CASE LAW UPDATE

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CHAPTER 1

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CASE LAW UPDATE

PART I
MORTGAGES AND FORECLOSURES

PNC Mortgage* v. *Howard, No. 19-0842 (Tex. January 29, 2021). A refinancing lender failed to foreclose its property lien within the statutory limitations period after the borrowers defaulted. The borrowers had used the proceeds from the refinancing to discharge two existing liens. Equitable subrogation "allows a lender who discharges a valid lien on the property of another to step into the prior lienholder's shoes and assume that lienholder's security interest in the property, even though the lender cannot foreclose on its own lien."

Without the benefit of our decision in ***Fed. Home Loan Mortgage Corp.* v. *Zepeda***, 601 S.W.3d 763, 766 (Tex. 2020) (summarized in Home Equity Lending in this paper), the court of appeals concluded that the refinancing lender's failure to timely foreclose its lien precluded the lender from seeking recourse through equitable subrogation. Because a lender's forfeit of its lien does not preclude the lender's equitable right to assert a pre-existing lien discharged with the proceeds from its loan, the Supreme Court reversed and remanded.

The facts of Zepeda substantially mirror those in this case. In that case, Sylvia Zepeda purchased her homestead with a loan using the homestead as collateral, creating a mortgage lien. Zepeda refinanced the debt four years later. Zepeda used the proceeds from the refinancing to pay off the balance of the first loan. Zepeda later notified the refinancing lender that its loan documents contained a constitutional defect, and she requested that the lender cure the defect. Eventually, Zepeda filed suit to quiet title. The Supreme Court in Zepeda held that a lender's negligence in preserving its rights under its own lien thus does not deprive the lender of its rights in equity to assert an earlier lien that was discharged using proceeds from the later loan. Applying Zepeda to this case, the Supreme Court held that the court of appeals erred in concluding that PNC's failure to timely foreclose under the deed of trust bars its subrogation rights. The availability of better credit terms and interest rates can make refinancing an attractive financial tool for borrowers. Subrogation operates as a hedge against the risk of refinancing the outstanding amount of an existing loan, opening this credit market to borrowers. Subrogation permits a lender to assert rights under a lien its loan has satisfied when the lender's own lien is infirm.

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

Federal Home Loan Mortgage Corporation* v. *Zepeda, 601 S.W.3d 763 (Tex. 2020). Zepeda refinanced her debt with a home-equity loan from Embrace Home Loans, Inc. She also used her homestead as collateral in that transaction. Embrace paid the balance of Zepeda's debt to C.I.T. Group, which then released its claim on the homestead. Zepeda, through an attorney, notified Embrace by letter that the loan documents did not comply with Article XVI, § 50 of the Texas Constitution because Embrace had not signed a form acknowledging the homestead's fair market value. The letter requested that Embrace cure the defect within 60 days, as required by § 50. In response, Embrace sent Zepeda another copy of the fair-market-value acknowledgment but failed to sign it. Embrace later sold the loan to Freddie Mac. Zepeda sent a letter to Freddie Mac notifying it of the constitutional defect and offering an opportunity to cure. Freddie Mac did not respond, and Zepeda sued to quiet title. Her theory is that because Freddie Mac failed to cure the constitutional defect in the loan documents within 60

days of notification, Freddie Mac does not possess a valid lien on her property. Freddie Mac claims that it is subrogated to C.I.T. Group's 2007 lien because its predecessor Embrace paid off the balance of C.I.T. Group's loan to Zepeda.

The United States District Court for the Southern District of Texas granted Zepeda's motion and denied Freddie Mac's. The court concluded that Freddie Mac is not entitled to equitable subrogation or common law subrogation because it was negligent in failing to cure the constitutional defect in the Zepeda-Embrace loan documents. Freddie Mac appealed to the Fifth Circuit. The Fifth Circuit then asked the Texas Supreme Court “If the party seeking equitable subrogation could have satisfied the requirements of § 50(a)(6)(Q)(ix) but failed to do so, does that failure preclude it from invoking equitable subrogation?"

Common law subrogation has coexisted with this constitutional scheme for more than a century. In the mortgage context, the doctrine allows a lender who discharges a valid lien on the property of another to step into the prior lienholder's shoes and assume that lienholder's security interest in the property, even though the lender cannot foreclose on its own lien. The Supreme Court has recognized the doctrine in the § 50 context since at least 1890. None of the Supreme Court’s subsequent § 50 decisions has considered any factor other than the lender's discharge of a prior, valid lien. To the contrary, in this context, the court has said that a lender's right to subrogation is "fixed" when the prior, valid lien is discharged.

Zepeda acknowledges these decisions but argues that Texas voters eliminated subrogation in the 1990s by adopting specific amendments to § 50. She argues that the doctrine was developed in the late 19th century to circumvent the constitutional prohibition on homestead liens securing a refinance or home-equity loan. In 1995 and 1997, the voters approved amendments authorizing refinances (§ 50(a)(4)) and home-equity loans like Zepeda's (§ 50(a)(6), (f)-(g)), thus eliminating the historical justification for the doctrine. Zepeda also points to language in the 1997 amendments that, she claims, reveals the voters' intent that subrogation be abolished specifically, § 50(a)(6)(Q)(x)'s mandate that a lender "forfeit all principal and interest" paid on the loan if the lender caused a constitutional defect in the loan documents and did not cure it within 60 days of receiving notice.

