CASE LAW UPDATE

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CASE UPDATE

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 627 S.W.3d and Supreme Court opinions released through November 13, 2021.

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

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

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

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PART I
MORTGAGES AND FORECLOSURES

Citibank N.A., Trustee* v. *Pechua, 624 S.W.3d 633 (Tex.App.-Houston 14th 2021, pet. pending). A secured lender must bring suit to foreclose on a real property lien "not later than four years after the day the cause of action accrues. Civil Practice & Remedies Code § 16.035(a). As a general rule, the accrual date is the maturity date of the note, rather than the date of a borrower's default. If, as here, the security instrument contains an optional acceleration clause, the cause of action accrues when the lender exercises its option to accelerate the maturity date of the note. Once a lender has accelerated the maturity date of the note, the lender can restore the original maturity date—and therefore reset the running of limitations—by abandoning the acceleration as though it never happened. Abandonment is based on the concept of waiver and requires proof that the party has an existing right, has actual knowledge of the right, and intends to relinquish the right or engages in intentional conduct inconsistent with the right. Intent is the critical element, and its manifestation must be unequivocal.

The best means of achieving an abandonment is through written notice of rescission. But that method is not exclusive. Abandonment can also be accomplished through an agreement between the parties, through other joint actions, or through unequivocal, unilateral conduct of the lender. For example, abandonment occurs when the borrower resumes making installment payments after an event of default and the lender accepts those payments without exacting any remedies available to it despite a previously declared acceleration. Whether a lender has abandoned an acceleration is generally a question of fact, but when the facts are admitted or clearly established, abandonment may be determined as a matter of law.

In this case, the borrower had filed several bankruptcies. The Bank argued that the bankruptcies tolled the running of limitations.

The bankruptcy law itself does not provide for the tolling of applicable state time limits but only provides for some deadlines to be extended by 30 days. By its express terms, 11 U.S.C. § 108(c) tolls no time limits, but provides only for some deadlines to be extended for 30 days after notice of the termination of a bankruptcy stay. Beyond this, a time period may be further suspended only if mandated by other federal or state law incorporated through section 108(c).

Although neither this court nor the Texas Supreme Court have expressly addressed the issue in a published, precedential opinion, several courts of appeal and the Fifth Circuit have concluded that tolling principles of Texas common law are incorporated through section 108(c) such that filing for bankruptcy tolls the running of limitations. This is because under Texas common law, where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right. Here, the court joined the line of cases it cited and held that the borrower's bankruptcies tolled the running of the statute of limitations.

PNC Mortgage* v. *Howard, 616 S.W.3d 581 (Tex. 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.

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.

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.

GRCDallasHomes LLC* v. *Caldwell, 619 S.W.3d 301 (Tex.App.—Ft. Worth 2021, pet. denied). GRC was in the business of flipping houses. Caldwell agreed to loan GRC $317,000 for purposes of a house-flipping project at 7413 Waters Edge in The Colony. GRC executed a promissory note in Caldwell's favor, which was purportedly secured by the Waters Edge property. According to the note, GRC would handle renovations, and the two sides would split profits for the deal pursuant to a formula. The note provided that GRC would repay the principal in July 2016 and that in the event of a default, Caldwell "shall retain property as payment." However, within a week, the Waters Edge deal was abandoned, and they agreed to use Caldwell's money to invest in two other properties instead. Those properties were sold, but Caldwell didn't ask for his money back but allowed GRC to invest in other projects. Caldwell loaned GRC some additional funds.

At one point, Caldwell demanded repayment. GRC said the money was gone. GRC offered to give Caldwell various

properties to satisfy the debt, but Caldwell declined and filed suit. GRC counterclaimed for a declaratory judgment that the note was nonrecourse in light of the clause which provided that Caldwell "shall retain property as payment" in the event of default, such that Caldwell's only remedy was to take the Waters Edge property to satisfy any judgment debt.

At trial, the jury found that GRC had an agreement with Caldwell but did not breach it. However, the jury found that GRC held $563,000 that in equity and good conscience belonged to Caldwell. Based on this verdict, the trial court rendered judgment in Caldwell's favor for money had and received. The trial court ruled that GRC's declaratory-judgment claim was moot in light of the jury's verdict.

On appeal, GRC argued that the note purports to be secured by the deed for the Waters Edge property and provides that if GRC defaulted on the note, then Caldwell "shall retain property as payment." GRC contends that the word "property" must refer to the Waters Edge property since it is the only property mentioned in the note. According to GRC, the effect of this clause is that Caldwell's only remedy for any suit arising from the note is to retain the Waters Edge property as sole satisfaction for any judgment debt.

But the note says that Caldwell "shall retain property," not "the property at 7413 Waters Edge" or even "the property," and thus it is not clear what property Caldwell would be retaining as payment. Moreover, there was evidence at trial that GRC did not own the Waters Edge property when the note was executed, which casts doubt on GRC's ability to grant a security interest in the property.

Even setting those complications aside, the court disagreed that the clause in question limits Caldwell's recourse. It said that the clause providing that Caldwell "shall retain property as payment" does not mean either that the note was nonrecourse or that retaining the Waters Edge property was Caldwell's exclusive remedy.

A nonrecourse note has the effect of making a note payable out of a particular fund or source, namely, the proceeds of the sale of the collateral securing the note, Under a nonrecourse note, the maker does not personally guarantee repayment of the note and will, thus, have no personal liability. If the maker of a nonrecourse note elects not to repay the note, he is not exposed to any personal liability, but he instead takes the risk that the collateral securing the note will be lost if the noteholder decides to enforce its security interest in the collateral.

A closely related family of contractual terms are those that provide exclusive remedies, limiting one party's recourse against another to certain forms of relief. Remedies provided for in a contract may be permissive or exclusive. The mere fact that the contract provides a party with a particular remedy does not, of course, necessarily mean that such remedy is exclusive. A construction that renders the specified remedy exclusive should not be made unless the intent of the parties that it be exclusive is clearly indicated or declared. An intent to provide an exclusive remedy may be clearly indicated with terms stating that the remedy is the "only," "sole," or "sole and exclusive" remedy. Or, in the case of nonrecourse loans, the contract might accomplish a similar effect by providing that a party "shall look solely to" a given source of payment to satisfy the debt,6 that the party's "sole" or "only recourse" is a given source of payment, or that a party shall have no "personal liability" on the note.

