination as a matter of law. Furthermore, whether a tenant can terminate a commercial lease under ***Davidow*** for material breach is a question of law for the court to decide, and it is not one which must be resolved before the jury can properly perform its fact-finding role.

Rohrmoos's position is that ***Davidow*** expressly prohibits termination as a remedy for material breach of a commercial lease. However, the court said that ***Davidow*** merely held that there was an implied warranty of suitability in commercial leases, and what the implied warranty means, i.e., that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. The court said that ***Davidow*** did not, as Rohrmoos contends, make an absolute statement that a material breach of a commercial lease will never justify termination. In fact, if anything, the holding in ***Davidow*** leans the other way.

In ***Davidow***, the Supreme Court addressed the implications of independent covenants in Texas property law, concluding that they were antiquated and unworkable in the modern lease setting. The opinion begins with the observation that "[a]t common law, the lease was traditionally regarded as a conveyance of an interest in land, subject to the doctrine of caveat emptor." Once the landlord delivered the right of possession to the tenant, the tenant had a duty to pay rent as long as he was in possession. All lease covenants at common law were thus considered independent because the tenant, being in possession of everything he was entitled to under the lease, had to pay rent no matter what lease covenant the landlord breached. This outdated common law concept,

Davidow noted, "is no longer indicative of the contemporary relationship between the tenant and landlord." The ***Davidow*** court held that the tenant's obligation to pay rent and the landlord's implied warranty of suitability are therefore mutually dependent.

The Supreme Court said that, although the last sentence refers to the tenant's obligation to pay rent as being dependent on the landlord's implied warranty of suitability, there is no reason to conclude that the court in ***Davidow*** did not intend to extend that same dependency to the landlord's obligations under the lease. Rohrmoos cites no authority that has interpreted ***Davidow*** to mean that a tenant cannot terminate a commercial lease for material breach of the contract. This is because there is none, and the court saw no reason to hold otherwise.

To be clear, said the court, ***Davidow*** stands for the proposition that in a commercial lease, a landlord warrants that the property is suitable for the tenant's intended commercial purpose. This implied warranty exists separately and apart from any obligation the landlord may have under the lease. As a matter of law, the implied warranty is limited only by specific terms in the parties' commercial lease whereby a tenant expressly agrees to repair certain defects. Parties are also free to contract out of the implied warranty by expressly waiving it in their contract. Termination is available as a remedy for breach of the implied warranty of suitability. The same holds true for a landlord's material breach of the commercial lease.

St. Anthony's Minor Emergency Center, L.L.C. **v.** ***Ross Nicholson 2000 Separate Property Trus***t, 567 S.W.3d 792 (Tex.App.—Houston [14th Dist.] 2018, pet. denied). The original landlord leased space to EIC. The lease prohibited subletting without the landlord's written consent, but EIC informed the landlord that its intent was to sublease most of the space to compatible medical companies, and it did so. The landlord didn't object, but there was no written consent. The original landlord sold the building and assigned the lease to Ross.

EIC defaulted on the lease. St. Anthony's, as a subtenant, had been paying rent to EIC, but it didn't make it to Ross, so Ross locked St. Anthony's out of the space. St. Anthony's sued.

To establish an unlawful lockout or constructive eviction, a plaintiff is required to prove a landlord-tenant relationship between the parties. St. Anthony's argues it has done so by virtue of its sublease with EIC. But a landlord that is not a party to a sublease generally has no rights or obligations under the sublease because there is no privity of estate or contract between the landlord and sublessee.

St. Anthony's argues that it has a landlord-tenant relationship with Nicholson under chapter 92 of the Property Code, which St. Anthony's concedes applies only to residential tenancies. Regardless, St. Anthony's asked the court to apply the definitions for "landlord" and "tenant" in chapter 92 to commercial tenancies under chapter 93. The court held that, even if it were to conclude that the definitions were applicable here, which it declined to do, they merely describe parties that can create a landlord-tenant relationship. The relationship itself is still governed by the terms of the applicable lease.

1320/1390 Don Haskins, Ltd. **v.** ***Xerox Commercial Solutions, LLC***, 584 S.W.3d 53 (Tex.App.—El Paso 2018, pet. denied). Xerox was a tenant of the Landlord's building, where Xerox operated a call center. The original lease was signed in 2005, and over the years a number of disputes arose between Xerox and the Landlord over parking at the project. In 2012, Xerox and the Landlord entered into a Temporary Parking Agreement pursuant to which Landlord agreed it would provide at least 358 parking spaces, referred to as "alternate

temporary parking spaces," in temporary parking areas depicted in an exhibit to the agreement.

Months after signing the TPA, the Landlord terminated the agreement, at will, after another tenant of the building decided to expand operations. In response, Xerox sent a letter, notifying the Landlord that reduction of the parking spaces below the minimum provided in the lease or the 358 spaces provided in the TPA was not acceptable, and would be viewed as a "material landlord breach of the lease." After several notices of Landlord's default were sent by Xerox, the Landlord filed a declaratory judgment action, seeking a determination that it had not breached either the Lease or the TPA. The trial court ruled for Xerox, finding that the TPA amended the Lease, that the TPA was enforceable, and that it was not terminable at will.

The Landlord asserted that Xerox did not prove that the TPA amended the Lease as a matter of law. Within this broad argument, four sub-arguments are included: (1) that the TPA did not purport to amend the Lease or otherwise alter the discretionary rights of the Landlord pursuant to the Lease; (2) that no language in the TPA supports a term coterminous with the Lease; (3) that the parties' prior conduct shows they plainly identified amendments by use of the term "Amendment; " and (4) in each of the parties' prior amendments, the parties plainly described the consideration supporting each agreement. Countering this, Xerox argued that that the TPA amended the Lease by its terms; or alternatively, even if it did not operate as an amendment, the TPA was enforceable as an agreement supported by consideration, and with a duration of a reasonable time based on the subject of the agreement. The court of appeals noted that the trial court had not ruled that the TPA amended the Lease, and that the trial court's judgment was based upon the TPA being a separate contract.

The court also determined that the TPA was supported by consideration. It is well recognized that a contract that lacks mutual consideration is unenforceable. Consideration is a bargained-for present exchange in return for a promise. It may consist of a benefit that accrues to one party or a detriment incurred by the other party; the detriment must induce the making of the promise and the promise must induce the incurring of the detriment.

The Landlord contended that the TPA obligates the Landlord to do a variety of things but does not impose an obligation on Xerox to do anything. On this basis, the Landlord asserts the TPA lacked consideration. The court disagreed. The Lease provided Xerox with a non-exclusive right to parking in any common area of the premises. Xerox then agreed to give up, in part, its right to park in a common area directly behind the premises, in exchange for the Landlord providing alternate parking spaces. The court agreed with Xerox that its agreement to give up its rights under the Lease constituted sufficient consideration on its part, as a bargained-for exchange, to support the TPA. In general, when a party gives up a pre-existing legal right, this provides valid consideration to support a contract.

The TPA did not include a specific term of duration, so the Landlord argued that made it terminable at will. Alternatively, the Landlord argued that, if the TPA weren't terminable at will, it would last only a reasonable time, which would make the term a question of fact for the jury. Again, the court disagreed.

If a contract is considered terminable at will, the act of terminating the contract is not itself a breach of contract by the promisor because it was merely exercising its right to terminate the contract with or without cause. But the case relied upon by the Landlord to support its position was a governmental

immunity case. ***Clear Lake City Water Auth. v. Clear Lake Utilities Co.***, 549 S.W.2d 385 (Tex. 1977). Because of governmental immunity, the contract in that case was terminable at will as a matter of law. The Landlord here was not even close to being a governmental entity.

The Landlord then argued that the TPA, lacking a term, was, in essence, a tenancy at will, as leases with no stated term are generally considered. In determining whether an agreement constitutes a lease, the lease must contain a "granting clause," or terms which reflect an intention on the part of the landowner to transfer an interest in and possession of the property described. Here, the TPA lacked a granting clause. There is no transfer of an interest in and possession of the property to Xerox, nor obligation on the Landlord to dispossess itself of the parking spaces. At most, the TPA imposes two obligations on the Landlord: (1) to provide Xerox alternate temporary parking spaces; and (2) to restrict adjacent tenants from routing truck traffic through the parking area. Therefore, the TPA lacks an essential element of a lease, and thus, cannot be construed as creating a tenancy at will over the premises.

The Landlord then argued that even if the TPA was not terminable at will, it was error for the trial court to imply a reasonable term for the TPA's duration as opposed to deciding it remained a genuine issue of material fact for a jury.

When construing an agreement, courts may imply terms that can reasonably be implied. Ordinarily, the question of what is a "reasonable" term for the duration of a contract without a specified term is to be determined by the circumstances of the parties and the subject matter of the contract.

Although the TPA is titled "Temporary Parking Agreement," the term "temporary" is left undefined. To start, both parties agreed, they did not intend for the agreement to last forever. The trial court implied the end of the Lease as a "reasonable period" for the TPA's duration, and instructed the jury that it was authorized to assess damages against the Landlord only through the end of that date. Without controverting evidence, the Lease and its amendments provided the only reasonable term from which the trial court could infer a reasonable period of duration. Keeping in mind the need for parking arose solely from the operation of the call center, the lease term itself provided a reasonable term by implication as there is no purpose otherwise for the alternate parking arrangement.

Brooks* v. *Acosta, 581 S.W.3d 485 (Tex.App.—Austin 2019, no pet.). The Brookses leased a house from Acosta. The lease agreement contained a provision that said: "LEASE TO PURCHASE where 5% of each rent payment will be applied toward the down payment when tenant is ready to purchase at market value". On at least three occasions, Acosta present offers to the Brookses to sell the house. The 5% amount was noted in one of the offers as a “Credit Factor” and "the end balance of your escrow account for the subject property." After a rent default, Acosta told the Brookses to vacate the house, which they did, after which they requested a refund of their $800 security deposit and all of the Credit Factor amount. Acosta refused. Part of the security deposit was used for repairs.

The Brookses sued Acosta for violating the DTPA, claiming that the lease was an “executory contract” subject to the provisions of subchapter D of the Property Code.

Subchapter D provides a series of protections and requirements relating to executory contracts but does not explicitly define

"executory contract." The Brookses asserted that the 2009 contract is an executory contract under Property Code § 5.062, which provides that, solely for the purpose of subchapter D, "an option to purchase real property that includes or is combined or executed concurrently with a residential lease agreement, together with the lease, is considered an executory contract for conveyance of real property." There is no dispute that the 2009 contract is a lease that contained the Lease to Purchase provision. The court then had to determine whether the Lease to Purchase provision of the 2009 contract was an "option to purchase."

An option to purchase is a land contract by which the owner gives another the right to buy property at a fixed price within a certain time.

Rather than containing a fixed price, the 2009 contract's Lease to Purchase provision specified that the Brookses could purchase the home at "market value," without specifying how "market value" might be determined. In the absence of a fixed price or other evidence that the parties had agreed on the meaning of "market value," the court concluded that the Lease to Purchase provision was not an option to purchase.

Hernandez* v. *Gallardo, 594 S.W.3d 341 (Tex.App.—El Paso 2014, pet. denied). The tenants claimed that the landlord failed to install operable security devices as required by Property Code § 92.153 and § 92.158. Section 92.153 of the Texas Property Code requires a landlord to equip a dwelling with certain security devices, including a doorknob lock or keyed dead bolt on each exterior door, without the necessity of a tenant request. Section 92.158 provides that a landlord shall repair or replace a security device on request or notification by the tenant that the security device is inoperable or in need of repair or replacement. Section 92.164 provides four remedies for a landlord's noncompliance with § 92.153: permitting tenant to install or rekey the security device and deduct the reasonable cost from the tenant's next rent payment, to unilaterally terminate the lease without court proceedings, to file suit and obtain a judgment for a court order directing landlord to comply if the tenant is in possession of the dwelling plus damages, court costs, and attorney's fees except in specified circumstances. The tenants did not pursue the specified remedies. They instead filed suit alleging Gallardo breached the contract by failing to change the locks and provide Roman with a key. But the tenants did not present evidence that they suffered any damages as a result of Gallardo's alleged failure to change the locks. Thus, the trial court properly granted Gallardo's motion for summary judgment on this breach of contract claim.

The tenants also alleged that the landlord breached the contract by retaliating against them in violation of Property Code § 92.331. Section 92.331, which is titled " Retaliation by Landlord," provides that a landlord may not retaliate against a tenant who among other things, in good faith, attempts to exercise a right or remedy against the landlord, gives notice to repair, or complains to a governmental entity, by evicting the tenant, depriving the tenant of the use of the premises, decreasing services, increasing rent, or engaging in a bad faith course of conduct that interferes with the tenant's rights. Under Property Code § 92.332(b), an eviction or lease termination does not constitute retaliation where the tenant is delinquent in rent when the landlord gives notice to vacate or files an eviction action.

Hilburn* v. *Storage Trust Properties, LP, 586 S.W.3d 501 (Tex.App.—Houston [14th Dist.] 2019, no pet.). Hilburn leased some self-storage units from Storage Trust. Parts of the storage facility were flooded. According to Hilburn, his units took on about a foot of water that receded quickly. Hilburn paid the June rent for all five units. Two days after he paid the

rent, Hilburn received a call from a Storage Trust representative regarding the flood. Hilburn was notified that some of the contents of his units had been damaged. The caller notified Hilburn that he previously should have received a letter from Storage Trust informing him of the flooding and that he needed to remove his property from the units by June 10, 2015. Hilburn responded that he had not received the letter and he could not remove his property by the time requested by Storage Trust, in part because of a medical emergency for his wife. According to Hilburn, he was told not to worry.

Approximately two weeks after he received the first call, Hilburn received a second call from another Storage Trust representative. The representative told Hilburn that the locks on his units had been cut and the contents of the units were being thrown away. When Hilburn went to the storage facility, he asked for additional time to remove his property. He left and returned four days later with a moving truck. When he returned, much of his property had been removed from the units, and some of it had been hauled away to the dump. According to Hilburn, some of his property that had been disposed of was not damaged, and some of it was damaged but salvageable. Hilburn filed suit.

Storage Trust moved for summary judgment on the basis that it did not breach the lease agreements, relying on the provision of the lease agreement giving it the right, in the event of an emergency, to remove the tenant's locks and enter the premises for the purpose of examining the premises or the contents thereof or for the purpose of making repairs or alterations to the premises and taking such other action as may be necessary or appropriate to preserve the premises.