The court disagreed. Throughout the court’s jurisprudence, it has stressed that the doctrine of equitable subrogation works to protect homestead property. Without equitable subrogation, lenders would be hesitant to refinance homestead property due to increased risk that they might be forced to forfeit their liens. The ability to refinance provides homeowners the flexibility to rearrange debt and avoid foreclosure. Home-equity loans have been legal in Texas for about 24 years, but subrogation has been part of the common law for more than a century. On this historical and procedural record, the court believed that revisiting the wisdom of subrogation in this case is unwarranted.

Under Texas law, a lender who discharges a prior, valid lien on the borrower's homestead property is entitled to subrogation, even if the lender failed to correct a curable defect in the loan documents under § 50 of the Texas Constitution.

Reverse Mortgage Funding, LLC v. Robertson, 599 S.W.3d 52 (Tex.App.—Texarkana 2020, no pet.). In 2005 Richard died. His will left the house to his wife, Katie, “"to be used, occupied and enjoyed by her for and during her natural life." Title was then to vest in his daughters.

Katie borrowed a reverse mortgage loan in 2008. After she died in 2009, one of the daughters, Robertson, filed suit to quiet title, claiming that Katie owned only a life estate and lacked authority to enter into the reverse mortgage loan. RMF, the lender, failed to answer the suit and the court entered a default judgment in Robertson’s favor, finding that Robertson was the fee simple owner of the house. The trial court further determined that Katie acquired no ownership interest in said property and only acquired a life estate in said property which terminated on her death, and that the deeds of trust are void. RMF filed a motion for a new trial, which was overruled.

Following the entry of a default judgment, the defaulting party is entitled to a new trial when (1) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided (2) the motion for a new trial sets up a meritorious defense; and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. It is undisputed that RMF's failure to answer was not intentional and that the granting of a motion for new trial would not have occasioned delay or otherwise worked an injury to Robertson. The dispositive question is whether RMF set up a meritorious defense.

To determine if RMF set up a meritorious defense, the court looks to the facts alleged in RMF's motion and supporting affidavit, regardless of whether those facts are controverted.

In its motion for new trial, RMF alleged it had meritorious defenses because, among other things, RMF is protected as a bona fide mortgagee, Katie had signed the mortgage documents, and RMF had no actual or constructive knowledge of the probate records.

Under Property Code § 13.001, a lender can be a bona fide mortgagee if it takes a lien in good faith, for valuable consideration, and without actual or

constructive notice of outstanding claims. Noticeably absent from RMF's factual allegations in its motion for new trial are any allegations supporting RMF's claim that it did not have actual knowledge of Robertson's claim to the Property. It is evident that RMF was unaware of Robertson's ownership interest in the Property at the time the mortgage was executed and at the time it purchased the mortgage. If RMF had such knowledge, it would not have purchased the mortgage. Yet, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed. RMF failed to allege any facts in its motion for new trial in support of its conclusory statement that it lacked actual knowledge of Robertson's claim.

Likewise, RMF's motion for new trial is devoid of factual allegations supporting its claim that it did not have constructive notice of Nagle's will. To claim the status of a bona fide mortgagee, RMF was bound to support its conclusory statements that it had no actual or constructive notice of Robertson's claim to the Property with verified allegations of fact. Because no such allegations appear in RMF's motion for new trial, it failed to establish a prima facie meritorious defense

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

Zentech, Inc.* v. *Gunter, 606 S.W.3d 847 (Tex.App.—Houston [14th Dist.] 2020, no pet.). To prevail on a suit for a promissory note, a plaintiff must prove: (1) the note in question; (2) the party sued signed the note; (3) the plaintiff is the owner or holder of the note; and (4) a certain balance is due on the note.

The trial court entered summary judgment against Zentech and Maini, jointly and severally, for the amounts owed on two promissory notes. Zentech and Maini appealed.

Maini claimed that the trial court erred in awarding the judgment because he wasn’t named or referenced in either note, that the promise to pay was made only by Zentech, and that his affidavit proved he had not signed in his individual capacity.

Maini is the president and primary shareholder of Zentech. Maini signed both Notes in a blank with the designation "Borrower" and did not indicate in the signature form of either Note that he was signing in a representative capacity, rather than in an individual capacity.

UCC § 3.402 provides that if a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, then if the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument, but the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity, or (ii) the represented person is not identified in the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

In this case, a holder in due course was not involved. The court held that, because Maini’s signature on the notes does not unambiguously refute personal liability, Maini can only escape liability by proving that the parties did not intend for Maini to be liable on the notes.

Maini’s argument that he was not liable individually is an affirmative defense, and Maini had the burden of proof. Such defense requires not only proof that the agent intended to sign only in a representative capacity, but also that the agent disclosed his representative capacity. Texas law provides that in order for an agent to avoid liability for his signature on a contract, he must disclose his intent to sign as a representative to the other contracting party. Uncommunicated intent will not suffice.

Here, the evidence showed that the holder knew that Maini was the president of Zentech, and Maini’s affidavit stated that, at the request of the payee of the notes, he executed the notes in that capacity. That

evidence was sufficient to reverse the summary judgment against Maini.

Maini and Zentech also argued that the promissory notes were not really notes at all, but were evidence of an investment. This argument failed. Both notes were headed "PROMISSORY NOTE" and both included a promise to pay a debt. The parties couldn't vary the terms of the note through parol evidence. The parol evidence rule prohibits the enforcement of any agreements that are inconsistent with the Notes, whether made before or contemporaneous with the execution of the notes.

PART IV
LEASES

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 V
DEEDS AND CONVEYANCES

Broadway National Bank* v. *Yates Energy Corporation, No. 19-0334 (Tex. May 14, 2021). Property Code § 5.029 authorizes the correction of a material error in a recorded original instrument of conveyance by agreement. To be effective, the instrument correcting the error must be executed by each party to the original instrument "or, if applicable, a party's heirs, successors, or assigns." The issue here is when are an original party's heirs, successors, or assigns applicable, such that their agreement is necessary to make the correction.