In the absence of such limiting terms or some other language which displaces the remedies that might otherwise be available, courts uniformly hold that a party may pursue any remedy that the law affords in addition to the remedies provided in the contract.

The phrase in question here—that Caldwell "shall retain property as payment"—lacks any indication that this solution is Caldwell's only, sole, or exclusive remedy, that Caldwell has no other recourse, that Caldwell shall look solely to the property for payment, or that GRC is not otherwise liable on the note. In the absence of any limiting language, the court would not agree that the note is nonrecourse or exclusive in its remedies. There is nothing about this clause that bars Caldwell from pursuing any form of liability that law or contract might provide against GRC.

Silverio* v. *Silverio, 625 S.W.3d 680 (Tex.App.-El Paso 2021, no pet.). Franklin and Tiffany got divorced. Franklin claimed that Tiffany had agreed to execute a promissory note for money she owed him for expenses incurred during the marriage. Franklin had his lawyer send Tiffany a letter demanding payment of the note, then filed this lawsuit. Tiffany denied signing a note. She claimed to have no knowledge of any purported note until she received the letter from the lawyer. After she received the demand letter, she went to the police.

The trial court entered judgment in favor of Tiffany. The judgment recited that the note in question was not valid. On appeal, Franklin contended that the "invalidity" of a promissory note is not a valid legal concept under Texas law. The court disagreed.

Franklin argues that the concept of "validity" is not a meaningful finding of fact or conclusion of law under Section 3.104 of the Texas Business and Commerce Code. But the court noted that it has previously recognized the validity of a promissory note as a basis for upholding a judgment.

The court focused its analysis on the essential element of whether the alleged maker signed the note. The validity of the signature on the note must be proved by the person claiming validity if validity is denied in the pleadings. Franklin limited his argument to there being "no evidence of probative force" to support the "invalid" note finding as it was not a valid legal concept. But Tiffany countered that more than a scintilla of evidence supported the trial court's implied findings that she did not sign the note and Franklin did not conclusively establish his right to recover on the unsecured note as a matter of law. The court agreed with Tiffany.

At trial, Franklin had the burden of proof to establish the note in question was signed by Tiffany, that he was the legal owner and holder of the note, and that a certain balance was owed on the note. Franklin presented purported proof of the note; and he testified that the note indicated that he and Tiffany had an agreement that she owed a principal amount due of $36,921.18, that monthly payments of $336 were to be made, and that interest would be due if the note remained unpaid. He further testified that Tiffany signed the note in his presence.

Tiffany, however, testified that she did not agree to pay Franklin any money, there was never an agreement to enter a promissory note, and the signature on the alleged promissory note was not her signature. Tiffany also testified she had never seen the alleged promissory note before she received the letter from Franklin's attorney demanding payment; and that neither the purported note nor Franklin's claim that she owed him money was ever brought up during their divorce proceedings. Based on the evidence and the trial court's resolution of the conflicts in testimony, the court held there was sufficient evidence to support the finding that Tiffany did not sign the note.

PART IV
LEASES AND EVICTIONS

Muzquiz* v. *Para Todos, Inc., 624 S.W.3d 263 (Tex.App.-El Paso 2021, pet. pending). Para Todos rented a restaurant space from Grimaldo when she was 80 years old. The lease was prepared by Para Todos, as the lessee. Grimaldo died and Muzquiz inherited the property from her. The term of the lease commenced June 1, 2003 and "shall be perpetual and terminable at Lessee's sole discretion upon thirty days written notice to Lessor."

Muzquiz attempted to terminate the lease and renegotiate with the lessee. The lessee refused, so Muzquiz brought this suit. The trial court ruled in favor of the lessee, holding that the parties intended to create a lease with a right of perpetual renewal, that the lease language did not create a tenancy at will, and that Muzquiz failed to meet his burden to prove unconscionability or the lease violated public policy.

Muzquiz asserts the "undisputed rule" is perpetual leases are unenforceable. However, the court's review of Texas law finds leases which renew in perpetuity are disfavored but upheld when a lease's language clearly indicates the parties' intent to create such an obligation. On the other hand, leases with a perpetual term are not, per se, unenforceable. Rather, leases with indefinite initial terms are treated as terminable at will by either party. The question was whether this lease's term indefinite or is it a term which renews in perpetuity?

Muzquiz contends there can be no logical interpretation of the lease language other than finding it creates a perpetual term and thus a terminable-at-will agreement. Para Todos counters the lease's explicit perpetual term evidences the parties' unambiguous intent to create a perpetual lease. It claims the unambiguous language regarding the perpetual lease term, coupled with the lease's requirement for Para Todos to use the property as a restaurant or any other legal purpose it chooses, constitutes an ascertainable date for termination of the perpetuity and accordingly should be enforced. Para Todos also argues the lease should be enforced as a periodic tenancy terminable solely at the will of the lessee.

The court held that the lease language created a tenancy at will. The paragraph heading is entitled "TERM." The lease explicitly states "the term of this lease shall commence . . . June 1, 2003 and shall be perpetual." The lease does not address renewals or the term of the lease other than what is found in this paragraph. The lease, as written, is only terminable by Para Todos, at their sole discretion, with no right of termination by Muzquiz. Further, Para Todos may continue their occupancy "in perpetuity" so long as they continuously occupy, use the premises as a restaurant, or any other lawful purpose they desire. In addition, Para Todos, under the lease, secured the right to assign the lease or sublet without the prior consent of Muzquiz. The lease did not provide for any increase in the term rental for the premises from its inception in 2003. Under the lease, Muzquiz is responsible for the maintenance of all external walls, roof and front parking lot; required to maintain insurance policies for loss or damage by fire; and could transfer his rights and obligations in the Building and the lease. Muzquiz also paid the real property taxes.

The court held that the parties did not intend to create a lease with an initial fixed term and a right of perpetual renewal. The lease expressly states the term is "perpetual" and makes no reference to a right of renewal. The lease does not describe a term with a definite end date nor does it require a particular use of the premises the cessation of which would end the lease term.

Considering the lease explicitly contains an indefinite perpetual initial lease term with no defined end date nor any requirement tying the

cessation of the lease to a specific use of the property, court held that the trial court erred in determining the parties intended to create a lease with a right of perpetual renewal and in finding the lease was not terminable at will by either party.