According to Storage Trust, the flooding event constituted an emergency under the lease agreements, which allowed Storage Trust to enter the storage units and dispose of Hilburn's hazardous property due to mold. But Storage Trust did not present any evidence that there were hazardous materials in the storage units or that there was mold. There is no evidence that Hilburn's property contained mold or showed signs of mold at the time Storage Trust entered the units. Accordingly, Storage Trust did not show it was entitled under the lease agreements to dispose of Hilburn's property. The court concluded there is a fact question regarding whether Storage Trust breached the lease agreements.

Storage Trust moved for summary judgment as to Hilburn's noncontractual claims of conversion, waiver, estoppel, promissory estoppel, and DTPA violations on the basis that they are barred by the economic loss rule because, according to Storage Trust, the only injury alleged by Hilburn is economic loss resulting from breach of contract. Hilburn contends that the economic loss rule only applies to negligence claims arising from the contract itself and not to his other claims.

The economic loss rule generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy. The economic loss rule has never been a general rule of tort law; it is a rule in negligence and strict product liability. But the rule does not bar all claims arising out of a contractual setting. A party cannot avoid tort liability to the world simply by entering into a contract with one party otherwise the economic loss rule would swallow all claims between contractual and commercial strangers. Thus, a party states a noncontractual claim when the duty allegedly breached is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit.

Under the lease agreements, Storage Trust had the right to enter the storage units in the event of an emergency for the purpose of examining the storage units or the contents thereof or for the purpose of making repairs or alterations to the storage units and taking such other action as may be necessary or appropriate to preserve the storage units. Nothing in the lease agreements explicitly authorizes Storage Trust to take possession of and dispose of property in the storage units unless the tenant is in default.

Zhang* v. *Capital Plastic & Bags, Inc., 587 S.W.3d 82 (Tex.App.—Houston [14th Dist.] 2019, pet. denied). An assignment of a lease is an assignment of an interest in real property, and since the Lease in this case was for a term longer than one year, such an assignment is required to be in writing under the Texas Statute of Frauds. Business & Commerce Code § 26.01. Accordingly, the Lease unambiguously shows that Zhang is named as the landlord. There is no assignment of the Lease in the record to Daxwell Group, LLC. The trial court's determination that Zhang and Daxwell are landlord is supported by the evidence of record.

The Property Code grants a commercial tenant the right to sue a landlord for retaining a security deposit in bad faith. Property Code § 93.011establishes two distinct causes of action for a tenant seeking the return of his security deposit. The first cause of action involves the landlord's bad faith retention of the security deposit. Property Code § 93.011(a). The second cause of action involves the landlord's bad faith failure to account for the security deposit. Property Code § 93.011(b). Moreover, the landlord has the burden to prove the retention of any portion of the security deposit was reasonable. Statutory damages under § 93.011 are predicated on a determination that the landlord retained the deposit in bad faith.

Because there is little case law under Property Code Chapter 93 relating to the landlord's bad faith, the court looked to cases under Chapter 92. Those cases hold that a residential landlord acts in bad faith if it either acts in dishonest disregard of the tenant's rights or intends to deprive the tenant of a lawfully due refund. Those cases further hold that, to rebut the presumption of bad faith, the landlord must prove its good faith -- that is, the landlord must prove honesty in fact in the conduct or transaction concerned.

Evidence that a landlord had reason to believe he was entitled to retain a security deposit to recover reasonable damages is sufficient to rebut the presumption of bad faith created by the Texas Property Code. Other evidence may include: (1) the landlord is an amateur lessor because the residence is his only rental property; (2) the landlord had no knowledge of the requirement to submit an itemized list of all deductions from the security deposit; (3) extensive damage was done to the residence; (4) the landlord attempted to do some of the repairs himself to save money; or (5) the landlord had a reasonable excuse for the delay, e.g., he was on vacation.

Here, the trial court found that the landlord had not rebutted the presumption of bad faith and therefore forfeited the right to withhold any portion of the security deposit.

PART VI
DEEDS AND CONVEYANCES

Chicago Title Insurance Company v. Cochran Investments, Inc., 602 S.W.3d 895 (Tex. 2020). England and Garza owned a duplex, subject to a deed of trust to EMC. England conveyed his interest in the duplex to Garza, but in a later involuntary bankruptcy, the conveyance was set aside as a fraudulent conveyance. EMC foreclosed and Cochran bought the duplex at the foreclosure sale.

Cochran and Ayers entered into a residential sales contract regarding the property. In the sales contract, Cochran agreed to sell the property and to give Ayres a general warranty deed. The contract also contained a "survival" clause, which said that all covenants, representations, and warranties survived closing. At closing, Cochran conveyed the property to Ayers by a special warranty deed.

The special warranty deed included a statement that no representation or warranty was made as to the condition of the property. The warranty clause stated that Cochran agreed to warrant title to the property "against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through and under [Cochran], but not otherwise." Ayers received an owner title insurance policy from Chicago Title insuring that he had good and indefeasible title.

Four days after the deed was delivered, the bankruptcy trustee sued EMC and Cochran seeking to set aside EMC's foreclosure, claiming that the foreclosure violated the automatic stay. Ayers filed a claim with Chicago Title. Chicago Title paid the trustee and Garza for their interests in the property and, being subrogated to Ayers under the policy, sued Cochran, asserting claims for breach of the implied covenant of seisin and breach of contract. The trial court rendered judgment for Chicago Title.

The court of appeals reversed holding that the special warranty deed does not imply the covenant of seisin. The court emphasized that a covenant is implied in a real-property conveyance only if it appears from the deed's express terms that the parties clearly contemplated the covenant to be implied, or if it is necessary from the deed's language to infer such a covenant in order to effectuate the full purpose of the deed as a whole. Analyzing the deed's language, the court held that the deed does not make a representation or claim of ownership of the property at issue. The court reasoned that, because section 5.023 of the Property Code provides that the use of the words "grant" or "convey" in a deed implies only a limited covenant that does not extend to ownership of the property being conveyed, the deed's granting clause does not make a representation or claim that the grantor owned the property at issue and, therefore, does not imply the covenant of seisin. The court of appeals also held that the merger doctrine bars Chicago Title's breach-of-contract claim.

On appeal to the Supreme Court, the first issue is whether Chicago Title may recover for Cochran's alleged breach of the implied covenant of seisin. A covenant of seisin is an assurance to the grantee that the grantor owns the very estate in the quantity and quality that she "purports to convey. A covenant in a deed or assignment to the effect that the grantor has good right and authority to sell and convey the same evidences the intention on the part of the grantor to convey the property itself and not merely the grantor's title and interest therein. The covenant of seisin is breached by the grantor at the time the instrument is made if she does not own the estate in the land she undertakes to convey. The measure of damages for breach of the covenant where there is a total failure of title is the consideration paid, with interest.

As a matter of longstanding common law, in the absence of any qualifying expressions, the covenant of seisin is read into every conveyance of land or an interest in land, except in quitclaim deeds. A quitclaim deed merely conveys the grantor's rights in the property, if any. But if a deed, taken as a whole, discloses a purpose to convey the property itself, as distinguished from the mere right, title, or interest of the grantor, then the instrument is not a quitclaim deed.

The deed in question is not a quitclaim deed that merely transferred Cochran's right, title, and interest in the property. Rather, the deed is a special warranty deed that conveyed the property to Ayers. Chicago Title argues that the deed thus necessarily implies a covenant of seisin, which Cochran breached by undertaking to convey property that it did not own. Cochran responds that the special warranty deed contains no language indicating that the parties intended to imply the covenant of seisin.

The court said that it need not resolve whether the special warranty deed here implies the covenant of seisin because, even assuming it does, the deed contains a qualifying expression that disclaims Cochran's liability for the alleged breach of that covenant here.

The deed at issue does not specifically reference the covenant of seisin or Cochran's right to convey, but Cochran argues that the deed's special warranty clause—in which Cochran agreed to warrant the property against persons claiming by, through, and under Cochran, but not otherwise—forecloses Cochran's liability for title failures that are not premised on such claims. Because the bankruptcy trustee and Garza did not claim the property by, through, and under Cochran, Cochran asserts that it is not liable to Ayers for the failure of title resulting from the foreclosure sale's violation of the automatic stay.

A warranty clause in a conveyance, either general or limited, is no part of the conveyance proper; it neither strengthens, enlarges, nor limits the title conveyed, but is a separate contract on the part of the grantor to pay damages in the event of failure of title. A warranty of title does not warrant the title of the grantor but instead warrants the title of the grantee. Further, a warranty of title runs with the land and is not breached unless and until there has been an actual or constructive eviction" of the grantee by an individual with superior title.

A warranty of title may take the form of either a general or a special warranty. A general warranty applies to any failure or defect in the grantee's title, whatever the source. By contrast, under a special warranty, the grantor warrants the title only against those claiming by, through or under the grantor. A special warranty deed still conveys the land itself, and the limited warranty does not, of itself, carry notice of defects of title. Nevertheless, when a vendee accepts a deed with special warranty, the presumption of law is that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title.

Cochran's conveyance of the property to Ayers via special warranty deed did not affect the scope of that conveyance or Ayers's ability to qualify as a good-faith purchaser of the property. But it did affect Cochran's liability for defects in its title. A special warranty limits the scope of that indemnity obligation to losses or injuries sustained by a failure or defect in the grantor's title arising by, through, or under the grantor. Absent that limitation, a special warranty deed effectively becomes a general warranty deed.

The fact that the covenant of seisin and a warranty of title are distinct does not prevent a warranty clause from affecting the grantor's liability for breach of seisin. According to the special warranty clause at issue here, Cochran assumed the risk for a failure or defect of title that resulted from an individual claiming the property by, through, and under Cochran, but not otherwise. So while the covenant of seisin and a warranty of title are conceptually distinct obligations, at bottom the deed's language expressly limits liability for a failure of title, regardless of whether that failure of title falls within the scope of the covenant of seisin. Thus,

reading the deed as a whole, the court holds that it contains a qualifying expression that limits the scope of Cochran's liability for a failure of title—including in the form of a breach of the covenant of seisin.

The special warranty clause does not strengthen, enlarge, or limit the title conveyed or the title that the deed purports to convey. Thus, the special warranty cannot transform the deed into a quitclaim deed. Instead, the special warranty clause limits the circumstances under which a grantee can recover for a failure of title, allowing it to do so for claims by, through, and under the grantor, but not otherwise. As such, the special warranty clause speaks to the grantor's liability, not its conveyance of property. And unlike a quitclaim deed, a special warranty clause still protects the grantee with respect to a failure or defect of title created by the grantor.

Chicago Title next challenges the court of appeals' holding that the merger doctrine bars Chicago Title's breach-of-contract claim for failure to convey title. The merger doctrine provides that when a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Thus, where the terms of the deed vary from those contained in the contract, courts must look to the deed alone to determine the rights of the parties.

Chicago Title argues that the merger doctrine does not bar its claim, as the pertinent obligations in the sales contract do not contradict the obligations in the deed. Chicago Title also contends that the presence of the savings clause in the sales contract—which provides that the contract's covenants, representations, and warranties survive closing and that Cochran would be in default if any of its contractual representations were untrue on the closing date—prevents the merger doctrine from barring its breach-of-contract claim. Cochran responds that the parties' agreement, as exhibited in the deed, does not warrant against any title defects that existed prior to its acquisition of the property. Thus, Cochran contends, the merger doctrine bars Chicago Title's breach-of-contract claim.

The court agreed with Cochran. To the extent the special warranty deed limits Cochran's liability for failures of title in a way the contract does not, the terms of the deed and the contract vary, and the merger doctrine forecloses the contract claim. As for the savings clause, that provision applies to representations that are untrue on the date of closing. Had Chicago Title pursued a claim that Cochran breached the sales contract by issuing a special warranty deed rather than the general warranty deed that the contract appears to have expressly contemplated, perhaps Chicago Title could proceed on that claim in light of the savings clause. But we need not and do not resolve that issue, as Chicago Title does not assert that Ayers was entitled to a general warranty deed.

Trial v. Dragon, 593 S.W.3d 313 (Tex. 2019). Leo and his six siblings each owned a one-seventh interest in the Karnes County property. Leo gave have of his interest to his wife, Ruth. Nine years later, Leo and his siblings conveyed the Karnes County property to the Dragons. The deed to the Dragons reserved minerals for fifteen years. The Dragons did not get title insurance or an abstract of title and weren't represented by counsel. They paid $100,000 for the property, which the sellers financed over a fifteen-year term.

The deed to the Dragons didn't mention the earlier conveyance to Ruth, and she wasn't a party to the conveyance to the Dragons.

About four years after the sale to the Dragons, Leo died and left his wife a life estate with the remainder to their two sons. Ruth kept

collecting Leo's share of the Dragon's payments and eventually signed the release of lien "Leo Trial by Ruth Trial." Ruth died and her one-fourteenth interest passed to the two sons.

After the mineral reservation expired, the Dragons sought a new division order directing royalty payments to them. The operator paid those amounts to the Dragons until a lease status report was done and the operator learned that Ruth owned the interest in her own right and it had passed to her sons. A new division order was entered, directing payment to the sons.

The Dragons sued the sons, asserting breach of warranty and estoppel by deed. The trial court ruled in favor of the sons and the Dragons appealed.

On appeal, the Dragons argued that the trial court erred in denying their motion for summary judgment because the 1992 deed conveyed the entire interest in the property, and estoppel by deed divested the Trials of any interest. The sons countered that together they inherited the 1/14 interest from their mother, an independent source from the 1992 deed, and therefore estoppel by deed did not apply.

The court of appeals reversed the trial court's judgment and rendered judgment for the Dragons based on estoppel by deed and the Supreme Court's decision in ***Duhig* v. *Peavy-Moore Lumber Co***., 144 S.W.2d 878 (Tex. 1940). The court of appeals relied on ***Duhig*** to hold that because Leo, grantor to the 1992 deed, breached the general warranty at the very time and execution of the deed by purporting to convey what he did not own, estoppel by deed would apply to estop Leo from claiming an interest that contradicts the general warranty. Building on that, the court concluded that estoppel by deed applies to the sons as remainder beneficiaries of Leo's estate, estopping them from claiming an interest that contradicts the general warranty because estoppel by deed applies to grantors, grantees, privies in blood, privies in estate, and privies in law.

Under the court of appeals' opinion, the sons were divested of an interest they inherited from their mother—her separate property—to satisfy their father's sale of the property in a separate grant. The sons argue that the court of appeals erred by endorsing the proposition that a wife can be divested of her separate real property, despite never having signed a deed, to honor a title warranty made by her husband, merely because the wife's heirs are the same as the husband's heirs. Stated differently, the sons assert that estoppel by deed does not apply because they are not claiming an interest in the property under their father, Leo, the original grantor to the Dragons under the 1992 deed. They are instead contending that their interest in the property arises from their mother who did not sign the 1992 deed and, thus, could not be bound by that deed.