In this case, the court of appeals considered whether the original parties could validly agree to correct a mistake in the original instrument of conveyance, after a third party acquired an interest. The court of appeals concluded that the original

parties could no longer correct their mistake solely by their agreement after an assignment. The court reasoned that the assignment or sale of an interest in the property by an original party triggered the "if applicable" clause, requiring the joinder of the assign for a material correction. In short, the court held that a validly executed correction instrument under § 5.029 must be signed by the property's current owners.

Here, the property at issue was once part of a trust created by Mary. The trust was amended in 2003 to provide that the property would be divided among four of her children, including John. Three of the children received the property outright, but John's interest was to be held in a separate trust with the Bank as trustee. Under the terms of that trust, income and principal were to be applied to take care of John, and upon John's death, the remainder was to be divided between one of Mary's daughters and Mary's grandson.

In 2005, the Bank, acting as trustee of Mary's trust, executed a mineral deed that conveyed the trust's mineral interests to her children as designated by Mary in the 2003 trust amendment. In the 2005 mineral deed, John received an undivided 25 percent interest in fee simple, which the Bank asserts was a mistake. To correct the error, the Bank, as trustee, filed a corrected mineral deed in 2006, explaining that John was only entitled to the distribution of a life estate in the minerals conveyed in the 2005 deed. The corrected deed also identified those whom Mary had designated to receive what remained of John's share of the trust property at his death. The corrected Deed, like the 2005 mineral deed it was meant to replace, was signed only by the Bank as trustee. Copies of the corrected deed were sent to Yates who had leased the minerals.

Years later, in 2012, John executed a royalty deed conveying his royalty interests to Yates. Yates then assigned EOG 70% of the royalty interests it had acquired from John. Meanwhile, a title attorney for EOG questioned the extent of John's ownership. He questioned the validity of the 2006 corrected deed because it was signed only by the Bank as trustee and not by the grantees named in the corrected deed. He also noted that the Bank was authorized only to convey a life estate in the minerals to John, not the fee simple estate. Based on this, the Bank and the other parties the original mineral deed executed a second corrected deed.

A few months after the second corrected deed was signed, John died. John's death ignited this dispute over the extent of the 2012 conveyance to Yates. The Bank maintains that Yates and its assignees acquired only John's life estate in the disputed royalties, as described in the 2013 amended correction deed. As trustee, it argued that these royalties are now owned by the remaindermen identified in the correction instrument. Conversely, Yates contends that John acquired full ownership of these royalties under the Trustee's 2005 mineral deed; the 2012 royalty deed from John to Yates likewise conveyed full ownership; and the 2013 correction deed did not change that or otherwise affect Yates's title.

The Bank brought a declaratory judgment action in probate court. It asked the probate court to declare that the 2012 correction deed conveyed John's life estate only to Yates and that title to the remainder when to the others on his death. Yates counterclaimed that the 2005 mineral deed was valid, that the 2006 and 2012 correction deeds were invalid, and that Yates's status as a BFP was irrelevant because of the invalidity of the correction deeds. The probate court ruled in favor of the Bank and the remaindermen.

Yates appealed. The court of appeals reversed the probate court, and the Bank and the remaindermen appealed to the Supreme Court, complaining that the 2013 amended correction deed complies with the Property Code's requirements for a material-correction instrument and that the court of appeals therefore erred in holding it invalid. Yates responded that the 2013 correction deed is not only invalid, as the court of appeals' determined, but is also barred by limitations.

Property Code § 5.029 is part of a group of statutes that provide for the correction of errors in a recorded instrument of conveyance with a subsequently recorded "correction instrument." Under these statutes, a correction instrument replaces and is a substitute for the original instrument and is (1) effective as of the effective date of the recorded original instrument of conveyance; (2) prima facie evidence of the facts stated in the correction instrument; (3) presumed to be true; (4) subject to rebuttal; and (5) notice to a subsequent buyer of the facts stated in the correction instrument.

Correction instruments may be used to correct both material and non-material errors. The error here is material, and thus the correction instrument must comply with § 5.029, which requires that the instrument must be executed by each party to the recorded original instrument or, if applicable, a party's heirs, successors, or assigns.

The dispute here is about when a party's heirs, successors, or assigns are "applicable," such that their signatures are necessary to validate a material correction under the statute. The Bank argues that "a party's heirs, successors, or assigns" are merely substitutes whose signatures are unnecessary unless an original party is unavailable to execute the correction instrument. Yates responds that it is not the agreement of the original parties to the mistake that

controls who must sign, but rather who controls the property at the time of the proposed correction. Thus, if an heir, successor, or assign acquires an interest in the property before a correction instrument is properly executed and recorded, Yates contends, such an acquiring third party must join in the instrument to validate a material correction. The court of appeals agreed with Yates. In a 5 to 4 decision, the Supreme Court reversed.

Whether 5.029 authorizes the original parties to the conveyance to correct a material error in a deed, or requires the joinder of others who subsequently acquire interests in the property, is a matter of statutory construction. Such matters are legal questions that the court reviewed de novo.

The Bank argued that the alternates are irrelevant when an original party is available and signs the correction instrument. It further submits that the original parties are the statute's primary alternative because they are in the best position to know the true intent of the original instrument. The court of appeals disagreed, however, holding that title to the property should determine relevance and who must sign. The Bank complains that the statutory text does not support the court of appeals' preference for the joinder of alternates merely because they exist. We agree to the extent that nothing in the text of § 5.029 indicates a preference one way or the other: Either that the Legislature intended for the original parties to sign, if they were available, or that it intended for an alternate to sign, once the alternate acquired an interest in the original conveyance.