Alanis* v. *Wells Fargo Bank National Association, Trustee, 616 S.W.3d 1 (Tex.App.—San Antonio 2020, pet. denied). Wells Fargo sent a 3-day Notice to Vacate Prior to Filing Unlawful Entry and Detainer-Residential cause of action against Alanis. Wells Fargo sent the notice to the Property's address via certified mail, return receipt requested and First Class Mail. The First Class Mail notice did not provide a proof of receipt. The notice sent by certified mail was delivered on November 5, 2018, at 12:40 p.m.

The same day, at 10:09 a.m., Wells Fargo filed in the justice court a suit to evict Alanis and all other occupants of the Property. After a bench trial, the justice court awarded Wells Fargo possession of the Property. Alanis appealed to the county court at law for a trial de novo—arguing that the justice court lacked jurisdiction in the case. After the county court at law denied Alanis's plea to the jurisdiction, Wells Fargo filed a motion for a traditional summary judgment, and Alanis timely filed a response. The county court at law found that it had jurisdiction over the parties and the subject matter of the forcible detainer action and that, based on the evidence, Wells Fargo was entitled to judgment as a matter of law. The county court at law also issued a writ of possession in favor of Wells Fargo.

On appeal Alanis claimed the county court at law erred in granting Wells Fargo's motion for summary judgment because Wells Fargo failed to provide Alanis with the three-day statutory notice to vacate and, therefore, both the justice court and the county court lacked jurisdiction.

For Alanis's jurisdictional challenges, both parties assume that failure to give a statutorily mandated pre-suit notice is jurisdictional. The court would not make that assumption. Before it addressed the parties' notice arguments, it had to first determine whether the statutory notice requirement in a forcible detainer action is jurisdictional.

Unless a statute provides otherwise, a failure to provide statutory notice to a party will not deprive a court of subject matter jurisdiction. The court began with the presumption that the legislature did not intend to make the provision jurisdictional. The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.

In determining whether a statute's requirements are jurisdictional, the court applied statutory construction principles. The court considered the statutory language, its purposes, and the consequences of each interpretation.

Property Code § 24.005(b) provides that the landlord must give the tenant at least three days' written notice to vacate before the landlord files a forcible detainer suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. Section 24.005's plain language requires notice as a prerequisite to filing a forcible detainer suit. The section's plain language does not state or imply that the notice to vacate is jurisdictional. At least one provision under Chapter 24 or the Property Code explicitly addresses the extent of the justice court's jurisdiction and the consequences when no jurisdiction exists. Under Property Code § 24.004(a), in forcible detainer cases, justice courts have jurisdiction to hear issues on possession and to issue writs of possession. If

the suit entails any issue dealing with title, the statute requires justice courts to dismiss the case on jurisdictional grounds.

In suits involving a governmental unit, failure to adhere to the statutes' mandatory provisions that must be accomplished before filing suit is a jurisdictional bar to suit.

So, the court looked at whether the purpose of the statute indicates that a notice to vacate is jurisdictional. A forcible detainer action is an action to determine who has the right to immediate possession of the premises. The purpose of a forcible detainer action is to provide a party with an immediate legal remedy to obtain possession of property. The detainer action is intended to be a speedy, inexpensive, summary procedure for obtaining possession without resorting to a suit on the title and where there is no claim of unlawful entry. The purpose of affording an immediate possession of premises through a cause of action intended to be speedy and inexpensive would not be served if the justice court did not have jurisdiction because of an inadequate notice to vacate.

On the other hand, if the notice to vacate is not jurisdictional in nature, the purpose of the statute to provide a quick and inexpensive procedure to obtain possession of realty is effectuated. Under such circumstances, the justice court could abate the proceeding until the notice requirement was met or render a judgment against a plaintiff who did not conform with the statutory requirement without the parties incurring additional expenses in re-filing a suit.

Construing section 24.004 as jurisdictional would threaten the finality of a forcible detainer cause of action because a judgment is void if rendered by a court without subject matter jurisdiction. If justice courts, faced with an allegedly deficient notice to vacate, proceed without jurisdiction, their writs of possession would be forever open to challenge and the purpose of the statute would not be served.

Tellez* v. *Rodriguez, 612 S.W.3d 707 (Tex.App.—Houston [14th Dist.] 2020, no pet.). Rodriguez's father conveyed real property to his son, reserving a life estate in the property to Tellez. Tellez failed to make the mortgage payments or pay any other expenses of the property, and to avoid foreclosure, Rodriguez paid more than $19,000 of the property's expenses. After Tellez failed to respond to Rodriguez's demands that she reimburse him and vacate the premises, Rodriguez filed a forcible-detainer action in justice court. The justice court ruled in favor of Rodriguez, and Tellez appealed by trial de novo to the county court at law. After a non-jury trial, the county court at law ruled in Rodriguez's favor, awarding him possession of the property, damages, and attorney's fees.

A forcible-detainer action determines which party has the superior right to immediate possession of real property. To obtain the right of possession through a forcible-detainer action, the plaintiff is not required to prove title, but need only supply sufficient evidence of ownership to demonstrate a superior right to immediate possession. In contrast, a justice court lacks jurisdiction to adjudicate title. Thus, a forcible-detainer action in a justice court determines only the right to actual possession of the property; such a proceeding cannot resolve title disputes, which may be addressed in a separate suit in a court of proper jurisdiction.

The mere existence of a title dispute does not necessarily deprive the justice court or county court of jurisdiction. The title dispute must be "so integrally linked to the issue of possession that possession may not be determined without first determining title. If the right to immediate possession can be adjudicated on a basis other than title, then the justice court (and on appeal, the county court)

retains jurisdiction over the forcible-detainer action.

In bringing a forcible-detainer action to oust the holder of a life estate, Rodriguez has demonstrated some confusion about the difference between a life estate and a tenancy in which property is leased from a landlord. This confusion may arise from the fact that the holder of a life estate is sometimes referred to as a "life tenant." Although Rodriguez admits that Tellez is not a tenant in the sense of one who leases property from a landlord, he argues that her life estate is analogous to such a tenancy and that he has a superior right of possession because he was paying all of the property's expenses. He further asserts that his right of possession does not require resolution of a title dispute because he has "never asserted or attempted to remove Tellez's life estate interest from her." He is mistaken on both points.

A life estate and a reversionary estate in a tract of land are separate estates. A life estate is created by a deed or will where the language of the instrument manifests an intention on the part of the grantor or testator to pass to a grantee or devisee a right to possess, use, or enjoy property during the period of the grantee's life. The life tenant owns the estate only for life, which is a lesser estate than the fee or inheritance which belongs to the remaindermen.