The Dragons, on the other hand, contend that under Texas law a grantee is protected against an over-conveyance when the deed contains a general warranty because the grantor and his or her heirs are estopped from claiming an ownership interest until the grantee is made whole.

In the broadest sense, estoppel by deed stands for the proposition that all parties to a deed are bound by the recitals in it, which operate as an estoppel. Over the years, the doctrine of estoppel by deed developed in the courts of appeals to have a wide application that all parties to a deed are bound by the recitals in it, which operate as an estoppel, working on the interest in the land if it be a deed of conveyance, and binding both parties and privies. The doctrine, however, is not without limitations. Estoppel by deed does not bind mere strangers,

or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed.

One of the most prominent displays of the estoppel by deed doctrine is this Court's decision in ***Duhig***, which the court of appeals applied to the facts at issue here. ***Duhig*** applies the doctrine of estoppel by deed to a very distinct fact pattern, and its holding is narrow and confined to those specific facts. ***Duhig***, owned a tract of real property subject to a one-half mineral reservation from a previous owner. ***Duhig*** purported to convey all of that land and the mineral estate to a subsequent purchaser while attempting to reserve one-half of the minerals for himself. But the warranty deed signed by ***Duhig*** did not mention the prior owner's reservation, nor did it indicate that ***Duhig*** did not own all of the minerals. The court in that case held that the grantor breached his general warranty in the deed by appearing to convey more than he actually did.

Had the Court stopped its analysis with that observation, then the holding would have rested exclusively on breach of warranty, with the remedy being self-correcting—that any reservation is rendered ineffective until the shortfall in the warranty is remedied, which would presumably be captured by damages. But the Court went on to apply equitable principles because the ***Duhig*** held the very interest, one-half of the minerals, required to remedy the breach at the very instance of execution and breach.

Although ***Duhig*** still has a place in Texas jurisprudence, the court held that it didn't apply in this case. The facts presented in this case differ significantly. While, in ***Duhig***, the grantor owned the interest required to remedy the breach, at the time of the 1992 deed, Leo did not own the interest required to remedy the breach – Ruth did. And the sons didn't inherit it until after Ruth's death many years later. Had Leo not transferred one-fourteenth to Ruth but held it in trust for his sons, so that the sons would inherit the interest directly from Leo, then perhaps ***Duhig***'s application of the estoppel by deed doctrine would fare better for the Dragons. But that is not the case.

Furthermore, regarding the broader estoppel by deed doctrine on which ***Duhig*** is based, the sons point out that they do not claim under the 1992 deed, even though they are, undoubtedly, Leo's privies. Rather, they claim an interest independent from that 1992 deed, by title predating the 1992 sale to the Dragons. Estoppel by deed does not bind individuals who are not a party to the reciting deed, nor does it bind those who claim title independently from the subject deed in question.

Strait* v. *Savannah Court Partnership, 576 S.W.3d 802 (Tex.App.—Fort Worth 2019, pet. denied). This is a fairly complicated case involving construction of a long line of conveyances, which I won't go into; however, the court reminds us of two rules for interpreting deeds.

First, the court discussed "strips and gores." It is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceases to be of use to him, unless such fee is clearly reserved. The reason for the rule is obvious. Where it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him, the presumption is that the grantor intended to include such strip in such conveyance; unless it clearly appears in the deed, by plain and specific language, that the grantor intended to reserve the strip. This presumption is known as the strip-and-gore doctrine. Application of the strip-and-gore doctrine is highly policy-driven: it discourages title disputes and prolonged litigation—

providing certainty in land titles— and encourages the use and development of real property. Texas public policy requires that we read a deed conveying land that does not identify but nevertheless creates a relatively narrow strip of land no longer useful to the grantor as conveying title in the strip to the grantee unless the grantor expressly and affirmatively reserves title to the strip in the deed.

Next, the court discussed the "centerline" presumption. The established doctrine of the common law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. Such is the legal construction of the grant, unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.

Like the strip-and-gore doctrine, this centerline presumption applies even if the description of the land in the deed or field notes terminates at the street, public highway, or railroad right-of-way, unless a contrary intention is expressed in plain and unequivocal terms. Moreover, the centerline presumption applies when an abutting road is referenced in a deed or plat, even if the road was not yet being used.

Copano Energy, LLC* v. *Bujnoch, 593 S.W.3d 721 (Tex. 2020). Certain agreements, including a contract for the sale of real estate, are not enforceable unless the promise or agreement, or a memorandum of it" is "in writing and signed by the person to be charged with the promise or agreement or by someone legally authorized to sign for him. Business & Commerce Code § 26.01(a), (b)(4). This requirement is commonly called the statute of frauds. Because an easement is an interest in real estate, a contract for the sale of an easement is subject to the statute of frauds. It has long been understood that to satisfy the statute of frauds, there must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony.

The required written memorandum need not always be a single document, however. A court may determine, as a matter of law, that multiple documents comprise a written contract. Indeed, multiple writings may comprise a contract even if the parties executed the instruments at different times and the instruments do not expressly refer to each other. When considering multiple writings proffered as a single contract, it remains the rule that the essential elements of the agreement must be evident from the writings themselves, without resorting to oral testimony.

To satisfy the statute of frauds, it is not enough that the writings state potential contract terms. The writings must evidence the agreement so that the contract can be ascertained from the writing.

Forward-looking writings could conceivably be used to supply essential terms if another writing confirmed that the parties later agreed to the terms stated in the forward-looking writing. But fundamentally essential element of the contract, without which no contract can exist, is the parties' intent to be legally bound to the contract's terms. The reason cases applying the statute of frauds generally disfavor forward-looking writings is precisely because such writings usually do not reflect the indispensable element of contract formation—an intent to be bound.

The court of appeals erred by failing to require a writing demonstrating not just that the

parties agreed to something, but that the parties agreed to the terms alleged to be binding on the defendant. The court of appeals identified one set of writings containing many essential terms and another set of writings evidencing an agreement. It correctly observed that the statute of frauds permits these writings to be read together because they relate to the same transaction. But it did not require any of the writings to evidence the lynchpin of the alleged contract— the other party's agreement to be bound by the terms stated in the e-mails.

Teal Trading and Development, LP* v. *Champee Springs Ranches Property Owners Association, 593 S.W.3d (Tex. 2020). In 1998 Cop platted 9,000 acres of land in Kendall and Kerr Counties as a residential development and called it Champee Springs Ranches. In conjunction with the plat, Cop signed and recorded CCRs, which included the easement in dispute in this case, which was a one-foot easement all around the property that precluded access to the property by adjoining landowners (referred to by Teal as a "spite strip").

Cop sold 1,300 acres to a buyer who resold 660 acres in the northwest corner of the property, now owned by Teal. The Champee Springs landowners replatted their acreage, subdividing the interior lots. The replat was filed in Kendall County and did not include Teal's property, which is all in Kerr County. The replat lists new boundary and interior lot line calls for the property, and utility easements that affect this property. But it does not list the disputed restrictive easement. It also stated that non-access easements aren't permitted unless dedicated to the county.

Teal's predecessor, BTEX, ended up owning a portion of the property subject to the easement and an adjacent portion not subject to the easement, and it wanted to develop both tracts as a single subdivision. A road was built from the non-burdened tract to the burdened tract. The Champee Springs POA sought to enforce the easement and intervened in a lawsuit filed against BTEX by Kendall County. Meanwhile, Teal acquired BTEX's land through foreclosure and intervened in the lawsuit.

In the trial court, the POA contended that the court should enforce the easement because Teal purchased the property subject to the easement. Teal, on the other hand, responded that the easement is void against public policy because it is an improper restraint on the use and alienation of real property and contrary to Kerr County subdivision regulations. Relying on the 1999 replat and its notation that restrictive easements are "not allowed," Teal also raised the affirmative defenses that the POA waived or is estopped from enforcing the easement against Teal.

At the Supreme Court, Teal for the first time contended that the POA lacks standing to sue to enforce the easement, and thus the suit should be dismissed for lack of subject-matter jurisdiction.

A plaintiff has standing to sue when the pleaded facts state a concrete and particularized, actual or imminent, not hypothetical" injury. Standing is a "prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case. Because constitutional standing implicates subject-matter jurisdiction, it cannot be waived and can be raised at any time.

Teal contends that the POA's alleged injury is illusory because the landowners initially subject to the easement were not mutually burdened by the same restriction. The POA responded that it has standing because the Property Code provides that a property owners association may initiate, defend, or intervene in litigation affecting the enforcement of a restrictive covenant. Property Code §

202.004(b) The court concluded that the POA demonstrated its constitutional standing to bring this suit. Standing is not conditioned on whether its claims are ultimately valid. Rather, standing merely requires that the parties to the suit be subject to the covenant, which the POA has demonstrated. And no rule provides that standing to enforce restrictive covenants is contingent on a finding that its burdens are evenly imposed among landowners.

Teal then argued that the 1999 replat established that the POA waived its right to enforce the restrictive covenant. "Waiver is defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. Waiver is a question of intent, examining whether a party's conduct, in light of the surrounding facts and circumstances, is unequivocally inconsistent with claiming that right. The question here is whether the residents intended the replat to relinquish any enforcement right.

The question is whether the omission of the easement in the replat and the statement that restrictive easements are not allowed were unequivocally inconsistent with claiming the right to enforce the easement, such that it speaks louder than the deed records themselves—records that consistently retain the restriction both before and after the 1999 replat. The court said the omission of the restrictive easement, both in the list of existing easements and on the maps themselves, is just that: an omission. Without more, it does not conclusively establish intent to relinquish a pre-existing easement recorded in the deed records.

Finally, Teal argued that the estoppel-by-deed should prevent the POA from enforcing the easement. The argument was that the POA's enforcement of the easement was inconsistent with its disclaimer of the easement in the replat.

Estoppel-by-deed stands for the proposition that all parties to a deed are bound by the recitals in it, which operate as an estoppel. Estoppel-by-deed does not bind mere strangers. The court of appeals held that Teal could not invoke an estoppel-by-deed defense because Teal was not a party to the replat. The Supreme Court agreed. It declined to change the law as to strangers. And, even if it held that Teal, as a stranger to the plat, could invoke estoppel-by-deed, it could not prevail on the theory. Although waiver and estoppel are distinct doctrines, Teal's argument that both apply is based solely on the 1999 replat, which the court held does not conclusively intent to relinquish the pre-existing easement. Although estoppel-by-deed presents the question under a different theory, the court's reading of the replat applies with equal force: the POA did not expressly disclaim its right to enforce the easement against Teal.

The same is true for Teal's quasi-estoppel argument. Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when "it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.

The question, again, is whether the POA in fact took a position in the replat inconsistent with asserting its right to enforce the easement against Teal. The replat is some evidence that the POA took a position inconsistent with enforcing the easement against Teal. But it is not conclusive evidence. Even if it were, it is difficult to see how the inconsistency is unconscionable when applied to Teal, which bought its land fully aware of the easement.

Finally, Teal argued that the easement should be declared void against public policy. Courts should refrain from nullifying a

transaction because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law.

The court declined to declare the easement void. Teal made reasonable arguments that restrictive easements can be problematic, but bad policy—which often lies in the eye of the beholder—does not automatically dispel an otherwise enforceable deed restriction. The court's authority under the common law to declare a valid contractual provision void is tempered by relevant expressions of public policy from the legislature. Simply put, when the legislature has spoken on the topic, the court generally considers its statutory enactments to be expressions of public policy. And the legislature has spoken extensively about restrictive covenants, both upholding their enforcement and setting limits.

Nor is it clear that the common law suggests a public policy that contravenes this restrictive easement. Teal points out that covenants restricting the free use of land are not favored. But they have been enforced for over a century.

Wagenschein* v. *Ehlinger, 581 S.W.3d 851 (Tex.App.--Corpus Christi 2019, pet denied). Texas recognizes two types of co-tenancies which may be deeded: a tenancy in common and a joint tenancy. Under a tenancy in common, the deeded interest descends to the heirs and beneficiaries of the deceased cotenant and not to the surviving tenants. A joint tenancy, on the other hand, carries a right of survivorship. In a survivorship, upon the death of one joint tenant, that tenant's share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it.

The deed in question contained the following reservation: THERE IS HEREBY RESERVED AND EXCEPTED from this conveyance for Grantors and the survivor of Grantors, a reservation until the survivor's death, of an undivided one-half (1/2) of the royalty interest in all the oil, gas and other minerals that are in and under the property and that may be produced from it. Grantors and Grantors' successors will not participate in the making of any oil, gas and mineral lease covering the property, but will be entitled to one-half (1/2) of any bonus paid for any such lease and one-half (1/2) of any royalty, rental or shut-in gas well royalty paid under any such lease. The reservation contained in this paragraph will continue until the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed.

Wagenschein argues that the reservation in the deed created a tenancy in common, as opposed to a joint tenancy, in a one-half interest in royalty and bonus income attributable to the lands described in the deed. That argument hinges on a single provision within the reservation that states, "Grantors and Grantors' successors ... will be entitled to one half (1/2) of ... any royalty ... paid under any such lease." Wagenschein asserts that the term "successor" has been afforded a single specific meaning when used in legal documents; i.e., it solely refers to "one to whom property descends or [the] estate of the decedent.

This interpretation, however, would require the court to disregard the reservation's opening and closing statements, both of which referred to "survivors." This language implies that the "survivors" of the Grantors— not the Grantors' respective heirs— are the beneficiaries of the reservation. The fact that the deed reserves an interest for the "Grantors' successors" does not indicate a contrary intent. When the deed is examined as a whole, it is apparent that the words "survivor" and "successor" carry synonymous meaning here. While "survivor" is defined as someone who outlives another, the word "successor" is defined as someone who

succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows a predecessor.

Consistent with these definitions— and in light of the "words of survival" in the opening and closing statements of the deed— the phrase "Grantors' successors" must refer to the surviving grantors, not the grantors' heirs.

Rahlek, Ltd.* v. *Wells, 587 S.W.3d 57 (Tex.App.—Eastland 2019, pet. denied). The question of whether a deed is ambiguous is a question of law for the court. The court's primary goal when construing a deed is to ascertain the true intention of the parties as expressed within the "four corners" of the instrument. The four-corners rule requires the court to ascertain the intent of the parties solely from all of the language in the deed. The intent that governs is not the intent that the parties meant but failed to express but, rather, the intent that is expressed. Additionally, the court must strive to harmonize all parts of the deed and construe it to give effect to all of its provisions. When different parts of a deed appear to be contradictory or inconsistent, the court must attempt to construe the instrument so that no provision is rendered meaningless.