The Legislature could have written § 5.029 to require that all current owners of the property must sign a correction instrument, but that is not what it says. And while § 5.029 certainly permits an original party's "heirs, successors, or assigns" to sign a correction instrument if the original party is unavailable, the statute plainly does not require that they do so when the original parties all execute the correction. The statute's plain language and the Property Code's encompassing scheme, confirm that § 5.029(b)(1) is satisfied when all parties to the original transaction agree to correct a material mistake in the original conveyance. Because the 2013 amended correction deed was executed and recorded in conformity with the Property Code, the court of appeals erred in declaring the correction instrument invalid.

Justice Busby dissent made several points. First, it argues that the plain language of § 5.029 requires the signature of the owner of the property interest affected by a correction instrument. Section 5.029 tells us that one of two things will happen: either the original parties must execute the correction instrument, or the assigns of an original party must execute the correction instrument instead of that party. The majority opinion says that the original parties must do so if they are available and if not, the assigns can step in. That might be correct if the statute simply provided that either original parties "or" assigns could execute the instrument. Adding the phrase "if applicable," however, tells us that the assigns must sign if they are applicable.

Second, an assignor cannot assert any rights it has assigned, so an original grantee of a conveyance cannot divest its assigns through a correction instrument. The Bank conveyed an interest in fee simple to John and John conveyed that same interest to Yates. When John did so, he kept nothing. John therefore had no control over the property interest he sought to modify when executing the correction instrument. Allowing him to defeat the rights of the assignee without consent or even notice is inconsistent with this basic tenet of assignment law.

Third, the majority's holding allows property owners to be stripped of their land without notice or consent and destabilizes the record title system. Under the majority opinion, property owners must check public records routinely to see whether they have been stripped of their property and, if they have been, pursue litigation to recover it. The majority holds that current property owners will receive protection as BFPs from § 5.030(c) in these circumstances, but that protection does not alleviate the concerns that property owners must vigilantly inspect public records and pursue costly litigation to right any wrongs. To say that a divested property owner would have a post-deprivation claim to recover its property as a bona fide purchaser does not explain why the owner should have to pursue the claim at all or why the status quo should be altered by stripping the owner of its property while litigation proceeds.

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.

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.

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 VI
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.

Covenant Clearinghouse, LLC* v. *Kush and Krishna, LLC, 607 S.W.3d 855 (Tex.App—Houston [14th Dist.] 2020, pet. denied). In 2011, the legislature addressed the practice of using private transfer fees in real estate transactions by amending the Property Code to add chapter 5, subchapter G, entitled "Certain Private Transfer Fees Prohibited; Preservation of Private Real Property Rights." A "private transfer fee" is defined as "an amount of money, regardless of the method of determining the amount, that is payable on the transfer of an interest in real property or payable for a right to make or accept a transfer." A "private transfer fee obligation" can be created by any number of instruments, including as here a declaration requiring payment of a private transfer fee that is recorded in the real property records in the county in which the property is located.

Subject to exceptions not relevant here, a private transfer fee obligation created on or after June 17, 2011 is void and unenforceable against a subsequent owner or subsequent purchaser of real property. Any private transfer fee obligation created before that date, however, is subject to rather austere notice requirements. First, a person who receives a private transfer fee under a private transfer fee obligation created before June 17, 2011 must, on or before

January 31, 2012, file a "Notice of Private Transfer Fee Obligation" in the real property records of each county in which the property is located. Property Code § 5.203(a). The notice must include the content and be in the form prescribed by the statute. Property Code § 5.203(c). Second, any person who is required to file the initial notice by January 31, 2012 must also refile the notice every three years thereafter. Property Code § 5.203(d) (stating a person required to file a notice under this section shall refile the notice described by this section within a thirty-day window preceding the third anniversary of the original filing date, and "within a similar 30-day period every third year thereafter").

If a person required to file a notice under this section fails to comply with Property Code § 5.203: (1) payment of the private transfer fee may not be a requirement for the conveyance of an interest in the property to a purchaser; (2) the property is not subject to further obligation under the private transfer fee obligation; and (3) the private transfer fee obligation is void.

In September 2009, I-45 Thirty recorded a Declaration of Covenant on real property it owned in Harris County. The Declaration became binding on the property at filing and does not expire until December 31, 2110. The Declaration contains a private transfer fee provision, which imposes an obligation to pay a private transfer fee equal to one percent of the total purchase price of the property upon the closing of a sale. The payment was to be made to a trustee for the benefit of various beneficiaries.

In December 2009, Kush purchased the property from I-45 Thirty. Kush was aware of the private transfer fee obligation when it purchased the property; however, because Kush's acquisition was the property's initial sale, the transfer was exempted from the private transfer fee obligation pursuant to the Declaration's terms.

On January 6, 2012, CCH filed in the Harris County real property records a "Notice of Private Transfer Fee Obligation," which designated itself as the "payee of record" entitled to accept payment on behalf of all payees under numerous instruments, including the Declaration at issue. However, it is undisputed that neither CCH nor anyone else refiled a Notice of Private Transfer Fee Obligation" pertaining to the Declaration any time after January 2012.

In February 2017, Kush sold the property. Apparently aware that no party had refiled a notice of private transfer fee obligation relating to the property by January 2015, Kush did not pay the private transfer fee at the time of sale but placed into an escrow account an amount that would be due as the fee were it payable. Kush then filed the present declaratory-judgment action, seeking declarations that the private transfer fee obligation in the Declaration is void for failure to comply with section 5.203's notice provisions and that Kush did not owe a private transfer fee. It also sought an order instructing the escrow agent to disperse the escrowed funds to Kush.