The relation of life tenant and remainderman is different from that of landlord and tenant in that the life tenant and the remainderman hold the same land from the same grantor under separate titles, whereas a landlord and tenant hold the same land under the same title. Moreover, a life tenant is entitled to exclusive possession and control of the property comprising the life estate and the remaindermen are not entitled to possession thereof until the life estate terminates. Thus, Tellez's right to possession of the property during her lifetime could be terminated only by terminating her title in the life estate.

Because the right to immediate possession of the property could be adjudicated only on the basis of title, neither the justice court nor the county court at law had subject-matter jurisdiction over Rodriguez's forcible-detainer action.

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.

Sanchez* v. *Barragan, 624 S.W.3d 832 (Tex.App.-El Paso 2021, no pet.). Barragan met Mr. Sanchez in 2006. At the time, Mr. Sanchez told Barragan he was unmarried. In 2009, Barragan and Mr. Sanchez entered into an Agreement for Barragan to purchase the property located at 1223 Tio Dink in El Paso. The Agreement also included purchase of a Silver Creek mobile home, a storage shed, and a Rambler. The contract price for all four—the real property, the mobile home, the storage shed, and the Rambler (collectively, the Property)—was $52,000. The following day, Barragan made a down payment of $13,000 to Mr. Sanchez. He continued paying thereafter at a rate of $600 per month.

In September of 2014, Barragan learned Mr. Sanchez was married at the time the Agreement was signed. Barragan was particularly surprised because, at Mr. Sanchez's insistence, the Agreement contained a provision allowing Mr. Sanchez's girlfriend to live at 1223 Tio Dink.

Barragan made his final payment to Mr. Sanchez on November 14, 2014. The check contained the notation, "Final Payment 1223 Tio Dink." Mr. Sanchez accepted, endorsed, and cashed the final check, and, according to Barragan, all previous checks before it. After making the final payment, Barragan asked Mr. Sanchez for a warranty deed and bill of sale for the Property. Mr. Sanchez refused, citing pressure put on him by Mrs. Sanchez to withhold the documents from Barragan.

Barragan filed suit against Mr. Sanchez, alleging causes of action for breach of Section 5.077 and 5.079 of the Texas Property Code, common law fraud and misrepresentation, statutory fraud, and breach of contract. In addition to damages, Barragan alternatively

sought specific performance under the Agreement. Shortly after Barragan filed his original petition, Mrs. Sanchez made an entry of appearance as a "third party respondent" to Barragan's lawsuit. She then filed an entry of appearance claiming she represented Mr. Sanchez pursuant to a power of attorney. Subsequently, she filed an answer as a third-party defendant in the case. A short time later, Mr. Sanchez filed his answer.

In their answers, Mr. and Mrs. Sanchez denied liability. They also claimed that Barragan knew Mr. Sanchez was married when he entered into the Agreement. The also claimed that any agreement to sell the property at 1223 Tio Dink was not in writing because the Agreement listed the property for sale as 1223 "Tio Dick."

The court first addressed whether there was a material fact issue regarding the description of the property in the Agreement, since it listed the property address as "Tio Dick" instead of "Tio Dink."

Mrs. Sanchez alleges that because the Agreement states it is for purchase of property at 1223 "Tio Dick" in El Paso, Texas, rather than 1223 Tio Dink, title to 1223 Tio Dink cannot transfer from Mr. Sanchez to Barragan. Mrs. Sanchez goes so far as to state the trial court transfigured the Agreement from one for property on Tio Dick into one for property on Tio Dink. According to Mrs. Sanchez, the discrepancy in the property address on the Agreement creates a fact issue regarding what property the parties actually bargained over. Barragan counters that the discrepancy is merely a spelling error, and the remaining summary judgment evidence clarifies Barragan's and Mr. Sanchez's intent to enter into an agreement regarding the property at 1223 Tio Dink.

The court agreed with Barragan. Mrs. Sanchez does not dispute Mr. Sanchez owned the property at 1223 Tio Dink, or that he purchased it in 1997 prior to his marriage to Mrs. Sanchez. Instead, Mrs. Sanchez claims the Agreement is evidence of Mr. Sanchez's intent to sell property to Barragan at 1223 "Tio Dick," since "Tio Dick" is the property's street name listed on the Agreement. This argument lacks merit. A simple Google search reveals "1223 Tio Dick" does not exist in El Paso. If the court were to accept Mrs. Sanchez's position, Mr. Sanchez knowingly entered into an agreement to accept money from Barragan for property that he not only did not own, but did not exist. In other words, Mr. Sanchez intended to defraud Barragan of $52,000. We do not believe it is Mrs. Sanchez's intent to judicially admit to Mr. Sanchez's estate attempting to defraud Barragan, and we accordingly do not accept Mrs. Sanchez's argument that Mr. Sanchez intended to negotiate the sale of property to Barragan that does not exist.

Rather, the court found the "Tio Dick" reference to be nothing more than a typographical error, and construed the Agreement according to the intent of the parties. It is obvious the parties intended the Agreement to cover the property at 1223 Tio Dink, and the spelling error in the street name did not create any ambiguity in that intent.

It is well-established that parol evidence cannot be used to show the intent of parties contracting for the sale of land, and the essential terms of such contract must be included in the contract. However, while essential elements of a contract may never be supplied by parol, the details which merely explain or clarify the essential terms appearing in the instrument may ordinarily be shown by parol," so long as the parol evidence relied upon does not constitute the framework or skeleton of the agreement.

The court held the Agreement was valid and enforceable. Having done so, the court looked at whether a genuine issue of material fact exists regarding Barragan's performance under the contract.

Mrs. Sanchez urges that the trial court erred when it pronounced Barragan made payment in full to Mr. Sanchez for the covered property. In support, he claims the Agreement's language which requires payments of $500 per month, contradicts the facts asserted by Barragan that he made payments of $600 per month. The court found that Mrs. Sanchez has not provided any affidavit testimony controverting Barragan's testimony that he paid the contract in full, nor to Barragan’s summary accounting of payments made under the Agreement. Accordingly, the court found no error in the trial court's determination that Barragan performed fully under the Agreement

Wheatley* v. *Farley, 610 S.W.3d 511 (Tex.App.—El Paso 2020, no pet.). Conveyance by deed requires delivery of the deed. Delivery encompasses two elements: (1) the grantor must place the deed within the control of the grantee (2) with the intention that the instrument become operative as a conveyance.