An ambiguity does not arise simply because the parties advance conflicting interpretations. Rather, only when a deed remains susceptible to two or more reasonable interpretations, after the court applies the applicable rules of interpretation, is the deed ambiguous. If a deed is worded in such a way that it can be given a certain or definite legal meaning, then the deed is not ambiguous.

Generally, deeds are construed to confer upon the grantee the greatest estate that the terms of the instrument will allow. In other words, a deed will pass whatever interest the grantor has in the land, unless it contains language showing a clear intention to grant a lesser estate. Thus, unless the deed contains reservations or exceptions that reduce the estate conveyed, a warranty deed will pass all of the estate owned by the grantor at the time of the conveyance.

Both reservations and exceptions in deeds must be clear and specific. The court will not find reservations by implication. A reservation of minerals to be effective must be by clear language. Similarly, exceptions, which generally are strictly construed against the grantor, must identify, with reasonable certainty, the property to be excepted from the larger conveyance.

PART VII
VENDOR AND PURCHASER

Atrium Medical Center, LP* v. *Houston Red C LLC, 595 S.W.3d 188 (Tex. 2020). Texas favors freedom of contract, as a policy firmly embedded in our jurisprudence. But tempering this policy is the universal rule that damages for breach of contract are limited to just compensation for the loss or damage actually sustained. Accordingly, courts carefully review liquidated damages provisions to ensure that they adhere to the principle of just compensation.

In keeping with this approach, an enforceable liquidated damages contract provision establishes an acceptable measure of damages that parties stipulate in advance will be assessed in the event of a contract breach. A damages provision that violates the rule of just compensation, however, and functions as a penalty, is unenforceable. Liquidated damages must not be punitive, neither in design nor operation.

Courts will enforce liquidated damages provisions when: (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages called

for is a reasonable forecast of just compensation.

A properly designed liquidated damages provision, however, may still operate as a penalty due to unanticipated events arising during the life of a contract. Courts must also examine whether the actual damages incurred were much less than the liquidated damages imposed, measured at the time of the breach.

When a contract's damages estimate proves inaccurate, and a significant difference exists between actual and liquidated damages, a court must not enforce the provision. Applying this rule in ***FPL Energy, LLC* v. *TXU Portfolio Mgmt. Co.*** 426 S.W.3d 59 (Tex. 2014), the Supreme Court held that the unacceptable disparity between damages assessed under the contract (approximately $29 million) and actual damages (approximately $6 million) made the liquidated damages provision unenforceable. At the time of contracting, damages from a breach in that case were difficult to estimate and the liquidated damages provision on its face, reasonably forecast damages. Nonetheless, in that case, the court held the provision unenforceable because it operated with no rational relationship to actual damages. When an "unbridgeable discrepancy" exists between "liquidated damages provisions as written and the unfortunate reality in application," the provisions are not enforceable.

Barrow-Shaver Resources Company* v. *Carrizo Oil & Gas, Inc., 590 S.W.3d 471 (Tex. 2019). The first draft of a farmout agreement regarding some oil and gas properties contained a "consent to assignment provision" that said the rights under the letter agreement could not be assigned without the written consent of Carrizo, "which consent shall not be unreasonably withheld." The "not be unreasonably withheld" wording was deleted in the next draft. Barrow-Shaver objected, but was assured by Carrizo that it would provide consent to assignments. The parties ultimately agreed to a provision without the "not be unreasonably withheld" wording.

After entering into the agreement, Raptor approached Barrow-Shaver about an assignment of the farmout. To assign its rights, Barrow-Shaver would have to get Carrizo's written consent. After a back and forth, Carrizo refused to consent and the sale to Raptor fell through.

Barrow-Shaver sued Carrizo for breach of contract. Both parties agreed that the consent to assignment was unambiguous. The trial court agreed, holding that the agreement was silent as to the reasons under which Carrizo could refuse consent to Barrow-Shaver's assignment. The trial court submitted the breach of contract question to the jury, explaining that it may consider evidence of industry custom in deciding whether Carrizo breached the agreement. The jury found in favor of Barrow-Shaver. The court of appeals reversed, holding that Carrizo could withhold its consent to assign for any reason or no reason—that is, that the purposeful deletion of the qualifying language "which consent shall not be unreasonably withheld" showed that Carrizo bargained for hard consent. The court of appeals held that because the provision was unambiguous, it should have been construed as a matter of law and therefore the breach of contract issue should not have been submitted to the jury. The Supreme Court affirmed the court of appeals' holding.

Barrow-Shaver argued that the agreement does not define the word "consent," and that the use of that term qualifies Carrizo's right to withhold consent to an assignment. Nothing in the agreement suggests that the parties intended to use the term in a technical sense; rather, the term can easily be understood according to its plain, ordinary, and generally accepted meaning—approval. So, the court said its

analysis does not turn on what "consent" is, but on what the farmout agreement requires as to the giving or withholding of consent.

The farmout agreement indicates that the parties agreed to how consent must be given: consent must be express, and it must be in writing. The contract contains no other consent requirements—it does not impose a deadline for consent to be given, it does not require that it be notarized or signed by a particular individual, nor does it prescribe a specific format for the consent, except that it be written and express. To the extent that the farmout agreement does not reflect any additional requirements as to Carrizo's consent, the absence of such language indicates there are no other qualifiers.

The consent-to-assign provision plainly states that Barrow-Shaver cannot assign its rights unless it obtains Carrizo's consent, which must be express and in writing. In other words, Carrizo has a right to consent to a proposed assignment, or not. The plain language of the provision imposes no obligation on Carrizo—it does not require Carrizo to consent when certain conditions are satisfied, require Carrizo to provide a reason for withholding consent, or subject Carrizo to any particular standard for withholding consent. The crux of this contract construction issue is whether the agreement's silence as to refusal or withholding of consent should nevertheless be interpreted to qualify Carrizo's right to withhold consent to an assignment of Barrow-Shaver's rights. After a lengthy discussion about silence as to material and immaterial terms, the court concluded that the express language of the consent-to-assign provision can be construed with only one certain and definite interpretation—a consent obligation only as to Barrow-Shaver and no qualifications as to Carrizo's right to withhold consent.

The court declined to allow extrinsic evidence to show industry custom and usage that would support Barrow-Shaver's position. Evidence of surrounding facts and circumstances, including evidence of industry custom and usage, cannot be used to add, alter, or change the contract's agreed-to terms.

The court also declined to find an implied duty to withhold consent only when it is reasonable to do so or to imply a duty of good faith and fair dealing in this situation. Any such implied obligations are not based on the meaning of "express written consent," as there is no indication in the contract that the parties intended a meaning other than the ordinary, non-technical meaning of the term. The obligation Barrow-Shaver asks the court to imply—that Carrizo not act unreasonably in withholding consent—amounts to an implied covenant to act reasonably and in good faith. The contract imposes no such duty, and precedent does not support implying one. The court held that Carrizo's right to withhold consent to a proposed assignment is unqualified.

Because the court concluded that the contract unambiguously allowed Carrizo to refuse its consent for any reason, Carrizo could not breach the parties' agreement for withholding its consent as a matter of law.

TLC Hospitality, LLC* v. *Pillar Income Asset Management, Inc., 570 S.W.3d 749 (Tex.App.—Tyler 2018, pet. denied). Pillar entered into a written contract with TLC to purchase an apartment complex owned by TLC. The contract was a typical "free-look" contract, with an inspection period and right for the buyer to terminate. The contract described the property as street address 3101 Mustang Drive, Grapevine, TX 76051 and made reference to a legal description in an exhibit. But neither that exhibit nor any other exhibit to the contract contained such a description. Part of the purchase price was to be paid by the assumption of an existing loan. The lender had to approve

the assumption and the contract provided that either party could terminate if the lender's consent wasn't obtained.

The contract was amended twice, to extend the inspection period and to require that Pillar apply for assumption approval within a set period of time. Pillar and TLC got a bit sideways regarding the assumption approval, with TLC not providing requested financial information to aid in Pillar's assumption application. TLC sent Pillar a letter terminating the contract. Pillar sued TLC for breach of contract. The trial court found in Pillar's favor.

Among other issues on appeal, the court looked into whether the contract was void under the statute of frauds, specifically because of the failure to include a complete legal description.

The statute of conveyances and the statute of frauds require that conveyances of and contracts for the sale of real property be in writing and signed by the conveyor or party to be charged. Property Code § 5.021 and Business and Commerce Code § 26.01(b)(4). In order for a conveyance or contract for sale to meet the requirements of the statute of frauds, the property description must furnish within itself or by reference to another existing writing the means or data to identify the particular land with reasonable certainty. The purpose of a description in a written conveyance is not to identify the land, but to afford a means of identification. If enough appears in the description so that a person familiar with the area can locate the premises with reasonable certainty, it is sufficient to satisfy the statute of frauds.

A street address or a commonly-known name for property has been held to be a sufficient property description if there is no confusion.

Here, the agreement described the property as follows: "The real property located in the City of Grapevine, County of Tarrant, State of Texas ... together with all existing buildings, structures, fixtures, amenities and improvements thereon situated known as and by the street address 3101 Mustang Drive, Grapevine, TX 76051." Below this description of the property, TLC agreed to convey any right it had to the use of the name "Village on the Creek Apartments" in connection with the property. The record contains no evidence of confusion as to the identity of the property subject to the agreement. Further, TLC presented no evidence that there is more than one tract of land fitting the description in the deed, that it owned other property nearby, or any other evidence indicating that the property cannot be located with reasonable certainty. The court held that the property description was sufficient to identify the property with reasonable certainty.

Van Duren* v. *Chife, 569 S.W.3d 176 (Tex.App.—Houston [1st Dist.] 2018, no pet.). The Van Durens bought a house from the Chifes. The Chifes partially financed the sale. The contract signed by the parties was a standard form promulgated by the Texas Real Estate Commission that brokers generally must use in homes sales. The form provides buyers with two options as to the acceptance of a property's condition: one in which they accept the property "in its present condition" and another in which they accept the property subject to the seller's completion of specified repairs. In this case, the Van Dorens opted to accept the property "in its present condition."

After living in the house for two years, the Van Duren's discovered substantial water damage and mold throughout the house. They sued the Chifes for negligent misrepresentation, fraud by nondisclosure, statutory fraud in a real estate transaction, and violations of the DTPA. They also sued the Chifes' broker, Mathews. The trial court entered summary judgment in

favor of both the Chifes and the broker, and the Van Durans appealed both. The court held that the trial court had not disposed of all of the issues between the Van Durens and the Chifes, so it dismissed the appeal as to the Chifes.

The Van Durens' claims against Mathews included claims of negligence and fraud. Mathews argued that the "present condition" clause in the contract barred those claims because the clause negates the causation and reliance elements required to prove them. The Van Durens argued that the clause doesn't expressly disclaim reliance and thus cannot negate reliance as a matter of law. They also claimed that the "present condition" provision was surreptitiously inserted into the contract without their knowledge and thus is unenforceable as it was not freely negotiated. Finally, they claimed they were fraudulently induced to accept the house "in its present condition."

Causation is a necessary element of a claim for negligence. Reliance is a necessary element of claims for negligent misrepresentation, fraud by nondisclosure, and statutory fraud in a real estate transaction.

When buyers contract to buy something "as is," they agree to make their own appraisal of the bargain and to accept the risk that they may be wrong. The sellers give no assurances, express or implied, as to the value or condition of the thing sold. Thus, an enforceable "as-is" clause negates the elements of causation and reliance on claims relating to the sale. In assessing the enforceability of an "as-is" clause, courts consider the totality of the circumstances surrounding the agreement. An "as-is" clause generally is enforceable as long as it was a significant part of the basis of the bargain, rather than an incidental or boilerplate provision, and was entered into by parties of relatively equal bargaining position.

Two scenarios may render a valid "as-is" clause unenforceable. The first involves fraudulent inducement. When sellers secure an agreement to an "as-is" clause through false assurances about the value or condition of the thing being sold or by the concealment of information as to its value or condition, the "as-is" clause does not bar claims against the sellers. Buyers also are not bound by an "as-is" clause if they have a right to inspect the property but the sellers impair or obstruct the exercise of this right.

The Van Durens point out that the "as-is" clause interpreted by the Supreme Court of Texas in ***Prudential Insurance Company of America*** **v.** ***Jefferson Associates***, 896 S.W.2d 156 (Tex. 1995), explicitly disclaimed any reliance by the buyer, and that the present-condition clause in their agreement with the Chifes does not.

The contract provided for acceptance of the property "in its present condition." While this provision did not disclaim reliance, an explicit disclaimer is not required for it to be an "as-is" clause. In the seminal "as is" case, ***Prudential***, the Supreme Court stated that the clause before it left no doubt as to its meaning but noted that "it should not be necessary in every 'as is' provision to go into this much detail." The Van Durens did not advance an alternative reasonable interpretation of this language, so the court applied the clause as written, stating that to interpret it as anything other than an as is clause would render it meaningless.

The Van Duren's claimed that the provision was boilerplate and not a genuine, bargained-for term. The Van Durens do not claim unequal bargaining power or lack of sophistication. Nor do they dispute that they bought the Royal Lakes home in an arms-length transaction, in which both sides were represented by licensed real estate brokers.

There was no evidence that the clause was boilerplate or was surreptitiously inserted into the contract. The contract was a standard form promulgated by the Texas Real Estate Commission that brokers generally must use in homes sales. A mandatory form contractual provision that requires the parties in any given transaction to choose from two or more options is by definition negotiable and not boilerplate.

The Van Durens also claimed that Mathews fraudulently induced the them into signing the contract by delivering a Seller's Disclosure Notice that failed to include material information about the water problems and making misrepresentations about an earlier inspection. With respect to the Sellers' Disclosure Notice, the law imposes a duty on the sellers of real property, not their agents, to make the statutorily-required disclosures. The Notice, which is a standard form promulgated by the Texas Association of Realtors, makes clear that the representations within it are the sellers' alone. The broker, therefore, generally cannot be held liable for misrepresentations in, or omissions from, the Notice because they are not his misrepresentations or omissions.

There is an exception. The Notice contains a representation that the "brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate." Under this provision, the broker has a duty to come forward if he has any reason to believe that the sellers' disclosures are false or inaccurate; thus, he can be held liable for this representation if it is shown that he knew it to be untrue. The court held that the Van Duren's failed to show that Mathews had knowledge of existing defects.