Kush filed a traditional motion for partial summary judgment on its declaratory-judgment claim. CCH filed a cross-motion for summary judgment urging, as relevant to this appeal, that it was not required to file a "Notice of Private Transfer Fee Obligation" either in January 2012 or later because it has never "received" a private transfer fee with respect to the property. The trial court entered judgment for Kush.

On appeal, CCH challenges the summary judgment in Kush's favor. CCH states that the duty to file, and refile, a Notice of Private Transfer Fee Obligation under section 5.203(a) applies only to a person "who receives a private transfer fee." Because to date CCH has never "received" such a fee related to the property, CCH asserts that the notice provisions do not apply to it. According to CCH, a person who "receives" a private transfer fee includes only those who have received the fee by physical possession and excludes those with a right to receive the fee in connection with a future conveyance of the property. Thus, the question can be reduced to whether the present tense of the word "receives" also includes the future tense.

According to the court, the answer is readily apparent in the Code Construction Act, which provides that words in the present tense include the future tense. Receive means to be given, presented with, or paid something. Applying the verb's present and future tenses, the court construed the phrase "a person who receives" to mean someone who is being, or may be, given, presented with, or paid something. So, CCH was required to file the 2012 notice and all subsequent notices.

Latouche* v. *Perry Homes, LLC, 606 S.W.3d 878 (Tex.App.—Houston [14th Dist.] 2020, pet. denied). Perry Homes sold a house to the Latouches in 2007. In 2009, Miriam Latouche submitted a warranty request to Perry Homes, stating in it that she had removed the carpet in the house and claiming that she had been sick since she moved in. Miriam submitted several additional similar complaints in 2013. She met with a warranty representative and told the representative that her family was made sick by the dirty subflooring. Three years after that, Miriam submitted another warranty request, again saying how she and her family had been sick since they moved into the house. During 2016 and 2017, the Latouche family saw a number of doctors. Miriam also retained a company to do environmental testing. The tests showed mold throughout the house.

In late 2017, the Latouches sued Perry Homes claiming negligence and DTPA violations. Perry Homes asserted that the suit was barred by the statute of limitations and the statute of repose. All of the claims were subject to a two-year limitations. The Latouches argued that limitations was tolled by the discovery rule.

A statute of limitations restricts the period within which a party can assert a right, and the limitations period begins to run when the claim accrues. Generally, a claim accrues when facts come into existence that authorize a claimant to seek a judicial remedy, when a wrongful act causes some legal injury, or whenever one person may sue another.

One exception to the general rule of accrual is the discovery rule. The discovery rule is limited to those rare circumstances where `the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable. An injury is not inherently undiscoverable when it could be discovered through the exercise of reasonable diligence. The discovery rule defers accrual of a claim until the injured party discovered or in the exercise of reasonable diligence should have discovered, the nature of the party's injury and the likelihood that the injury was caused by the wrongful acts of another. The rule expressly requires a plaintiff to use reasonable diligence to investigate the nature of the injury and its likely cause once the plaintiff is apprised of facts that would make a reasonably diligent person seek information.

Generally, when a plaintiff discovers or should have discovered the cause of the injury and whether a particular plaintiff exercised due diligence in so discovering the injury are fact questions. However, if reasonable minds could not differ about the conclusion to be drawn from the facts, the commencement of the limitations period may be determined as a matter of law.

In arguing that the discovery rule did not apply, Perry Homes made two arguments. First, it claimed the alleged injuries were not inherently undiscoverable. Second, even if the rule applied, the Latouches had claimed at least since 2009 that something in the house was making them sick, so they knew or through reasonable diligence should have known of the nature of their injuries long before they filed suit. The court ultimately agreed with Perry Homes that the Latouches' claims were barred by limitations.

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.

McGehee* v. *Endeavor Acquisitions, LLC, 603 S.W.3d 515 (Tex.App.—El Paso 2020, no pet.). Endeavor sent a solicitation letter to McGehee and Stewart offering to purchase certain property they owned. They each owned an undivided 40 acres of surface and some bonus and royalty interests in a 160-acre tract. Included with the letter were two purchase contracts, six general warranty deeds, and two W-9 forms. The letter told McGehee and Stewart that, if the terms of the offer were acceptable, they should sign and date the enclosed PSA and General Warranty Deeds in front of a notary public, retain a copy of the originals for their own records, and return the remaining executed originals in the prepaid envelope supplied with the mailing. Endeavor also advised them that, upon receipt of the executed documents, it would commence its title review of the identified property.

The enclosed PSA stated that the agreement was entered into between Endeavor, defined as "Buyer," and McGehee and Stewart, jointly defined as "Seller." As Buyer, Endeavor offered to purchase the entirety of Sellers' surface and mineral interest for a total purchase price of $185,000. The terms further provided that upon Endeavor's receipt of executed originals of the PSA and the Warranty Deeds it would be permitted thirty days to review title to the property. A closing would take place five days after expiration of the title review period, unless Endeavor, in its sole discretion, extended the review period and delayed the closing as reasonably necessary to properly conduct the required title review. The PSA also contained representations stating that it had been duly executed and delivered on behalf of each of the parties and constitutes their legal and binding obligations enforceable in accordance with its terms" and that, at Closing, all documents and instruments required to be executed and delivered shall constitute legal, valid, enforceable, and binding obligations of the parties.