Manual delivery of the deed is not, however, required. The test is not physical possession, but whether the grantor gave the grantee control of the deed. For example, a grantor may effect a delivery through a third person. If a grantor delivers a deed to a third person, without any reservation on his part of the right to recall it, and with instructions to the third person to deliver it to the grantee upon the grantor's death, he thereby makes an effective delivery of the deed as a matter of law.

Ultimately, the question of delivery of the deed is controlled by the intent of the grantor, and it is determined by examining all the facts and circumstances preceding, attending, and following the execution of the instrument.

Here, only two witnesses testified at trial, and neither could say whether the Deeds were delivered; both testified that they simply did not know. The deeds were found among the grantee’s effects after her death, which gives rise to a presumption that they were delivered. The question was whether the presumption was rebutted. That no one saw the deeds in the grantee’s possession and that the deeds were not recorded was insufficient to rebut the presumption.

PART VI
VENDOR AND PURCHASER

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.

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.

Gutierrez* v. *Rios, 621 S.W.3d 907 (Tex.App.—El Paso 2021, no pet.). There were two versions of the story about the house. Gutierrez said Rios had agreed to sell him the house for $40,000. He paid $1,000 a week for a while and he spent a good deal of money remodeling and repairing it. Rios claimed that she allowed Gutierrez to use the house until he could find somewhere to live with his daughter. She told him he could pay her whatever he could weekly. She stated that they did not agree on any total price, nor did they agree on any payment terms. In fact, she testified that she never heard the $40,000 figure until much later. She was adamant that the arrangement was for Gutierrez to rent the house, not purchase it. Ultimately, when Gutierrez asked for a deed to the house on his final payment, Rios refused. At trial, the court found that Gutierrez failed to sustain his burden of proof that a valid contract existed, that there was no meeting of the minds.

A fundamental element of a breach of contract claim is the existence of a valid contract, an issue on which the plaintiff bears the burden of proof. And one of the fundamental elements of contract formation is that the parties had a meeting of the minds on the essential terms of the contract. Meeting of the minds is measured by what the parties said and did and not on their subjective state of mind. Where one party attests to a contractual agreement while the other vigorously denies any meeting of the minds, determining the existence of a contract is a factual inquiry.

The trial court in this case expressly found that there was no meeting of the minds for the formation of a contract for the purchase and sale of the subject property, and Gutierrez's challenges to factual sufficiency failed to

persuade the court.

Gutierrez then claimed that the partial performance doctrine under the statute of frauds supports a finding that the parties entered into a contract. Rios did not, however, plead the statute of frauds in the court below, nor does she rely on it on appeal. The flaw in Gutierrez's argument, however, is that the trial court did not deny Gutierrez's claim based on the statute of frauds, that is, based on the fact that the purported contract was not in writing. The basis of the court's take-nothing judgment is that Gutierrez did not prove that there was a meeting of the minds. This requirement applies to both oral and written contracts and is, thus, independent of the statute of frauds.

In any event, Gutierrez did not establish that the partial performance doctrine applies. One of that doctrine's requirements is that the performance on which the party relies must be unequivocally referable to the agreement. The purpose of the alleged acts of performance must be to fulfill a specific agreement. If the evidence establishes that the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable.

Juen* v. *Rodriguez, 615 S.W.3d 362 (Tex.App.—El Paso, no pet.). The measure of damages for breach of a contract for the sale or purchase of real estate is the difference between the contract price and the property's market value at the time of the breach. The issue here is whether Rodriguez, as summary judgment movant, established the market value of the property as a matter of law. Rodriguez's evidence of market value was his testimony that the property had been on the market for a long time and the best offer he had gotten was $500,000.

Rodriguez contends that this testimony is sufficient to establish the market value of the property because a property owner can testify to its market value, even if he could not qualify to testify about the value of like property belonging to someone else. However, while the Property Owner Rule establishes that an owner is qualified to testify to property value, a court must insist that the testimony meet the same requirements as any other opinion evidence. One of those requirements is that the testimony not be conclusory. Testimony that merely states a conclusion without any explanation is conclusory as a matter of law.

Property valuations may not be based solely on a property owner's ipse dixit. An owner may not simply echo the phrase "market value" and state a number to substantiate his diminished value claim; he must provide the factual basis on which his opinion rests. This burden is not onerous, particularly in light of the resources available today. Evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim. But the valuation must be substantiated; a naked assertion of "market value" is not enough. Of course, the owner's testimony may be challenged on cross-examination or refuted with independent evidence. But even if unchallenged, the testimony must support a verdict, and conclusion without any explanation is conclusory as a matter of law.

The only seemingly concrete basis for Rodriguez's valuation is the reference to a $500,000 offer, which he claims is the highest offer received. But Texas courts have long held that unaccepted offers to purchase property are no evidence of market value of property.

Rodriguez nevertheless argues that his testimony is sufficient because Appellants did not object to it. But conclusory opinion testimony constitutes no evidence, regardless of whether it is challenged. Rodriguez's affidavit

cannot be considered probative evidence and, consequently, does not establish market value as a matter of law.

PART VII
EASEMENTS

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.

Townsend* v. *Hindes, 619 S.W.3d 763 (Tex.App.—San Antonio 2020, no pet.). Whether a property owner is entitled to an easement by necessity is a question of law, although underlying factual issues may need to

be resolved in order to reach the legal question. In the summary judgment context, the existence of underlying factual issues would preclude the court from reaching the legal question.

The party claiming a necessity easement must show: (1) unity of ownership of the alleged dominant and servient estates before severance; (2) the claimed easement is a present necessity and not a mere convenience; and (3) the necessity for the easement existed when the two estates were severed.

Hindes moved for traditional summary judgment on the ground that access to the Disputed Road is not a necessity because there are other routes providing access to Townsend's property. A way of necessity must be more than one of convenience, for if the owner of the land can use another way, he cannot claim by implication to pass over that of another to get to his own. In other words, the claimant is not entitled to a way of necessity if he has a right of way over the land of another. In addition, this necessity must have existed at the time the dominant and servient estates were severed, and must also be a continuing, present necessity. Hindes specifically argues that another route to Townsend's property—the Agreement Road—has been available since 1981 pursuant to the Road Use Agreement.