Finally, the Van Durens claimed that Mathews breached his duty to treat all parties to the transaction fair and fiduciary manner. The existence of a fiduciary duty is an element of a claim for breach of fiduciary duty. While brokers also must treat other parties to a transaction fairly, this obligation does not make the broker a fiduciary of these other parties whom he does not represent.

Rima Group, Inc.* v. *Janowitz, 573 S.W.3d 505 (Tex.App.—Houston [14th Dist.] 2019, no pet.). Rima, as Buyer, entered into two contracts to buy property from the Trust. Each contract contained a seller financing addendum in which Rima agreed to deliver a credit report to the Trust by December 9, 2016. Rima failed to provide the credit report under each contract by the date it was due. The addenda provided that if Rima did not provide the credit report within the specified time, the Trust could terminate the contract by notice to Rima within seven days after the expiration of the time for delivery of the credit report. On the termination deadline, the Trust gave notice that it was terminating each contract based solely on the failure to timely deliver the credit report.

Rima sued seeking specific performance. The trial court ruled that the Trust had properly terminated the contracts.

Under the unambiguous text of each contract, Rima had to deliver a credit report to the Trust on or before the Credit Report Deadline— within 5 days after the Effective Date of each contract. The parties do not dispute this deadline, nor do they dispute that Rima failed to deliver a credit report to the Trust on or before the deadline. Under the clear text of each contract, if Rima does not deliver a credit report to the Trust on or before the Credit Report Deadline, the Trust may terminate the contract by notice to Rima on or before the Termination Deadline.

The parties do not dispute that "within 7 days after expiration of the time for delivery" means on or before the Termination Deadline. Rima does not dispute that the Trust gave notice of termination on the Termination Deadline

based on Rima's failure to deliver the credit report. Instead, Rima asserts that the summary-judgment evidence raises a fact issue as to whether the doctrines of waiver and estoppel preclude the Trust from terminating each contract based on Rima's failure to deliver a credit report on Rima to the Trust on or before the Credit Report Deadline.

Waiver may be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming the known right. Waiver is largely a matter of intent, and for implied waiver to be found through a party's conduct, intent must be demonstrated clearly by the surrounding facts and circumstances. Ordinarily waiver is a question of fact, but waiver may be decided as a matter of law based on undisputed evidence regarding the facts and circumstances. The court reviewed the evidence and concluded that there was a fact issue as to whether a waiver had occurred.

Caruso* v. *Young, 582 S.W.3d 634 (Tex.App.—Texarkana 2019, pet. denied). Young owned a house in Pflugerville that he leased to Caruso and Donner. The term of the Lease was one year and it automatically renewed for another year unless the tenant gave notice to the landlord. The Lease also contained an option for the tenant to purchase the house by paying the balance of the loan secured by the house.

Alleging that they had attempted to exercise their option to purchase the Property, Caruso and Donner sued Young for breach of the Lease resulting from his alleged refusal to provide the information necessary for them to exercise the option, including the balance of the loan encumbering the house.

Young claimed that the option contained in the Lease violated the Rule Against Perpetuities. The trial court ruled in Young's favor.

The Texas Constitution prohibits perpetuities because they are contrary to the genius of free government. Constitution, art. I, § 26. Thus, no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance. The Rule requires that a challenged conveyance be viewed as of the date the instrument is executed, and prohibits the interest as void if by any possible contingency the grant or devise could violate the Rule.

Young argued that the Lease's option, which is an executory interest subject to the Rule, violated the Rule because the Lease created a covenant running with the land to be honored by both parties' heirs and, for that reason, could be exercised by Caruso's and Donner's yet unborn heirs after all lives in being had ended plus twenty-one years. Young argues that Caruso and Donner's interest was void at the outset because it could potentially vest outside the time period specified by the Rule.

The word "vest" in regards to the Rule refers to an immediate, fixed right of present or future enjoyment of the interest. The Rule does not apply to present or future interests that vest at their creation. An executory interest is a future interest, held by a third person, that either cuts off another's interest or begins after the natural termination of a preceding estate. A springing executory interest is one that operates to end an interest left in the transferor. This interest does not vest at the execution of the deed, rather executory interests vest an estate in the holder of the interest upon the happening of a condition or event that "terminates the grantor's present possessory interest." Until such happening, they are non-vested future interests and are subject to the Rule.

The option could be exercised at any time during the term of the Lease, and the Lease's

term was automatically renewed unless Caruso and Donner gave written notice to Young of their intent to terminate it. This essentially created a perpetual lease and option to purchase (and encumbrance on Young's fee simple interest) for as long as Caruso and Donner, or their heirs, successors, and assigns wished to remain on the Property.

PART VIII
PARTITION

Bowman **v.** ***Stephens*****,** 569 S.W.3d 210 (Tex.App.—Houston [1st Dist.] 2018, no pet.). Two brothers and a sister co-own a 117-acre lakefront property on Lake Austin. It is comprised of two parcels of land that were purchased in separate transactions by their grandmother in the 1950s. One tract is roughly 35 acres and has 900 feet of frontage along Lake Austin. The land gently slopes upward from the river. The property includes a modest house, boat dock, and gazebo. The other tract is roughly 85 acres and has steep slopes, heavy vegetation, and other topographical features that make it difficult to access. The upper tract is undeveloped. It is near but not in the Balcones Canyonland Conservation Plan's Preserve, which was created about 20 years ago to protect the natural habitat of local endangered species. These 85 acres are designated for future inclusion in the Preserve. The designation requires a landowner to go through a federal permitting process when developing the land.

The two brothers approached their sister about selling the property and splitting the money. The sister didn't want to sell and asked if the property could be partitioned in kind. She wanted the house and the boat dock that she had installed. The brothers sued.

The law will not force a reluctant joint owner of real property to maintain a joint ownership. Instead, joint owners of real property may compel a partition of the interest or the property among the joint owners. Property Code § 23.01. Partitions may be in kind (meaning that property is divided into separate parcels and each parcel is allotted to a separate owner) or by sale (meaning that property is sold and sale proceeds are divided among the owners). Texas law favors partition in kind over partition by sale.

The threshold question in a partition suit is whether the property is susceptible of partition in kind or if it is, instead, incapable of partition in kind because a fair and equitable division cannot be made. A tract may be incapable of partition in kind even though a partition in kind is not physically impossible. The issue is whether partition in kind is so impractical or unfair that partition by sale would best serve the parties' interest and restore or preserve the maximum value of the property.

The party seeking to obtain a partition by sale (instead of the legally favored partition in kind) has the burden to demonstrate that partition in kind is impractical or unfair. Generally, where the evidence is conflicting or admits of more than one inference, it is a question of fact for the jury or the trier of facts whether or not a partition in kind is feasible or a sale for division necessary.

One of the recognized factors for determining whether property is incapable of partition in kind is whether it can be divided without materially impairing its value.

Even if partition in kind is possible and will preserve the land's value, a trial court may reasonably conclude partition in kind is not feasible, fair, practical, or equitable given the parties' interests in the property. If the trial court determines property is incapable of partition in kind, then the trial court must order partition by sale.

In this case, the court of appeals upheld that

the trial court's holding in favor of partition in kind.

PART IX
EASEMENTS

Southwestern Electric Power Company* v. *Lynch, 595 S.W.3d 678 (Tex. 2020). In 1949, Southwestern Gas & Electric Company (Southwestern) acquired a number of easements over a stretch of land in northeast Texas to construct a transmission line. Pursuant to the easements, Southwestern constructed a wooden-pole transmission line in 1949 that crossed the encumbered properties. Southwestern Electric Power Company (SWEPCO) subsequently acquired these easements. The easements authorize SWEPCO "to erect towers, poles and anchors along" a set course on a right-of-way that traverses several privately owned properties. In addition, these easements grant SWEPCO the right to ingress and egress over the encumbered properties "for the purpose of constructing, reconstructing, inspecting, patrolling, hanging new wires on, maintaining and removing said line and appurtenances." The easements limit the number of poles, towers, and anchors that SWEPCO may construct on the properties, but also give SWEPCO the option to increase the number of poles, towers, or anchors by compensating the landowners. Since acquiring the easements from Southwestern, SWEPCO has continued to utilize the easements to maintain the transmission line following the same general path since the line's construction.

In 2014 and 2015, SWEPCO undertook a modernization project on the original transmission line. This modernization project included replacing the line's wooden poles with steel poles. As part of the modernization project, SWEPCO made offers to many of the landowners whose properties were encumbered by the 1949 easements to supplement the easements to "bring the rights and restrictions to SWEPCO's standard right of way requirements." Specifically, the supplemental terms to the 1949 easements included additional rights for SWEPCO and proposed setting the easements' width at 100 feet. SWEPCO offered landowners $1,000 if they accepted the supplemental terms. Some of those landowners accepted SWEPCO's proposal, but Lynch and two other landowners did not. SWEPCO therefore proceeded to complete the modernization project on the Landowners' properties under the original, unamended terms of the 1949 easements.

Over the course of the modernization project, Lynch and the other two landowners did not object to SWEPCO's utilization of the 1949 easements to access their encumbered properties to upgrade the transmission line. After the project was completed, however, the Lynch and the other two landowners filed suit seeking a declaratory judgment fixing SWEPCO's easements to a thirty-foot width, fifteen feet on each side of the transmission line. They argued that SWEPCO has only ever utilized thirty feet of the encumbered properties, and thirty feet should be the maximum amount of land that SWEPCO may utilize in the future. The trial court agreed and held that the easement was limited to fifteen feet on either side of the centerpoint of the transmission line – in other words, a thirty-foot easement. The court of appeals affirmed.

When construing the terms of an easement, courts deploy the rules of contract interpretation and look to the easement's express terms to determine its scope. As in contract interpretation cases, courts look to all of the language in the easement and harmonize its terms to give effect to all of the provisions. If the easement's terms can be given a definite or certain meaning, then the language is not ambiguous, and the court is obligated to interpret the contract as a matter of law. Importantly, a dispute over the meaning of the

easement's terms is not enough to render an easement ambiguous. An easement is ambiguous only if it is susceptible to two different, reasonable meanings.

The plain language of the easements grants SWEPCO (1) a right-of-way on the Landowners' properties on which SWEPCO may construct a transmission line along a particular course; and (2) the right of ingress and regress over the Landowners' properties adjacent to the right-of-way for the purpose of constructing, removing, reconstructing, and maintaining the transmission line. The easements do not state a specific maximum width of the right-of-way, nor do the easements specify how much of the land SWEPCO is entitled to access under the ingress and egress provision. SWEPCO maintains—and its representatives testified at trial—that this plain language grants SWEPCO what is known as a "general easement." General easements, SWEPCO argues, entitle the company to access, in a reasonable manner, as much of the Landowners' properties as is reasonably necessary to maintain the transmission line.

Instead of construing the easements as general easements that intentionally omitted a defined width, the courts below concluded that once Southwestern constructed the transmission line in 1949 pursuant to the easements, its rights—and therefore SWEPCO's rights—under the easements became "fixed and certain," and based on SWEPCO's historical use of the land, a thirty-foot wide easement is what is reasonably necessary.

The Supreme Court has recognized the existence of general easements that do not require a fixed width. A grant or reservation of an easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner. Consistent with the recognition of general easements in Texas, courts have long been reluctant to write fixed widths into easements when the parties to the easements never agreed to a particular width.

Because landowners purchase properties aware of any encumbrances, and easements are a common encumbrance, landowners are charged with notice of easements that may encumber their property, including easements that do not contain a specific width but instead include general language. Here, the landowners purchased their properties long after SWEPCO acquired its express general easements. As a result, the landowners took these properties with notice that the easements authorized SWEPCO to utilize the land for a number of purposes relating to the transmission line, and that these easements did not specify a width. The landowners were of course free to renegotiate the easements with SWEPCO, and in fact SWEPCO invited them to do so. But the landowners did not agree to SWEPCO's proposed fixed width. As a result, the landowners' properties remain burdened by general easements with no defined width.

This does not mean, however, that the landowners are without recourse as to SWEPCO's future use of the easements. The holder of a general easement must utilize the land in a reasonable manner and only to an extent that is reasonably necessary. Specifically, a general easement includes the implied grant of reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner. This requirement provides a vehicle for the servient land owner to pursue recourse if the grantee utilizes the servient land in an unreasonable or unnecessary manner.

Clearpoint Crossing Property Owners Association* v. *Chambers, 569 S.W.3d 195 (Tex.App.—Houston [1st Dist.] 2018, pet.

denied). The Chambers own 32 acres adjoined by land owned by the Clearpoint and Space Center, leased to Cullen's. The Chambers tract is landlocked, lacking direct access to a public road. Exxon previously owned the Chambers tract and abandoned an earlier easement that gave the Chambers access across the Clearpoint tract in exchange for two express easements.

In one of the two express easements, Clearpoint conveyed an easement across its land via a private road. In the other Space Center conveyed an easement across a parking lot. Together, the two easements gave access from the Chambers tract to Space Center Boulevard. Both easements are perpetual, irrevocable, and run with the land to benefit Exxon's successors and assigns. The easements state that their purpose was to give "free and uninterrupted pedestrian and vehicular ingress to and egress from" a parcel of the Chambers tract identified as "Drill Site BB," which they describe as a 7-acre tract within the larger Chambers Tract. Exxon had owned the drill site before they acquired the entire Chambers tract.

When the Chambers began using the easements to clear the land in preparation for growing hay and for building storage units on another 5 acres, Clearpoint objected. Clearpoint and Space Center contended that the express easements are limited in scope and grant the Chambers access to benefit Drill Site BB, not the entire tract, and for the sole purpose of furthering drilling activities. Clearpoint and Space Center also disputed whether the Chambers were entitled to an implied easement by necessity.

The jury found that the express easements granted a right of ingress and egress to benefit the entire Chambers tract. In addition, based on the jury's findings, the court held that the Chambers had an easement by necessity.

On appeal, the court held that the plain language of the express easements provided access to Drill Site BB and not to anywhere else on the Chambers tract; however, the court also held that the easements do not limit the right of access to uses associated with drilling.

As to the Chambers' claim of an easement by necessity, the court noted that, to establish an easement by necessity, the Chambers had to prove, among other things, that the claimed access is a necessity and not a mere convenience. This requires a showing of strict necessity. Thus, if the proof establishes that the Chambers have other means of accessing the Chambers tract, a necessity easement cannot exist as a matter of law.