On receipt of the PSA, McGehee and Stewart each crossed out the purchase price amount of $185,000, inserted $200,000 instead, and initialed their changes. They then executed and returned the originals to Endeavor without any further changes. Most significantly, McGehee and Stewart did not alter the term "Seller," as used throughout the PSA, to include both McGehee and Stewart jointly. McGehee and Stewart additionally executed and returned the original warranty deeds that Endeavor had supplied. Those deeds stated by their recitals that the grantor does hereby grant, bargain, sell, convey, transfer, assign and deliver to Endeavor all of the grantor's right, title, and interest in the described property.

Activity went on for a few months. Endeavor then informed McGehee and Stewart that it was extending the title review period and setting a closing date. Endeavor filed the deeds, and sent each Seller a check for $100,000. McGehee and Stewart each declined to negotiate the checks and informed Endeavor that the PSA required $200,000 to each Seller.

After the original checks expired, Endeavor sent McGehee and Stewart each a second check, in the amount of $100,000. These checks, like the original checks, stated that they were "VOID AFTER 45 DAYS." Forty-five days following the date of the

checks fell on June 5, 2016. McGehee deposited his check with his bank on May 31. On June 6, that bank notified him that the check was returned for insufficient funds, but that it was redepositing the check for his benefit. On June 15, McGehee's bank informed him that the redeposited check was returned because of a stop payment order. Stewart deposited his check with his bank on June 3. But on June 8 he learned that it was returned because of a stop payment order.

Endeavor acknowledges that it stopped payment. Endeavor tendered payment to McGehee and Stewart a third time by initiating two wire transfers of $100,000 each. McGehee and Stewart refused to accept the funds.

McGehee and Stewart sued Endeavor, seeking a declaratory judgment that the PSA and deeds were invalid because Endeavor had breached the PSA by failing to tender the stated consideration. They asked the court to quiet title and also to request rescission of the deeds.

Endeavor counterclaimed that the PSA was valid and enforceable. It moved for summary judgment on the basis that the PSA was enforceable, that the total purchase price was $200,000, that the stop payment orders did not breach the PSA, and that rescission was not available to McGehee and Stewart. Endeavor had not previously delivered a fully executed PSA, ultimately did deliver an executed PSA, but not until after this lawsuit was filed. The trial court ruled in favor of Endeavor.

On appeal, McGehee and Stewart first argued that Endeavor's failure to deliver an executed PSA to them at or prior to a formal closing renders the PSA void and unenforceable. In opposition, Endeavor contends that longstanding contract law supports its position that the PSA is valid and enforceable, regardless of when, or even whether, it delivered an executed copy to McGehee and Stewart.

A contract is established when proven by a preponderance of evidence that an offer is accepted, accompanied by consideration. Parties form a binding contract when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. Relevant to the subject matter at issue, the statute of frauds requires a contract for the sale of real estate to be in writing and signed by the party to be charged with the promise or agreement.

As for the elements of a contract, where an offer prescribes the time and manner of acceptance, those terms must ordinarily be complied with to create a contract. Of note, a purported acceptance that changes a material term of an offer results in a counteroffer rather than acceptance. Indeed, contracts require mutual assent, which, in the case of a written contract, is generally evidenced by the signatures of the parties and delivery with the intent to bind. But while signature and delivery are often evidence of the mutual assent required for a contract, they are not essential.

Here, the record establishes that Endeavor made a written offer to McGehee and Stewart to purchase their interest in the subject property for a total purchase price of $185,000. The terms of the offer were contained in the PSAs included with Endeavor's transmittal letter. By means of its letter, Endeavor indicated that McGehee and Stewart should sign the PSAs and Warranty Deeds before a notary public and return the executed originals if the offer was acceptable. Instructions of this nature manifest a requirement that a party accept an offer only by signing it. The solicitation letter of Endeavor prescribed the method by which McGehee and Stewart could accept the enclosed offer to purchase their property. Although McGehee and Stewart generally followed Endeavor's instructions, they did not accept the initial offer but instead made a counteroffer by striking out the original purchase price of $185,000 and changing it to $200,000.

The question that arises next, then, is whether McGehee and Stewart in turn prescribed the method by which Endeavor could accept their counteroffer. In contrast to Endeavor's separate letter of instruction, McGehee and Stewart do not contend on appeal that they prescribed the method of acceptance by any means other than the terms of the PSA itself. Consequently, the question at hand is narrowed to whether there is any language in the PSA requiring that Endeavor accept the Seller’s counteroffer only by signing the PSA and delivering an executed copy to McGehee and Stewart. In other words, we next consider whether there is any language in the PSA requiring Endeavor to sign it as a condition precedent to its validity.

The court held that nothing in the PSA’s language prescribes a particular method required for Endeavor's acceptance of Appellants' counteroffer or requires Endeavor's signature and delivery of the PSA as a condition precedent to its validity. McGehee and Stewart assented by executing and delivering the PSA and Warranty Deeds, and Endeavor assented by tendering the first set of checks. The contract was fully formed at that time. Thus, the court held that the PSA was valid and enforceable notwithstanding Endeavor’s failure to sign and deliver it.

McGehee and Stewart argue that the PSA was not valid and enforceable unless and until the parties conducted a formal closing, at which time payment and title would be exchanged. The court agreed with Endeavor that conducting a formal closing would have been superfluous. Appellants' obligation under

the PSA was to deliver executed Warranty Deeds, which they did. Nothing remained to be done.

PART VII
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.