Townsend does not dispute that the Agreement Road provides physical access to his property, or that that road has, in fact, been long-used to access his property. He argues instead that it does not provide legal access to his property because one of the landowners across whose property the Agreement Road runs was not a party to the 1981 Road Use Agreement and does not consent to Townsend's use of the road. This argument fails for two reasons.

First, Townsend did not raise the issue of legal access in his summary judgment response. Second, Townsend's response did not identify any summary judgment evidence supporting his assertion that an unidentified property owner claimed not to be bound by the Road Use Agreement. Even if the court considered the question of legal access to have been adequately raised, Townsend's mere say-so does not create a genuine issue of material fact on that issue. Thus, faced with the Road Use Agreement and his own acknowledgment of prior use of the Agreement Road by virtue of that agreement, it was Townsend's burden to produce evidence that legal access was lacking. Townsend did not sustain this burden.

PART VIII
ADVERSE POSSESSION, QUIET TITLE, TITLE DISPUTES

Brumley v. McDuff, 616 S.W.3d 826 (Tex. 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.

See also ***MCI Camp Springs, LLC* v. *Clear Fork, Inc.***, 623 S.W.3d 83 (Tex.App.—Eastland 2021, no pet.).

Draughon* v. *Johnson, No. 20-0158 (Tex. March 24, 2021). A defendant who moves for summary judgment based on limitations must conclusively establish the elements of that defense and must also conclusively negate application of the discovery rule and any tolling doctrines pleaded as an exception to limitations.

Pape Partners, Ltd.* v. *DRR Family Properties LP, 623 S.W.3d 436 (Tex.App.—Waco 2020, no pet.). The Papes purchased a tract of land. The purchase included irrigation water rights. The purchase included irrigation water rights recognized by the State of Texas in two Certificates of Adjudication. The Papes attempted to record their purchase of water rights with TCEQ. The TCEQ notified DRR and other potentially interested landowners that they might own an interest in the water rights. DRR filed a change of ownership form, and the TCEQ eventually concluded that DRR owned a portion of the water rights. The TCEQ changed its records to reflect DRR's ownership.

The Papes moved to reverse the TCEQ's decision, and the motion was overruled by operation of law. The Papes did not pursue an administrative appeal, but brought the present suit seeking a declaration that it owns all of the water rights in the tract. The Papes further asserted claims against DRR for trespass to try title – adverse possession and to quiet title. DRR moved to dismiss the Papes' claims against it for lack of subject matter jurisdiction, asserting that the Papes had failed to exhaust their administrative remedies. The trial court granted DRR's motion.

In its sole issue, the Papes assert that the TCEQ's ruling was in effect a determination of the legal ownership of the water rights and that the trial court erred in granting DRR's motion to dismiss because: (1) the question of property ownership is within the sole jurisdiction of the courts; (2) the legislature did not vest the TCEQ with exclusive jurisdiction over the Papes' claims; and (3) the ruling violates the separation of powers clause in the Texas Constitution.

Generally, the power to determine controverted rights to property by means of binding judgment is vested in the courts. Courts of general jurisdiction in Texas are presumed to have subject matter jurisdiction absent a showing that the Texas Constitution or some other law confers jurisdiction on another court, tribunal, or administrative body. Administrative bodies may exercise only those powers the law confers upon them in clear and express language. Courts will not imply the existence of additional authority for administrative bodies, nor may these bodies create for themselves any excess powers. If an agency has exclusive jurisdiction, the Legislature grants the agency the sole authority to make an initial determination in a dispute. A party must then exhaust all administrative remedies before seeking judicial review of an agency's action.

The Papes argue that the Water Code does not expressly grant exclusive jurisdiction to the TCEQ.

The Texas Constitution provides that the conservation and development of natural resources, including water for irrigation, power, and other purposes, are public and the Legislature "shall pass such laws as may be appropriate thereto." Constitution art. 16, §59. In keeping with this authority, the Legislature enacted the Water Code, granting the TCEQ the "primary authority to establish surface water quality standards, which it implements, in part, in its permitting actions. Although the statute does not expressly grant exclusive jurisdiction over water rights to the TCEQ, the regulatory scheme behind surface water permits is pervasive and indicative of the Legislature's intent that jurisdiction over the adjudication of surface water permits is ceded to the TCEQ.

Once it is determined that an agency has

exclusive jurisdiction over an issue, then the party injured by agency action must follow the review process set up in the statute. An appeal from an administrative agency is not a matter of right, it is set out by statute and must be strictly complied with in order to vest the district court with jurisdiction. failure to comply with statutory prerequisites under Water Code deprives trial court of jurisdiction. It is undisputed that the Papes did not follow the administrative review process. Because the Legislature has vested the TCEQ with the exclusive jurisdiction to determine water rights, the Papes were required to exhaust their administrative remedies before resorting to the courts.

I won't recite anything from it here, but I highly recommend reading the very colorful dissent by Chief Justice Tom Gray.

Benner* v. *Armstrong, 622 S.W.3d 562 (Tex.App.—Waco 2021, no pet.). Ruth owned 11.93 acres, consisting of Tracts A, B, and C. Ruth died. Before her death, she lived in her home on Tract C. Wily, one of Ruth's eight children, lived on Tract D. Krystal, Wily's step-daughter, lived close to the 11.93 acres.

In two gift deeds recorded in the real property records of McLennan County on June 17, 2010, the entire 11.93 acres were conveyed to Krystal and Jeffrey. After the gift deeds were executed, Krystal and her then-husband Jeffrey moved a manufactured home onto Tract A.

Benner brought suit on September 21, 2012 to quiet title to the entire 11.93 acres. After a bench trial in December 2018, the trial court set aside the two gift deeds as invalid based upon mistake. However, the trial court further awarded Tract A and B to Krystal based upon adverse possession except for the "Benner Tract" that the trial court awarded to Melissa Benner. As a result, the trial court ultimately awarded the 9.9 acres to Krystal. The trial court found that Tract C and D are to be retained by the owners of record prior to the execution of the gift deeds.

Benner argues that the trial court erred in awarding the 9.9 acres from Tracts A and B to Krystal under each of the adverse possession statutes.