The express easements unambiguously grant part of the Chambers tract a right of ingress and egress across the Clearpoint tract, for the purpose of accessing Drill Site BB. Drill Site BB's northern and eastern boundaries, in turn, adjoin the remainder of the Chambers tract. Because the Chambers can access the remainder of their property from Drill Site BB, for which they have express easements across the Clearpoint tract to a public road, the Chambers cannot establish the strict necessity required for the law to imply an easement by necessity.

Cook* v. *Nissimov, 580 S.W.3d 745 (Tex.App.--Houston [14th Dist.] 2019, no pet.). McKnight owned an access easement to the 130-acre tract that Cook was going to subdivide. Cook owned another 450 acres that he also planned to subdivide. Cook entered into an agreement with McKnight assigning the non-exclusive right to use the easement to Cook, his heirs and assigns. Their agreement also provided that, if Cook wanted to use the easement for access to the 450-acre tract, he would impose deed restrictions on that tract.

Lots were sold in the subdivided 130-acre tract. The deeds for the lots included a

conveyance of the non-exclusive right to the access easement and also contained a list of exceptions, including an exception for existing easements. After Cook sold lots in the 130-acre tract, he subdivided the 450-acre tract and sold lots. With those sales, he purported to grant access across the 130-acre tract using the access easement. Those grants led to the probability that the purchasers of lots in the 450-acre tract would have access to the 130-acre tract, which was a private gated subdivision.

The County sued Cook for selling the lots in the 450-acre tract as unplatted lots. The lot owners in the 130-acre tract intervened, claiming that the access easement was never intended to provide access outside of the 130-acre tract. The lot owners' action was severed from the County's suit.

The trial court ruled in favor of the lot owners. It held that the subdivision on the 130-acre tract was a private gated subdivision, that the lot owners had the right to use the access easement to access their lots, that Cook didn't reserve the right to use the access easement within the 130-acre tract, and that Cook's purported grants of easements to parties outside the 130-acre tract were invalid.

An easement is a non-possessory interest in another's property that authorizes the holder to use that property for a particular purpose. An easement does not convey the property itself. For an easement appurtenant to exist either by implication or in writing, there must be (1) a dominant estate, to which the easement is attached; and (2) a servient estate, which is subject to the use of the dominant estate to the extent of the easement granted or reserved.

In determining whether an easement has been granted expressly, the court looks to the same rules of construction applicable to deeds. An easement appurtenant benefits the property to which it is attached; it cannot be separated from the owner's rights in the land, and it passes with the property. Although an easement appurtenant passes by a deed's use of the word "appurtenant," it is usually held that such an easement passes even without such an express reference in the deed.

A warranty deed will pass all of the estate owned by the grantor at the time of the conveyance unless there are reservations or exceptions that reduce the estate conveyed. An easement created by reference to a plat is an appurtenance which cannot be separated from the owner's rights in the land and passes with the property. An owner who wishes to reserve a right or easement from conveying with the property must make such reservation by clear language. Although an "exception" can refer to any "mere exclusion from the grant," a "reservation" must "always be in favor of and for the benefit of the grantor."

The words "exception" and "reservation," though at times used interchangeably, each has its own separate meaning. A reservation is the creation of a new right in favor of the grantor. An owner who wishes to reserve a right or easement from conveying with the conveyed property must make the reservation by clear language. An exception, by contrast, operates to exclude some interest from the grant.

The issue raised by appellants is whether the "exception" in the deeds to appellees acted to reserve the right to grant access to the Access Easement. Cook argued that by excepting validly existing easements in the deeds to appellees Cook reserved the right to convey use of the Access Easement to others. The lot owners argued that to reserve the right to convey use of the easement to others Cook was required to expressly reserve that right in the deeds.

Recognizing that separate ownership of long narrow strips of land, distinct from the land

adjoining on each side, is a fruitful source of litigation and disputes, the Texas Supreme Court of Texas developed a rule with respect to the legal construction of conveyances like Cook's to the lot owners: "[I]t is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceases to be of use to him, unless such fee is clearly reserved." ***Cantley* v. *Gulf Prod. Co.***, 135 Tex. 339, 143 S.W.2d 912, 915 (1940) (presuming that language "keeping" thirty-foot-wide road easement did not reserve title to strip of land underlying easement in absence of evidence of clear intention to do so). When an instrument conveys land definitely described in the instrument and then excepts from the conveyance a road, railroad right-of-way or canal right-of-way occupying an easement on, over or across the land conveyed, the instrument conveys the fee to the entire tract, subject to such right-of-way, unless the deed clearly indicates that the grantor intended to reserve the strip.

There is no disagreement that the right-of-way at issue here is a 60-foot-wide strip of land that adjoins the lots that were conveyed in the deeds to the lot owners. Cook believed the "exception" language was sufficient to indicate his intention to reserve an interest in the access easement. The court disagreed. In the absence of an express reservation of the access easement in the deeds to the lot owners, the court applied the Cantley presumption and determined that the deeds are reasonably susceptible to only one construction-i.e., the construction that the express right to grant access to the easement was not reserved by Cook.

Texas Land & Cattle II, Ltd.* v. *ExxonMobil Pipeline Company, 579 S.W.3d 540 (Tex.App.--Houston [14th Dist.] 2019, no pet.). ExxonMobil owns a pipeline easement created in a right-of-way deed from 1919 that granted its predecessor the right of way to lay, maintain, operate, and remove a pipeline for the "transportation of oil or gas" across TLC's property. The easement does not define oil or gas. ExxonMobil has been transporting gasoline and diesel through the pipeline since at least 1995.

TLC sued ExxonMobil, claiming that ExxonMobil was exceeding its rights under the easement, which TLC claimed was limited to the transport only of crude oil or crude petroleum. ExxonMobil, on the other hand, argued that the terms oil and gas, as used in pipeline easement agreements from the early 20th century, include refined products like gasoline and diesel. The parties do not dispute that gasoline and diesel are refined petroleum products.

The parties have not cited and did the court did not find a Texas appellate decision addressing directly the meaning of oil or gas in a pipeline easement. Because this easement does not define oil or gas, the court's task is to give those terms their plain, ordinary, generally accepted meaning. Reference to the ordinary meaning of oil or gas as reflected in dictionaries and other secondary sources supports ExxonMobil's argument. "Oil" is broadly defined in The Century Dictionary, published in 1914, as the general name for a class of bodies which have all or most of the following properties in common: they are neutral bodies having a more or less unctuous feel and viscous consistence, are liquid at ordinary temperatures, are lighter than water, and are insoluble in it, but dissolve in alcohol and more readily in ether, and take fire when heated in air, burning with a luminous smoky flame.

According to this dictionary, "oil" is divided into three classes: fatty or fixed oils, essential or volatile oils, and the mineral oils. In turn, "mineral oils" include "petroleum and its derivatives, ... mixtures of hydrocarbons, some being exclusively paraffins, others containing varying quantities of hydrocarbons of the

olefine and naphthene series. Other definitions were offered by ExxonMobil that further tended to support its position. TLC did not provide any contravening evidence of commonly accepted or industry-specific definitions for these terms. Nor did TLC address the meaning of "gas" specifically or rebut ExxonMobil's definitions showing that the term's ordinary meaning includes gaseous mixtures used as fuel.

Texas courts have addressed the terms "natural gas" or "gas" in a deed or lease and found that they include "all constituent elements," including refined products such as gasoline.

The court held that, based on the cases it reviewed and on the ordinary meaning of oil and gas, ExxonMobil did not exceed its rights under the 1919 easement by transporting the refined products gasoline and diesel through the pipeline.

Houston Community College System* v. *HV BTW, LP, 589 S.W.3d 204 (Tex.App.—Houston [14th Dist.] 2019, pet. dismissed). The Houston Community College System owned a vacant lot in Houston and the Partnership owned an adjacent building. The Partnership asked HCC for an easement across HCC's property and the parties entered into an Easement Agreement. The Easement Agreement required the Partnership to construct parking facilities on the Property according to plans approved by HCC and the Partnership.

The Partnership spent over $500,000 in engineering and permitting costs and fees, demolition costs, grading, and constructing drainage, curbs, and landscaping on the HCC Property. At the time of the lawsuit, only things left to be done are paving the road and parking lot and striping the parking lot. In order to do the paving work, the Partnership needed approval from CenterPoint Energy, which had a utility easement on the Property. To obtain the approval, CenterPoint required a signed "Consent to Encroach" from HCC. The Partnership submitted the consent form to HCC. HCC refused to sign it unless the Partnership agreed to a license agreement instead of an easement. The Partnership sued HCC. HCC filed a plea to the jurisdiction, claiming governmental immunity. The trial court denied the governmental immunity claim and granted judgment in favor of the Partnership.

On appeal, HCC argues it is entitled to immunity from suit as a political subdivision for which immunity has not been waived. The Partnership contends immunity has been waived under chapter 271 of the Local Government Code, which waives governmental immunity from suit for a governmental entity that enters into a contract for services. HCC argues that the Easement Agreement is not a contract for services to HCC because an easement is an interest in land and HCC will not receive a direct benefit. The dispositive issue is whether the Partnership, in agreeing to construct parking facilities on the Property, agreed to provide a service to HCC.

Chapter 271 does not define "services," but the supreme court has interpreted the term in this context as broad enough to encompass a wide array of activities. Under the Easement Agreement, the Partnership was required to construct parking facilities on HCC's property as consideration for the Easement to be granted. No other consideration was required. Courts have frequently held that the construction of facilities to benefit a governmental entity is a service for purposes of chapter 271. Here, the court held that the Partnership's construction of parking facilities as consideration for the grant of an easement is a service to HCC. Accordingly, the Easement Agreement is an agreement for services within the purview of chapter 271.

PART X
CONDEMNATION

San Jacinto River Authority* v. *Burney, 570 S.W.3d 820 (Tex.App.--Houston [1st Dist.] 2018, no pet.). During Hurricane Harvey, the San Jacinto River Authority released water from Lake Conroe into the San Jacinto River. Owners of homes that flooded in Kingwood, Texas have sued the River Authority in the district courts of Harris County, seeking compensation for their inverse-condemnation and statutory takings claims.

Generally, Texas district courts and county courts at law have concurrent jurisdiction in eminent-domain cases. Harris County is an exception. Before September 1, 2015, county civil courts at law had exclusive jurisdiction of all eminent-domain proceedings in Harris County. For cases filed on or after September 1, 2015, the Legislature modified the subject-matter jurisdiction of Harris County courts with respect to eminent-domain cases by amending Government Code § 25.1032(c).

Oak Lawn Apartments, Ltd.* v. *State of Texas, 584 S.W.3d 11 (Tex.App.—Fort Worth 2018, pet. denied). After the special commission filed its findings and issued an award in the condemnation action to acquire Oak Lawn's property, Oak Lawn filed a "Motion to Withdraw Award Of Special Commissioners." Two months after that motion was filed, the State filed a motion for entry of judgment on the special commissions award. The trial court found that no objections to the special commissions award had been filed and entered judgment. Oak Lawn then appealed, claiming that the Motion to Withdraw was a written statement of objection under the condemnation statutes.

Chapter 21 of the Texas Property Code governs eminent-domain proceedings. The Texas eminent-domain scheme is a two-part process that begins with an administrative proceeding followed, if necessary, by a judicial one. The initial filing of the petition and the commissioners' hearing and award constitute the administrative proceeding part of the eminent-domain scheme. The condemning entity initiates a condemnation proceeding by filing a petition in the proper court. The court then appoints three special commissioners to conduct a hearing and to determine just compensation. Once the commissioners have made an award, the condemnor, if satisfied, must pay the amount of the award to the condemnee, deposit that amount in the court's registry, or post a sufficient bond.

On the filing of objections, the special commissioners' award is vacated, and the administrative proceeding converts into a normal pending judicial cause with the condemnor as plaintiff for the purpose of proving its right to condemn and the landowner as defendant. Either party may challenge the special commissioners' award by filing a written statement of their objections in the same court. Objections to the special commissioners' award need not utilize particular words but must be filed with the court and must identify the substance of the party's complaint by stating the "grounds" for its objections. The objecting party must then secure service of citation on the adverse party and try the case in the manner of other civil causes. Absent timely-filed objections, the court has a ministerial duty to enter judgment in accordance with the special commissioners' award. In the absence of timely-filed objections, the trial court's judgment on the commissioners' findings and award is not appealable.

Oak Lawn argues on appeal that two sentences in its "Motion to Withdraw Award of Special Commissioners" constitute written statement of objections to the special commissioners' award. Oak Lawn points to the second sentence of paragraph I that states,

"Objections were filed by Defendant to the Award of the Special Commissioners," and to the second sentence of paragraph II that states, "[a]lthough the parties have not yet agreed to a final compensable amount, the $2,034,432.00 deposited into the Registry of the Court is not in dispute." Oak Lawn argues that these two sentences are sufficient to under Property Code § 21.018(b) to constitute a statement of written objections to the special commissioners' award because the threshold for a sufficient objection in the eminent-domain context is low.

Under Property Code § 21.018(a), a party to a condemnation proceeding objects to the findings of the special commissioners by filing a written statement of the objections and their grounds with the court that has jurisdiction of the proceeding. Giving § 21.018(a) its plain meaning, an objecting party must file a written document; the document must set forth the party's objections (e.g., an objection that the condemnor did not have the authority to condemn the property at issue, an objection that the award is insufficient, etc.); and the document must set forth the grounds for the stated objections. Although the plain language of § 21.018(a) does not require the written statement of the objections and their grounds to adhere to strict or formal pleading requirements, the plain language of the statute reflects the legislature's intent that the written statement, at a minimum, must apprise the trial court that objections have been filed.

The two sentences in Oak Lawn's motion to withdraw the award that Oak Lawn contends satisfy the requisites of § 21.018(a) do not constitute a written statement of objections. Instead, Oak Lawn's motion to withdraw the award indicates only that objections were filed. But none were. The record does not include, and Oak Lawn does not contend it filed, a separate document stating Oak Lawn's objections to the special commissioners' award.

Alternatively, even if Oak Lawn's motion is construed to withdraw the award as a written statement of the objections, Oak Lawn's motion to withdraw the award would still fail to comply with § 21.018(a), which also requires grounds for the objections.

City of Houston* v. *Commons at Lake Houston, Ltd., 587 S.W.3d 494 (Tex.App.—Houston [14th Dist.] 2019, no pet.). The Commons owns a roughly 318-acre tract of land near Lake Houston. The Commons has begun development of the land into a master-planned community known as "The Crossing." Significant portions of The Crossing are located within the 100-year or 500-year floodplains. The City approved a drainage plan and construction plans concerning water, sanitation, sewage, drainage facilities, and paving for part of The Crossing. The Commons began working on water, sewage, and drainage lines, investing millions of dollars towards amenities for the development of The Crossing.