Atmos Energy Corporation* v. *Paul, 598 S.W.3d 431 (Tex.App.—Ft. Worth 2020, no pet.). Under Texas law, a blanket easement is an easement without a metes and bounds description of its location on the property. It is not necessary for the easement description to be a smaller area than the entire servient estate. Blanket easements have been commonly used in Texas history, particularly for long route utility projects such as pipelines and electric power lines. The purpose of a blanket easement is for the practical convenience of the easement holder to alter the exact location of the lines during construction. The flip side of the flexibility provided for a blanket easement is the loss of control of exclusive use which the landowner otherwise enjoys.

Here, the Easement Agreement contains no metes and bounds description specifying the location of an easement on the property. Rather, it conveys the right of way and easement to construct, maintain and operate pipe lines and appurtenances thereto over and through certain described lands. By its express terms, the Easement Agreement permits the grantee to lay "pipe lines " and "more than one pipe" at "any time. There is no language limiting the location or width of the lines or requiring that any additional lines be parallel or adjacent to the first line laid. Rather, the Easement Agreement identified the entire tract as the property burdened by the servitude. As a matter of law, the face of the Easement Agreement created an expansible, or multiple line, blanket easement. An 'expansible' easement is one which specifically grants to the easement holder the authority to place additional easement improvements across the servient tract from time to time. It is fairly common for utility easements to expressly grant the right to add additional lines from time to time on routes selected by the grantee. Such easements are enforceable expansible grants and vest in the grantee at the time of the grant.

Under the plain language of the Easement Agreement, Paul's predecessors-in-title intended to burden their entire 137-acre tract of land and for the grantee to have the right to lay an unlimited number of pipelines as it may reasonably demand across the entirety of the predecessors' property by expanding the servitude each time upon the payment of the additional consideration of one dollar per lineal rod.

The grant of a multiple pipeline blanket easement does not mean, however, that Atmos may use Paul's property however it deems fit without regard to the burden it places upon Paul's use of his land. The majority of states, including Texas, that have chosen to impose limits on existing easement rights adopt some version of the reasonable necessity test. Under Texas law, 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.

As it pertains to this case, Atmos is restrained by this rule of reasonable necessity when it selects a route for a new line. What constitutes an unreasonable use of easement rights such that the grantee is unreasonably interfering with the property rights of the servient estate is a question that is inherently fact intensive.

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 VIII
ADVERSE POSSESSION, QUIET TITLE, TITLE DISPUTES

Brumley v. McDuff**,** No. 19-0365 (Tex. February 5, 2021). In this property dispute between neighboring landowners, the plaintiffs pleaded the elements of adverse possession and received a favorable jury verdict and judgment. The court of appeals reversed, holding that the pleadings do not support the judgment because the plaintiffs denominated their claim as a "quiet title" action rather than a "trespass to try title" action. The Supreme Court reversed because the plaintiff's pleadings in substance allege a claim of trespass to try title by adverse possession.

A plaintiff sufficiently pleads a cause of action when the elements of the claim and the relief sought may be discerned from the pleadings alone. Mere formalities, minor defects and technical insufficiencies will not invalidate a judgment where the petition states a cause of action and gives 'fair notice' to the opposing party of the relief sought.

PART IX
CONDEMNATION

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.

Hlavinka* v. *HSC Pipeline Partnership, LLC, 605 S.W.3d 819 (Tex.App.—Houston [1st Dist.] 2020, pet. pending). In Texas, common carriers have the right and power of eminent domain. Natural Resource Code § 111.019(a). In the exercise of that power, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline. HSC asserts that the evidence conclusively establishes that it is a common carrier with the right of eminent domain under both Section 2.105 of the Business Organizations Code and Section 111.002(1)[2] of the Natural Resources Code.

Business Organizations Code § 2.105 states that “In addition to the powers provided by the other sections of this subchapter, a corporation, general partnership, limited partnership, limited liability company, or other combination of those entities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions has all the rights and powers conferred on a common carrier by Sections 111.019-111.022, Natural Resources Code.” Among other things, natural Resources Code § 111.019 grants a common carrier the power of eminent domain.

This court, Houston 1st District, has previously held that Business Organizations Code § 2.105 provides an independent grant of eminent domain authority. Other courts of appeals have as well. The Beaumont Court of Appeals is the only court that has held that section 2.105 does not provide an independent grant of eminent domain authority. The court could see no reason not to continue to hold that § 2.105 provides an independent grant of eminent domain authority.

PART X
RESTRICTIONS AND OWNERS ASSOCIATIONS

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.

Carmichael* v. *Tarantino Properties, Inc., 604 S.W.3d 469 (Tex.App.—Houston [14th Dist.] 2020, no pet.). Carmichael and certain other members of the condominium homeowners association sued the association’s officers, its property manager, and the developer, alleging all sorts of wrongdoing. The officers and management company challenged the jurisdiction, claiming that the Business Organizations Code confers derivative standing on shareholders of a for-profit corporation, but not on members of a

nonprofit organization, that the condominium regime's governing documents authorize a unit owner to sue only to enforce the condominium declaration provisions, and Texas common law does not confer derivative standing on members of nonprofit corporations. The members argued that Business Organizations Code § 20.00(c)(2) authorizes members to sue a nonprofit corporation's officers or directors for exceeding their authority.

Standing is a constitutional prerequisite to maintaining suit. Title 2 of the Texas Business Organizations Code addresses Texas law concerning corporations. Within the Code, chapter 20 contains general provisions; chapter 21 pertains to for-profit corporations; and chapter 22 deals with nonprofit corporations. The Officers, Premier, and the Management Company correctly point out that chapter 21 confers derivative standing on shareholders of for-profit corporations, and that chapter 22 lacks a parallel provision conferring derivative standing on members of nonprofit corporations. Chapter 20, however, applies to both for-profit and nonprofit corporations, and section 20.002(c)(2) provides in relevant part as follows: "The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be asserted in a proceeding ... through members in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person's authority...." Thus, this section grants the members standing to assert claims that present and former officers and directors and others breached fiduciary duties to the Association by their ultra vires conduct.