The Texas Civil Practice and Remedies Code provides for adverse possession based upon periods of 3, 5, 10, and 25 years. See Civil Practice & Remedies Code. § 16.024 - 16.028. Adverse possession is an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person throughout the statutory period. The statute requires that such possession be inconsistent with and hostile to the claims of all others. One seeking to establish title to land by virtue of the statute of limitations has the burden of proving every fact essential to that claim by a preponderance of the evidence. Inferences are never indulged in the adverse claimant's favor.

The 3-year limitations period statute for adverse possession provides that a person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues. Civil Practice & Remedies Code. § 16.024. Additionally, the statute for the 5-year limitations period for adverse possession provides that a person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by a person who cultivates, uses, or enjoys the property, pays taxes, and claims under a duly registered deed. Civil Practice & Remedies Code. § 16.025. Here, gift deeds that were the basis of the claim were filed in 2010 and this suit was brought in 2012, so Krystal and Jeffrey did not establish adverse possession under either the 3-

or 5-year statute.

The 10-year limitations period statute for adverse possession provides that a person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property. Civil Practice & Remedies Code. § 16.026. Krystal and Jeffrey did not move their home onto the 11.93 acres until 2010. Prior to that, they testified that they used the property to graze cattle and goats. The adverse claimant who relies upon grazing only as evidence of his adverse use and enjoyment must show as part of his case that the land in dispute was designedly enclosed If the fence existed before the claimant took possession of the land, and the claimant fails to demonstrate the purpose for which it was erected, then the fence is a "casual fence." Repairing or maintaining a casual fence, even for the express purpose of keeping the claimant's animals within the enclosed area, generally does not change a casual fence into a designed enclosure. Here, the court held the evidence does not establish adverse possession under the 10-year limitations period.

Eggemeyer* v. *Hughes, 621 S.W.3d 883 (Tex.App.—El Paso 2021, no pet.). Texas has long adhered to the American Rule with respect to awards of attorney's fees, which prohibits the recovery of attorney's fees from an opposing party in legal proceedings unless authorized by statute or contract. Trespass-to-try-title claims are exclusively governed by statute, and that statutory scheme does not generally include a provision for the award of attorney's fees. Accordingly, Texas does not permit attorney's fees for the prevailing party in a trespass-to-try-title suit.

Conversely, the Uniform Declaratory Judgments Act permits a trial court to "award costs and reasonable and necessary attorney's fees as are equitable and just. Civil Practice & Remedies Code § 37.009. Given this discrepancy in available remedies, litigants have sometimes cast trespass-to-try-title cases as declaratory judgment claims. The legislature amended the UDJA in 2007 to specifically allow, notwithstanding the Property Code's trespass-to-try-title provisions, that a person could obtain declaratory relief to determine the proper boundary line between adjoining properties, when that is the sole issue concerning title to real property. Civil Practice & Remedies Code § 37.004(c).

Here, Hughes asserted a claim for trespass-to-try-title, he also asserted and prevailed on a claim under the UDJA to define the boundary of the properties. Eggemeyers' argument on attorney's fees was that this case presented a trespass-to-try-title dispute and not a boundary dispute.

A trespass-to-try-title action is a procedure by which competing claims to title or the right to possession of real property may be adjudicated. Yet there has long been some overlap with a boundary determination, because boundary necessarily involves the question of title, else the parties would gain nothing by the judgment.

The court held that the proper test for determining if the case is one of boundary is as follows: If there would have been no case but for the question of boundary, then the case is necessarily a boundary case even though it might involve questions of title. In applying that test, the court must look to the heart of the controversy.

The court held that the heart of this dispute was a boundary dispute. Hughes traced his title back to the sovereign, but the disputed trial issues all focused on the title and the actions of the predecessors in title after 1914--the date of the boundary agreement between the

then-owners. The stated purpose of that agreement was to settle the boundary for all time. And the question for the trial court was then to apply the wording of that agreement against the monuments still in existence today and as evidenced over time.

PART IX
CONDEMNATION

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
TAXATION

Odyssey 2020 Academy, Inc.* v. *Galveston Central Appraisal District, 624 S.W.3d 535 (Tex. 2021). Odyssey 2020 Academy subleases the property and uses it to operate a public open enrollment charter school. Odyssey contractually agreed to pay the property owners' ad valorem taxes, and it requested that the Galveston Central Appraisal District exempt the property from taxation under Tax Code § 11.11(a) as "property owned by this state." Odyssey relies on Education Code § 12.128(a),, which provides that property a charter school purchases or leases with state funds "is considered to be public property for all purposes under state law."

The appraisal district denied the exemption request because Odyssey has only a leasehold interest in the property. The district court and court of appeals agreed, holding that Education Code § 12.128 does not give Odyssey either legal or equitable title to the property.

The Supreme Court agreed. Property encumbered by a lease is taxed to the lessor who owns the underlying fee interest, and not even Odyssey contends that section 12.128 actually strips the private lessors of their fee ownership. The court held that the Constitution does not allow the legislature to recharacterize a property interest that is not, in fact, publicly owned so that it qualifies for an exemption. The Texas Constitution sets detailed limits on the

Legislature's authority to create exemptions because they undermine the guarantee that taxation shall be equal and uniform, imposing a greater burden on some taxpayers rather than sharing the burden among all taxpayers equally. The Supreme Court has long enforced these constitutional limits, and the precedents are clear that the Legislature may not treat the public as the owner of a fee estate it does not actually own.

Dallas Central Appraisal District* v. *International American Education Federation Inc., 618 S.W.3d 375 (Tex.App.—Dallas 2020, no pet.). The Tax Code provides that property owned by the state or a political subdivision of the state is exempt from taxation if the property is used for public purposes. Tax Code § 11.11(a). Thus, in order to qualify for this exemption, IAEF must establish that the Property is (1) owned by the state and (2) used for a public purpose. DCAD does not dispute that the Property is used for the public purpose of operating schools. Instead, the parties dispute whether the Property is owned by the state or a political subdivision of the state.

Texas courts generally have defined "ownership" for taxation purposes in terms of the person or entity holding legal or equitable title. Generally, equitable title has been considered sufficient to establish ownership for property tax purposes. Equitable title for these purposes includes "the present right to compel legal title."

IAEF argues that it has equitable title to the Property because its lease of the property contained a purchase option which gave it the unqualified, unilateral right to assume fee title to the property. The court held that the option gave IAEF equitable title.