After Hurricane Harvey, the City amended the existing floodplain development ordinance. The old ordinance required that new residential structures within the 100-year floodplain had to be built at least one foot above the flood elevation. Among other changes, the new ordinance requires that new residential structures within the 500-year floodplain must be built at least two feet above the flood elevation.

The Commons sued the City before the effective date of the ordinance and asserted claims for inverse condemnation, alleging that the application of the amended ordinance to its property would substantially damage the market value of the property, and the current development plan would be unfeasible. The City filed a plea to the jurisdiction, claiming that the suit by The Commons was not ripe because the City had not made a final decision applying its new floodplain regulations to the

development.

Justiciability doctrines, such as ripeness, are rooted in the prohibition against advisory opinions. Ripeness is a question of timing. It is invoked to determine whether a dispute has matured to the point that warrants a decision. The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated or may not occur at all.

Ripeness requires a concrete injury. A case is not ripe if determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass.

A court cannot determine whether a taking has occurred until the court can compare the uses prohibited by the regulation to any permissible uses that may be made of the affected property. for a regulatory taking claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue. A final decision usually requires both a rejected development plan and the denial of a variance from the controlling regulations. The variance requirement is applied flexibly to serve its purpose of giving the government an opportunity to grant different forms of relief or make policy decisions which might abate the alleged taking. Thus, a landowner is not required to make futile variance requests or permit applications

It is undisputed that The Commons has not had any permit or plat applications, or requests for variances, denied as a result of the amended ordinance. Indeed, the ordinance did not become effective until after the trial court denied the plea. The Commons contends that its inverse condemnation claim was "ripe upon enactment" because the ordinance prohibits precisely the use intended for the property.

PART XI
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Dealer Computer Services, Inc.* v. *DCT Hollister RD, LLC, 574 S.W.3d 610 (Tex.App.—Houston [14th Dist.] 2019, no pet.). Standing is implicit in the concept of subject-matter jurisdiction, and subject-matter jurisdiction is essential to the authority of a court to decide a case. A restrictive covenant such as a deed restriction is a contractual agreement between the seller and purchaser of real property. Ordinarily, only the contracting parties and those in direct privity with the contracting parties have standing to enforce restrictive covenants.

Dealer CS was not party to the Northwest Crossing section 3 deed restrictions in question here. It owned property in section 4, which was developed later. The section 3 deed restrictions do not list Dealer CS as a party who may enforce section 3 deed restrictions. Dealer CS does not dispute that it lacks standing under the terms of the deed restrictions themselves. The enforcement provision of section 3 deed restrictions states that the Association or section 3 property owners. Dealer CS nonetheless contends that it has standing to enforce the restrictions because the property is operated under a common scheme or plan.

Under Texas law, a property owner may subdivide property into lots and create a subdivision in which all property owners agree to the same or similar restrictive covenants designed to further the owner's general plan or scheme of development. When property has been developed under such a general plan or scheme of development, each property owner in the development has standing to enforce deed restrictions against other property owners within the development.

The "general plan or scheme" doctrine does

not authorize owners of lots in previously or subsequently platted subdivisions to enforce the covenants of property in other subdivisions. Courts have held that where the grantor's entire tract of land is developed in separate sections and not as a single unit, there is no general plan or scheme that would permit owners in all the subdivisions to enforce restrictive covenants against each other.

Because the undisputed evidence shows the sections of Northwest Crossing were developed in stages, the "general plan or scheme" doctrine does not apply and Dealer CS lacks standing to enforce section 3 restrictions.

Powell* v. *City of Houston, 580 S.W.3d 391 (Tex.App.—Houston [1st Dist.] 2019, no pet.). The Homeowners owned houses in a designated historic district. They sued the City, claiming the City's Historic Preservation Ordinance ("HPO") violated the Houston City Charter's prohibition against zoning regulations. The trial court ruled for the City. On appeal, the Homeowners argued that the HPO constitutes a zoning measure.

Courts have acknowledged a distinction between zoning ordinances enacted pursuant to a comprehensive plan and other ordinances or measures that regulate land use pursuant to a home-rule city's general police powers. The Homeowners have presented no authority indicating that the legislature's grant of authority to pass zoning laws displaces a city's inherent authority to engage in more limited land-use regulation. To the contrary, the legislative grant of zoning authority to municipalities does not prevent, by implication or otherwise, the municipality from exercising the authority incident to self-government.

Charles Glen Hyde, Northwest Regional Airport, Inc.* v. *Northwest Regional Airport Property Owners Association, Inc., 583 S.W.3d 644 (Tex.App.—Fort Worth 2018, pet. denied). The Airport was built in 1969. After that, various tracts around the Airport were developed and deed restrictions were placed on them. The various deed restrictions did not employ a uniform procedure for making assessments for maintaining the common areas of the Airport.

AVDCO developed the land generally located northeast of the Airport. The properties that AVDCO sold granted owners access to the Airport's common areas via an express easement. AVDCO also deed restricted its subdivisions. Of the eight sets of deed restrictions burdening the northeast properties, most call for an Architectural Control Committee to collect a fee from the property owners to maintain the Airport's common areas. Seven of the deed restrictions can be amended when an instrument signed by a majority of the then record owners of the property has been recorded.

Hyde-Way acquired the Airport in 1982 and is the current owner. Hyde-Way also acquired and partially developed a 119-acre tract generally located northwest of the Airport. Like AVDCO, Hyde-Way imposed deed restrictions on the properties it sold, but instead of conveying easements to access the Airport's common areas, Hyde-Way's deed restrictions afforded property owners access to the common areas via a "Runway and Taxiway License. And instead of paying a fee to a committee to maintain the common areas, property owners with a license agreement paid Hyde-Way an annual license fee. But similar to the AVDCO restrictions, the Hyde-Way restrictions can be amended by an instrument signed by a majority of the then property owners of record.

A number of third parties developed and deed restricted several areas generally located in the southern half of the Airport. According to the POA, by 2016, almost all of the lots located in that area were burdened by some form of

Hyde-Way's deed restrictions.

The ACC was disbanded long ago, and the POA claims that Hyde allowed the Airport's runway to fall into a severe state of disrepair, using the license fees not to maintain the Airport's common areas but to pay salaries to himself and his spouse to supplement their incomes. A number of concerned property owners consequently devised a plan to create a uniform system of airport governance with authority to assess fees and maintain the runway. The plan principally involved (1) amending all of the preexisting deed restrictions covering the Airport-area properties to consolidate the authority to assess fees and maintain the Airport's common areas in the POA and (2) amending the POA's bylaws to authorize it to exercise those duties.

The POA maintains that it achieved both tasks. It claims that a majority of the Airport-area property owners signed the Integrated Deed Restrictions ("IDRs"), which amended all of the preexisting deed restrictions (seven of the eight AVDCO deed restrictions and the Hyde-Way deed restrictions, including the deed restrictions imposed by other developers) by requiring each property owner to pay an annual fee to the POA for the purpose of maintaining the Airport's common areas. The POA also amended its bylaws, permitting its board to exercise those rights and duties prescribed by the IDRs.

The POA then assessed fees against the property owners. Hyde claimed that the POA lacked the authority to assess maintenance fees. The POA then sued, seeking a declaration that it had the authority under the IDRs to make the assessments.

Each deed restriction that the IDRs purported to amend could be amended only by a majority of the then record owners of the properties. To prove that it obtained the requisite number of signatures, the POA's summary-judgment evidence included, among other things signature pages of the owners who had approved the IDRs, a spreadsheet showing who the owners and their property. The court held that the exhibits offered by the POA made it possible to ascertain whether the POA received the approval of the required minimum number of property owners burdened by a single set of deed restrictions at a particular point in time, reflected in a single instrument, during a time when amendments were allowed under existing deed restrictions.

The properties contained in the Northwest part of the Airport are burdened by what appears to be a single set of deed restrictions and the court found that over 50% of the owners subject to that set of deed restrictions approved the IDRs. But the same cannot be said for the properties located in the Northeast and Southern regions of the Airport. So, a majority of the then property owners subject to each set of preexisting deed restrictions failed to approve the IDRs; therefore, as a matter of law, the IDRs are invalid and unenforceable, and the POA lacks the authority to assess fees to maintain the Airport's common areas.

Roddy* v. *Holly Lake Ranch Association, Inc., 589 S.W.3d 336 (Tex.App.—Tyler 2019, no pet.). Paragraph 26(c) of the restrictions provide that they could be amended by a majority vote of the lot owners in the subdivision, each then existing lot entitling its owner to one vote. The Owners argue that the last phrase of the section meant that, for example, if someone owns three lots in the subdivision, that person is entitled to three votes regarding a proposed amendment to the deed restrictions. On the other hand, the Association contends that this language is intended to address only a situation wherein a lot has multiple owners and to restrict each lot to one vote, regardless of the number of lot owners. The trial court found that the plain meaning of

Paragraph 26(c) is that each member who owns a lot is entitled to one vote, regardless of how many lots that member might own, and regardless of how many persons, or entities, might share the ownership rights to that member's lot. The court of appeals disagreed.

Paragraph 26(c) makes no reference to multiple lot owners in the context of allotment of votes. Rather, it sets forth that the success of an amendment depends on a majority vote of a subdivision's lot owners, but it allots votes based on the number of lots, each of which entitles its "owner" to one vote. Thus, if there are one hundred lots in a subdivision, one hundred votes may be cast. Had the drafting parties intended to address only a situation wherein a lot had multiple owners, they could have so stated. But we cannot conclude based on a reasonable interpretation of the language used that they intended this clause to address only such an eventuality.

PART XII
TAXATION

Grimes County Appraisal District* v. *Harvey, 573 S.W.3d 430 (Tex.App.—Houston [1st Dist.] 2019, no pet.). Harvey's application to continue his agricultural exemption was denied. Although he did not make any tax payment by the statutory delinquency date of February 1, he filed a protest with the Grimes County Appraisal Review Board. The ARB scheduled a hearing, but at the hearing, before any evidence was received, the ARB announced that it was dismissing Harvey's protest for lack of jurisdiction based on the GCAD records indicating that Harvey hadn't made any tax payment by February 1. Tax Code § 42.08(b) requires a property owner who appeals tax determination to pay statutorily determined minimum tax payment before the delinquency date or the property owner forfeits the right to proceed to a final determination of the appeal, and provides a means to establish amount of minimum payment.

Harvey filed suit, in which GCAD filed a plea to the jurisdiction because of Harvey's failure to pay. The trial court denied the jurisdiction plea and GCAD appealed.

GCAD argues that the trial court erred in denying its plea to the jurisdiction because Harvey's failure to pay any property taxes by the delinquency date deprived the trial court of subject-matter jurisdiction.

To be eligible to appeal an appraisal determination, a property owner is required to have paid a minimum amount of taxes by the delinquency date. The minimum tax payment is calculated in one of three ways, but the parties agree that, in this case, the amount Harvey owed by February 1 was the taxes due on the portion of the taxable value of the property that is not in dispute. Compliance with Section 42.08's payment deadline is a jurisdictional prerequisite to district court's subject matter jurisdiction to determine property owner's rights.

Harvey concedes that he did not make a tax payment before February 1, 2017. Nonetheless, he argues that his payment of zero dollars complies with Section 42.08(b)(1) because there is no way to know the "portion not in dispute" until the agricultural-use exemption has been finally determined. In other words, according to Harvey, without a proper hearing on all of his claims, the entire amount is in dispute, leaving the amount that is not in dispute equal to zero dollars. The court did not agree.

Harvey's underlying contention is that his land has benefitted from an agricultural-use exemption in past years and continued to qualify for the exemption for the 2016 tax year. Under the exemption, Harvey's recent property tax bills have been between $100 and $200 annually. It was $138.13 in the 2015 tax year.

Harvey expressly does not argue that he owes zero dollars in 2016 property taxes. He agrees he owes some amount in taxes. Thus, there was some amount of taxes that were due and undisputed. Yet Harvey paid nothing— not even an estimate of the amount that would have been due had he continued to benefit from the agricultural-use exemption he sought. Accordingly, Harvey failed to meet the minimum payment requirement of Section 42.08.

Sorrell* v. *Estate of Carlton, 593 S.W.3d 167 (Tex. 2019). For decades, the lower courts have held that substantial compliance with statutory requirements is sufficient for redemption. The Supreme Court has not decided the issue. It had, however, ruled recently in BankDirect Capital Finance, LLC v. Plasma Fab, LLC, 519 S.W.3d 76, 83 (Tex. 2017), that substantial compliance is insufficient to comply with an Insurance Code provision requiring an insurance premium finance company to give ten days' notice before canceling a policy. In that case, the court held that, absent statutory language to the contrary, a statutorily imposed time period does not allow for substantial compliance. The purchaser argued that the BankDirect case was dispositive. The court held it was not.

The court noted that the tax redemption statute and the insurance notice statute were very different. The insurance notice requirement is short, straightforward, and clearly focused on the deadline stated in the notice of default. Section 34.21 is exceedingly complex, and reading the provision as a whole, one cannot say that it is singularly focused on the redemption deadlines stated in it.

Although, substantial compliance is insufficient to satisfy a statutory deadline, it may be sufficient to comply with other statutory requirements. Here, the Estate paid Sorrell before the statute's deadline but did not pay the full amount that the statute requires. In light of the longstanding practice of favoring redemption over forfeiture in this property-rights context, the court held that a party's timely substantial compliance with the redemption statute's requirement to pay certain amounts may satisfy the statute's demands.

PART XIII
CONSTRUCTION

Lyda Swinerton Builders, Inc.* v. *Cathay Bank, 566 S.W.3d 836 (Tex.App.—Houston [14th Dist.] 2018, pet. pending). After a lot of problems getting paid, the contractor suspended work and ordered its subcontractors to suspend work as well. No work was done again after the suspension. The contractor filed its first mechanics' lien. The owner asked the contractor remain on the work site and the contractor did so, incurring costs for keeping its materials and equipment on site. The contractor sent a notice of intent to terminate the contract, but the owner kept assuring it that financing was on the way, so the contractor did not expressly terminate the contract. The owner filed bankruptcy. Finally, the contractor left the site, but claimed that it never terminated or abandoned the contract.