PART XII
TAXATION

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
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 XIV
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 XV
LAWYER STUFF

Landry's, Inc.* v. *Animal Legal Defense Fund, No. 19-0036 (Tex. May 21, 2021). An attorney who

repeats his client's allegations to the media or the public for publicity purposes is not acting in the unique, lawyerly capacity to which Texas law affords the strong protection of immunity. Although attorneys often make publicity statements for their clients, wrapping these statements in an absolute privilege would unreasonably shield attorneys from liability for defamatory statements that would be actionable if uttered by anyone other than an attorney. Attorneys who make such statements outside a judicial proceeding have many potential defenses to defamation liability, but the judicial-proceedings privilege and attorney immunity are not among them.

Landry's owns Houston Aquarium, Inc., which operates the Downtown Aquarium in Houston. Four white Bengal tigers live at the aquarium. Conley, a radio station owner, asked Landry's for a behind-the-scenes tour of the tiger habitat. Landry's obliged, allowing Conley to photograph the tigers and their environs. Landry's also answered her questions about the animals. Conley did not run a story about the tigers.

A while later, Conley contacted ALDF about the tigers. ALDF is an animal rights organization founded by attorneys. Nasser, an attorney at ALDF, sent Landry's a 60-day Notice Letter of intended suit pursuant to the Endangered Species Act. The same day, ALDF posted a press release on its website describing its service of the Notice Letter and criticizing the tigers' conditions. After the press release, stories were run in the Houston Chronicle and on the website Dodo (in an article "White Tigers Stuck In Aquarium Haven't Felt The Sun In 12 Years.").

Landry's sued Conley, Nasser, and ALDF for defamation, business disparagement, tortious interference, abuse of process, trespass, and civil conspiracy. Landry's sought actual damages, exemplary damages, declaratory relief, an order that the defendants retract the allegedly defamatory statements, and an injunction prohibiting the defendants from further defaming or disparaging Landry's. Conley, ALDF and Nasser filed motions to dismiss pursuant to the Texas Citizens Participation Act ("TCPA") claiming, among other things, that that the judicial-proceedings privilege barred all the claims and that attorney immunity barred Landry's claims against Nasser and ALDF. The trial court granted the defendants' motion to dismiss.

The court of appeals held that the judicial-proceedings privilege immunizes the defendants from liability for the challenged statements. The Supreme Court reversed on this issue.

The "judicial-proceedings privilege" and "attorney immunity" are "independent defenses serving independent purposes. The judicial-proceedings privilege is straightforward: "Communications in the due course of a judicial proceeding will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made.

Attorney immunity is a comprehensive affirmative defense protecting attorneys from liability to non-clients. It stems from the law's longstanding recognition that "attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages. Not just any action taken when representing a client qualifies for immunity, however. Instead, attorney immunity generally applies when attorneys act in the uniquely lawyerly capacity of one who possesses the office, professional training, skill, and authority of an attorney. Conversely, attorneys are not protected from liability to non-clients for their actions when they do not qualify as the kind of conduct in which an attorney engages when discharging his duties to his client. Some conduct by attorneys, even if it occurred during a lawsuit, would be actionable because it does not involve the provision of legal services and would thus fall outside the scope of client representation. Moreover, attorney immunity will not protect a lawyer when his acts are entirely foreign to the duties of an attorney.

The Supreme Court held that the delivery of the Notice Letter to Landry's and the Secretary of the Interior is protected by the judicial-proceedings privilege because it was necessary to set the judicial machinery in motion. But the delivery of the Notice Letter itself is not at issue. The dissemination of the letter to the media along with a press release—and the defendants' other republications of their allegations for publicity purposes—are the source of Landry's complaint. As explained above, the defendants lost the judicial-proceedings privilege's protections when they repeated the Notice Letter's allegations for publicity purposes "outside the protected context within which the statements originally were made.

As to attorney immunity, the court noted that Landry's did not sue the defendants for delivering the Notice Letter to the required entities, however. Landry's sued the defendants for their publicity statements to the press and on social media. Such statements, while sometimes made by lawyers, do not partake of the office, professional training, skill, and authority of an attorney. Anyone—including press agents, spokespersons, or someone with no particular training or authority at all—can publicize a client's allegations to the media, and they commonly do so without the protection of immunity. While lawyers can also make such statements, attorney immunity does not apply to an activity simply because attorneys often engage in that activity.

Haynes and Boone, LLP* v. *NFTD, LLC, No. 20-0066 (Tex. May 21, 2021). Does attorney immunity apply to actions a lawyer takes on behalf of a client outside of the litigation context? The Supreme Court held that it does, so long as the lawyer's conduct constitutes the "kind" of conduct the attorney-immunity defense protects.

Attorney immunity is an affirmative defense that stems from the broad declaration over a century ago that attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages. The attorney-immunity defense is not without its limits. When an attorney personally participates in a fraudulent business scheme with his client, as opposed to on his client's behalf, the attorney will not be heard to deny his liability because "such acts are entirely foreign to the duties of an attorney. Also, an attorney who repeats his client's allegations to the media or the public for publicity purposes is not acting in the unique, lawyerly capacity to which Texas law affords the strong protection of immunity. In summary, attorney immunity protects an attorney against a non-client's claim when the claim is based on conduct that (1) constitutes the provision of "legal" services involving the unique office, professional skill, training, and authority of an attorney and (2) the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and therefore the non-client's reliance on the attorney's conduct is not justifiable.