PART XI
BROKERS

NLD, Inc.* v. *Huang, 615 S.W.3d 444 (Tex.App-Houston [1st Dist.] 2019, pet. denied). Huang introduced the Nguyen, who was trying to sell a motel, to Bhakta. Nguyen and Bhakta signed a contract for the sale, even though it was Nguyen's company, NLD, that actually owned the motel. The contract provided that Huang's employer, Champion, would receive a commission of 3% of the sales price to be paid at the closing of the sale. The contract misspelled Nguyen's name. The sale was contingent on financing.

The sale did not close on time. The City had filed a suit that Bhakta claimed clouded title, so he declined to go through with the deal. Bhakta did not, however, send a timely notice of termination.

Huang circulated a release form to both Nguyen and Bhakta which provided that the parties, brokers, and title company released each other from all liability. The release was signed by Nguyen, Bhakta, and Huang.

The City's lawsuit settled. NLD sold the motel to a new entity, Ansdil, owned by Bhakta and his brother. Their contract did not provide for a brokerage commission. After the sale, Huang sued Nguyen and NLD for breach of contract. They answered, claiming that Occupations Code § 1101.806(c) barred any recovery because NLD had not signed anything agreeing to pay a commission. Huang non-suited Nguyen. The trial court entered summary judgment in favor of Huang, awarding him the amount of commission he would have been entitled to under the original contract.

NLD contended that Huang cannot recover a commission for the sale because he did not have an agreement to represent NLD in the 2015 transaction with Ansdil. NLD maintained that it sold the motel on materially different terms to another buyer without Huang's assistance and Huang had no blanket agreement

with NLD to represent it in the sale of the motel. Huang responded that the terms of the original contract signed by Nguyen and Bhakta applied and conferred a commission to Huang arising out of the subsequent sale.

The statute of frauds contained in the Real Estate License Act provides that an agreement to pay a commission may be enforced against the signatory. To establish his claim for a commission, Huang relied on the form contract that was signed by Nguyen and Bhakta, specifically the commission agreement set out in Section 9. In that contract, Nguyen—acting on behalf of the owner of the motel, NLD, as the president and representative of NLD, and acting under NLD's assumed name of W. Airport Inn,2 —agreed in writing to pay Huang a commission when the motel sale closed. The contract specifically referred, on multiple pages, to "W. Airport Inn," which is NLD's assumed name. Page 1 of the sales contract, paragraph 1, states, "Seller: Lan [Nguyen]/W. Airport Inn." At the end, the contract is signed by Lan Nguyen under the heading "Seller: Lan [Nguyen]/W. Airport Inn.

NLD argued that the contract was between Bhakta and Nguyen, not itself; but that is incorrect under the plain language of the contract and the law. As president of NLD, the seller and record title owner of the property, and signing on behalf of NLD's assumed name, Nguyen was clearly authorized to sign the sales contract as NLD's agent. Indeed, only an agent of a corporation can sign on its behalf, as a corporation cannot act on its own or represent itself. An undisclosed principal—such as NLD, which was not mentioned in the August 2014 sales contract—may be bound to the contract if an agent—such as Nguyen—was acting with authority and intending to act on behalf of the principal. Here, NLD owned the property that was the subject of the sales contract, not Nguyen. Thus, when Nguyen signed the sales contract, she could only do so on behalf of her principal, NLD.

NLD also argued that the contract was contingent under its terms. A close reading of the contract negates this argument. The contract could have been terminated within thirty days if notice to terminate the contract had been given, but it was not.

NLD argued that the contract was superseded by the Release that applied to the first iteration of the sale terms. That Release, however, provided only generally that for the release of the parties, brokers, and title companies from all liability under the contract (not just for disbursement of earnest money). And it specifically provided only that the Buyer and Seller release each other, any broker, title company, and escrow agent from any and all liability under the aforementioned contract. Champions, through Huang, generally acknowledged only the release of any liability it and Huang might have as brokers. There was no mention of any release by Champions or Huang of their claim for a realtor's commission, and that claim was not released. Rather, the commission agreement, which had not yet matured into a claim against the parties, remained in effect.

PART XII PARTNERSHIPS

Pike* v. *Texas EMC Management, LLC, 610 S.W.3d 763 (Tex. 2020) and ***Cooke* v. *Karleseng***, 615 S.W.3d 911 (Tex. 2021). A partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of its interest in the organization.

PART XIII EXECUTION OF DOCUMENTS

Aerotek, Inc.* v. *Boyd, 624 S.W.3d 199 (Tex. 2021). The Texas Uniform Electronic

Transactions Act states that "[a]n electronic record or electronic signature is attributable to a person [by] showing . . . the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." Business & Commerce Code § 322.009. The issues in this case are how the efficacy of a security procedure is shown and, once it is, whether the alleged signatory's simple denial that he signed the record is sufficient to prevent attribution of an electronic signature to him.

For a paper document with a handwritten, wet-ink signature, the genuineness of the signature can be proved by direct evidence—for example, testimony by an eyewitness, a witness familiar with the signatory's handwriting, or an expert who has compared the signature against a genuine specimen. But these authentication methods may not be applicable to a purely electronic signature. While handwritten signatures are unique to an individual, electronic signatures sometimes involve nothing more than clicking a box online and recording the information in an electronic database.

Once parties to a transaction have agreed to conduct it by electronic means, the Act provides a standard for attributing electronic signatures to them. Section 322.009(a) provides that an electronic signature is attributable to a person if it was the act of the person. That may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable. Section 322.002(13) defines a security procedure as any procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record, including the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

Thus, security procedures may include requiring personal identifying information—such as a social security number or an address—to register for an account; assigning a unique identifier to a user and then tying that identifier to the user's actions; maintaining a single, secure system for tracking user activities that prevents unauthorized access to electronic records; business rules that require users to complete all steps in a program before moving on or completing it; and timestamps showing when users completed certain actions. These examples are illustrative and not exclusive under Section 322.009(a). The efficacy of the security procedure provides the link between the electronic record stored on a computer or in a database and the person to whom the record is attributed. A record that cannot be created or changed without unique, secret credentials can be attributed to the one person who holds those credentials.

In this case, Aerotek's evidence of the security procedures for its hiring application and its operation is such that reasonable people could not differ in concluding that employees could not have completed their hiring applications without signing the documents. The employees' simple denials are no evidence otherwise. Mere denials do not suffice. Evidence cannot be disregarded when it demonstrates physical facts that cannot be denied, so that 'reasonable people could not differ in their conclusions.

PART XIV
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.