In a lien priority dispute with the bank, the trial court held that the contractor had a lien superior to the bank's lien, but held that the contract was "constructively terminated" ninety days after the contractor suspended work, thereby making several of the lien affidavit filings untimely and ineffective.

Section 53.053(b) of the Texas Property Code addresses when a debt to an original contractor accrues. The statute provides that indebtedness to an original contractor accrues on the last day of the month in which the contract is terminated by a written declaration received by either the original contractor or the contracting party, or the contract is completed,

finally settled, or abandoned. It is undisputed that the contract was never completed or finally settled. It is also undisputed on appeal that neither the contractor nor the owner received a written declaration from the other terminating the contract. The court then looked to see if the contract had been abandoned.

The Property Code does not recognize "constructive termination" as a basis for determining when a debt to an original contractor accrues. The bank seemed to recognize this and argued on appeal that the court should construe the trial court's conclusion of law regarding constructive termination as, in reality, a determination that the contract was abandoned on that date. The court declined to do so because both parties submitted proposed findings and conclusions regarding abandonment of the contract and the trial court did not adopt them. The court therefore treated the trial court's failure to adopt them as a deliberate refusal, and would not imply or presume any findings regarding abandonment.

Dakota Utility Contractors, Inc.* v. *Sterling Commercial Credit, 583 S.W.3d 199 (Tex.App.—Corpus Christi 2018, pet. denied). Sterling had a factoring relationship with Dambold, a gas pipeline construction company. Dambold sold its invoices to Sterling in exchange for monetary advances. Dambold had an obligation to repurchase invoices that were unpaid after a certain period of time. Sterling advanced over $2 million to Dambold under this arrangement.

Dambold ultimately defaulted under its agreement with Sterling, filed bankruptcy and ceased operating. The bankruptcy court approved a settlement between the parties and various subcontractors. Dakota was one of the subcontractors, and after the settlement, where it received some payment, it claimed it was still owed money by Dambold.

Dakota filed suit against Sterling contending that Sterling misapplied construction trust funds owed to Dakota in violation of the Construction Trust Fund Act, Chapter 162 of the Property Code. Sterling argued that the Act did not apply to Sterling because either: (1) Sterling was not an "agent" of Dakota's contractor and, therefore, not a "trustee" under the Act; or, alternatively (2) Sterling was a "lender" to Dakota's contractor and, therefore, exempt from liability under the Act. In turn, Dakota's motion for summary judgment asserted that the Act applied to Sterling because Sterling was a "trustee" and was not a "lender." After a hearing, the trial court granted Sterling's motion for summary judgment and denied Dakota's motion.

This case concerns the correct construction of the Construction Trust Fund Act. The Act's overarching purpose is to serve as a special protection for unpaid subcontractors and materialmen when contractors refuse to pay them for labor and materials. The Act imposes fiduciary responsibilities on contractors to ensure that Texas subcontractors, mechanics, and materialmen are paid for work completed. The Act is a stand-alone, comprehensive statutory scheme defining whether construction payments and loan receipts constitute trust funds, determining who are beneficiaries of trust funds, and providing for penalties.

Under the Act, "construction payments" are "trust funds" subject to the statute "if the payments are made to a contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor, under a construction contract for the improvement of specific real property in this state." Property Code § 162.001(a). "An artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or who furnishes labor or material for the construction or repair of an improvement on specific real property in this

state is a beneficiary of any trust funds paid or received in connection with the improvement." Property Code § 162.003. And, a "trustee" of trust funds is defined as a "contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds." Property Code § 162.002.

Under the Act, a trustee misapplies trust funds if it intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds.

The Act expressly provides that it does not apply to certain specified entities which include a bank, savings and loan, or other lender. Dakota contends that, since the legislature did not specifically include factoring companies in the list of people and entities exempt from the Act, the legislature intended for the Act to apply to factoring companies. The court disagreed. The record indicates that Sterling, as a financing entity, is not a "trustee" under the Act because it is not a "contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner."

And, contrary to Dakota's arguments, the record does not show that Sterling served as Dambold's agent under the Act. In this context, we note that the two essential elements of agency are the authority to act on the principal's behalf and control. The party claiming agency must prove that the principal has both the right to assign the agent's task and the right to control the means and details by which the agent will accomplish the task. Dakota has not shown that Dambold had the right to assign Sterling particular tasks or that it had the right to control the means and details for Sterling to accomplish those tasks. The factoring agreement between Dambold and Sterling did not imbue or vest Dambold with the right to control Sterling's actions regarding the accounts receivable. And the record as a whole does not indicate that Sterling acted as Dambold's agent regarding the accounts receivable at issue in this case.

Further, even if Sterling were the agent of Dambold, the payments made to Sterling did not constitute trust funds under the statute. Under the Act, construction payments are trust funds if the payments are made under a construction contract for the improvement of specific real property. Here, the payments made to Sterling were not made under a construction contract but were instead based on the factoring agreement between Dambold and Sterling.

Schear Hampton Drywall, LLC* v. *Founders Commercial, Ltd., 586 S.W.3d 80 (Tex.App.—Houston [14th Dist.] 2019, no pet.). In the construction context, a property owner is ordinarily not a third-party beneficiary of a contract between the general contractor and a subcontractor absent clear evidence that the parties intended to benefit the property owner. Any doubt over intent should be resolved against the property owner. For a property owner to recover as beneficiary of a subcontract, it must also show that the contracting parties entered into the contract directly and primarily for the property owner's benefit.

PART XIV
PARTY WALLS

Scott* v. *West, 594 S.W.3d 397 (Tex.App.—Fort Worth 2019, pet. denied). After the Adjoining Neighbors declined to pay for part of the Retaining Wall's replacement, the Scotts filed this suit. In their live petition, the Scotts alleged that the Retaining Wall is failing, that it is both falling on and being pushed onto their property, and that it needs to be replaced. They asserted that the Adjoining Neighbors' acts and

omissions contributed to the Retaining Wall's failing. The trial court granted permission for an interlocutory appeal on the matter because there was no guiding statutory or case law. The court of appeals granted the appeal to address whether the law imposes an absolute legal duty for any of the parties to repair or replace the Retaining Wall.

As expressed in the age-old principle of sic utere tuo ut alienum non laedas, all property owners have a general duty to not use their own property in a manner that injures the rights of others. When the violation of this duty causes an injury, the law may provide a cause of action and, consequently, a remedy; this general duty provides the foundation for some areas of tort law, such as nuisance.

In some circumstances, courts have impliedly used this general duty, as expressed in the laws of that state, to impose an obligation on landowners to provide lateral support to their own property after raising the grade of their land. The reasoning is essentially this: when a landowner has no duty to provide lateral support to a higher-elevated adjoining property, then the duty that the owner of the higher property has— to avoid causing harm to the lower neighboring property— imposes on that owner an obligation to keep the owner's soil from sloughing off onto the lower property. In such a case, the owner of the higher-elevated property must support his or her own property to prevent soil from the higher land from falling, and to that end, courts have sometimes required the owner of the higher-elevated property to build a retaining wall.

Even in these cases, the duty is not specifically to build a retaining wall. The duty, as expressed through various causes of action, is for landowners to avoid using their property so as to injure another's property— in the cases cited by the Scotts, by preventing soil from falling onto a neighbor's property. Building a retaining wall or other structure may in some circumstances be the proper method to satisfy that duty. But the court declined to apply the cited cases to hold that under Texas law, the general duty applicable to all property owners imposes an absolute duty on either the Scotts or the Adjoining Neighbors to repair the Retaining Wall. Rather, requiring one or more parties to undertake a repair is only a possible remedy for a breach of this general duty, not a strict, absolute obligation. What the proper remedy would be upon proof of a breach of this duty depends on the cause of action asserted, the remedies available for that cause of action, and whether the evidence at trial supports a right to a remedy under that cause of action.

After a lengthy and scholarly discussion, the court held also that the doctrine of lateral support does not impose a duty on the Adjoining Landowners to support their own land. None of them had removed the natural lateral support so none of them could be strictly liable for removing it. The right of lateral support is a property right. Its purpose is not to protect a landowner from trespass or some other unwanted intrusion by another's soil. Its purpose is to protect landowners' absolute right to their own soil. That is the injury from which the doctrine provides protection.

PART XV
PARTNERSHIPS

Energy Transfer Partners, L.P.* v. *Enterprise Products Partners, L.P., 593 S.W.3d 732 (Tex. 2020). In connection with a series of letters of intent, Enterprise and ETP signed an agreement that recognized that they were in the process of negotiating mutually agreeable definitive agreements for the project and stated that nothing in it would be deemed to create or constitute a joint venture, a partnership, a corporation, or any entity taxable as a corporation, partnership or otherwise.

One of the parties to this agreement, Enterprise, entered into a profitable enterprise with a third party without joining the other party, ETP. ETP sued, arguing, that, despite the disclaimer in their agreement with Enterprise, a partnership had been formed and that Enterprise had breached its statutory duty of loyalty by pursuing its project with the third party. At trial, the jury ruled in favor of ETP and the trial court awarded over $500 million in damages. The court of appeals reversed, holding that the Business Organizations Code allows parties to contract for conditions precedent to partnership formation and that ETP had failed to prove that the conditions set out in the various agreements between the parties had been met.

Section 152.051(b) of the Business Organizations Code states that an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether the persons intend to create a partnership or the association is called a partnership, joint venture, or other name. Citing again its mantra concerning freedom of contract, the Supreme Court stated that Texas courts regularly enforce conditions precedent to contract formation and reject legal claims that are artfully pleaded to skirt unambiguous contract language, especially when that language is the result of arm's-length negotiations between sophisticated business entities.

The court noted that it has never squarely addressed whether parties' freedom to contract for conditions precedent to partnership formation can override the statutory default test, in which intent is a mere factor. Enterprise urges the primacy of freedom of contract and argues that if parties cannot by contract protect themselves from the creation of an unwanted partnership, detrimental economic consequences to the State and constant litigation will ensue.

An agreement not to be partners unless certain conditions are met will ordinarily be conclusive on the issue of partnership formation as between the parties. Performance of a condition precedent, however, can be waived or modified by the party to whom the obligation was due by word or deed. Here, ETP did not obtain a jury finding that any condition had been waived and did not prove a waiver. ETP has not pointed to any evidence that Enterprise specifically disavowed the agreement's requirement of definitive, board-of-directors-approved agreements or that Enterprise intentionally acted inconsistently with that requirement.

The court held that parties can conclusively negate the formation of a partnership under Chapter 152 of the Business and Commerce Code through contractual conditions precedent. ETP and Enterprise did so as a matter of law here, and there is no evidence that Enterprise waived the conditions.

PART XVI CRITTERS

Hillis* v. *McCall, No. 18-1065 (Tex. March 13, 2020). Hillis owns a B&B and a neighboring cabin in Fredericksburg. He used the B&B as a second home until 2012, when he began renting it out, mainly on weekends. Hillis hired a housekeeper to prepare and clean the B&B before guests arrived. That process included utilizing "bug bombs" in the event the housekeeper noticed any pest problems. Thus, as Hillis described it, pest control at the B&B was conducted on an as needed basis.

Hillis leased the neighboring cabin on the property to Henry McCall. The cabin had no washer or dryer and had only a small refrigerator, so Hillis permitted McCall to use the laundry facilities and larger refrigerator in the B&B. McCall also offered to "open up" the B&B for guests and others needing access, such

as electricians and other maintenance workers. According to McCall, Hillis typically called him several days before guests arrived and asked him to perform various tasks.

On December 12, 2014, McCall accessed the B&B at Hillis's request to check the dishwasher and investigate whether the sink was leaking. While checking under the sink for a leak, McCall was bitten by a brown recluse spider, which is a venomous spider found in several states, including Texas. Before he was bitten, McCall had observed spiders in both the cabin and the B&B on several occasions and had notified Hillis about the general presence of spiders in the B&B.

McCall sued Hillis for negligence under a premises-liability theory, alleging that the presence of brown recluse spiders on Hillis's property constituted an unreasonably dangerous condition, that Hillis knew or should have known of the condition, that Hillis owed McCall a duty to adequately warn him of the condition or make the property safe, that Hillis breached that duty, and that McCall suffered damages as a result.

Hillis filed a motion for summary judgment, arguing that, under the longstanding doctrine of *ferae naturae*, he owed no duty to McCall with respect to indigenous wild animals that Hillis had neither introduced to nor harbored on the property. The trial court granted the motion, and McCall appealed.

The court of appeals reversed. That court concluded that McCall was bitten by a spider in an artificial structure and Hillis knew or should have known of an unreasonable risk of harm posed by the spiders inside the B&B.

A claim against a property owner for injury caused by a condition of real property generally sounds in premises liability. When the claim is based on the property owner's negligence, the threshold question is whether the owner owed a duty to the injured person. A premises owner generally has no duty to protect invitees from the criminal acts of third parties on the owner's property, but there is an exception when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable. Pertinent to this case, the court also recognizes that, with certain exceptions, a premises owner generally owes no duty to protect invitees from wild animals on the owner's property. Under this longstanding doctrine of *ferae naturae*, such a duty does not exist unless the landowner actually reduced indigenous wild animals to his possession or control, introduced nonindigenous animals into the area, or affirmatively attracted the animals to the property.

The reasoning underlying the doctrine is that wild animals exist throughout nature and are generally not predictable or controllable. In turn, the mere fact that an indigenous wild animal has crossed a landowner's property line does not make the landowner better able to protect an invitee than the invitee is to protect himself.

Courts applying the ferae naturae doctrine have long recognized an additional exception to the general no-duty rule, holding that a landowner could be negligent with regard to wild animals found in artificial structures or places where they are not normally found; that is, stores, hotels, apartment houses, or billboards, if the landowner knows or should know of the unreasonable risk of harm posed by an animal on its premises, and cannot expect patrons to realize the danger or guard against it.

The court held that Hillis owed no duty to McCall. McCall argued that there should be a duty because Hillis knew there had been spiders and he knew that brown recluse spiders are found in Texas. The court didn't buy McCall's argument.

First, knowledge of the general intermittent presence of spiders does not necessarily amount to knowledge of an unreasonable risk of harm, and Hillis had no particular reason to know that brown recluses, or other venomous spiders, were inside the B&B. Further, McCall and Hillis had identical actual knowledge of the presence of spiders on the property: both knew that they had been seen in the B&B periodically, and neither knew of the presence of brown recluses or of other types of venomous spiders. According to McCall, Hillis should have warned him that the spiders McCall himself had seen could have been venomous. But it is simply common knowledge that some spiders are venomous and others harmless. The court would not impose a duty on a landowner to warn an invitee about something he already knows.