CASE LAW UPDATE

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

32nd ANNUAL ROBERT C. SNEED
TEXAS LAND TITLE INSTITUTE
San Antonio
December 8 9, 2022

CASE UPDATE

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

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 647 S.W.3d and Supreme Court opinions released through November 4, 2022.

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.

TABLE OF CONTENTS

PART I
PROMISSORY NOTES

Angel* v. *Tauch, 642 S.W.3d 481 (Tex. 2022). The Bank held a $4.6 million judgment against Tauch, which the bank purportedly offered to settle for $2 million while admonishing Tauch that he needed to act "quickly" because the bank would "likely be look[ing] at other collection alternatives." Two days later, the Bank executed an agreement assigning the judgment to another of Tauch's creditors, the Gobsmack Gift Trust, for collection.

Almost immediately thereafter, the trust's attorney emailed Tauch's attorney, notifying him about the assignment and demanding payment in full on the judgment. At Tauch's request, the trustee's attorney forwarded a copy of the assignment agreement, which bore a stated effective date of the following day. On receipt of the assignment agreement, Tauch promptly emailed the bank to accept the settlement offer.

The bank and the trust rejected Tauch's assertion that a binding contract to settle the debt had been formed by his acceptance before the assignment agreement's effective date. Cross actions for declaratory and other relief ensued, and on cross motions for summary judgment, the trial court held that any offer was revoked on Tauch's receipt of the assignment agreement. The Court of Appeals reversed in a split decision, holding that the assignment did not render the bank unable to go forward with the offer at the time of acceptance because its stated effective date was the following day. The dissent opined that the effective date was immaterial because precedent set the standard for an implied revocation as requiring only "some act inconsistent with the offer," not an act precluding the offer from materializing into a contract.

The Supreme Court reversed and rendered judgment that no contract to settle the debt was formed. More than 75 years ago, in ***Antwine* v. *Reed***, the Court held that an offer could be revoked without express words of revocation, so long as the offeree had knowledge that the offeror had acted inconsistently with the offer. 199 S.W.2d 482, 485 (Tex. 1947). ***Antwine*** was the first and last time the Court applied the doctrine. Because ***Antwine*** involved a land transaction and information communicated to the offeree by the offeror's agent, the parties disputed whether other types of offers can be impliedly revoked and whether the doctrine is applicable when the offeree learns about the offeror's inconsistent action indirectly rather than directly from the offeror or its agent.

The Court held that the doctrine is not constrained to land transactions and the touchstone is inconsistent action manifesting the offeror's unwillingness to enter the proposed bargain. The assignment agreement's effective date did not preclude its execution from manifesting the bank's unwillingness to enter the settlement. The dispositive issue is not the offeror's ability to enter the proposed bargain but continued willingness to do so, and assigning the judgment for collection was inconsistent with an intent to release the judgment. Tauch's receipt of the assignment agreement was sufficiently reliable information about the bank's action to effectuate a revocation of the settlement offer.

PART II
GUARANTIES

BBVA USA* v. *Francis, 642 S.W.3d 932 (Tex. App.—Houston [14th Dist.] 2022, no pet.). Francis was one of the guarantors of a loan from the Bank to the Hospital. The Hospital defaulted, so the Bank accelerated and then sued the Hospital and the guarantors,

including Francis. The Bank settled with the Hospital and the other guarantors, but not with Francis.

Francis contends that his obligations as guarantor are tied to the Hospital's liability and the Bank's release and settlement of the Hospital's liability extinguished Francis's obligations under the guaranty. Francis moved for summary judgment on that ground, contending that his obligations are limited to the "Indebtedness of Borrower" under the language of the guaranty.

To determine a guarantor's liability, the courts look to the language of the guaranty agreement. The interpretation of a guaranty agreement, like any contract, is a legal question to be reviewed de novo. Guaranties are to be strictly according to their precise terms and must not be extended the guarantor's obligations beyond the language of the agreement.

Here, the guaranty was a “continuing guarantee of payment and performance," in which Francis absolutely and unconditionally guaranteed full and punctual payment and satisfaction of the “Indebtedness” of the Hospital to the Bank, and the performance and discharge of all borrower's obligations under the loan documents. “Indebtedness”, as defined in the guaranty included liability and obligations barred or unenforceable against the Hospital “for any reason whatsoever.”

In the settlement agreement with the Hospital, the Bank reserved any rights it had against Francis. Despite this wording, Francis contends that the Bank is barred from asserting a deficiency claim against him as a guarantor based solely on the Bank's release of the Hospital as the principal obligor. Francis contends, in other words, that because the Bank discharged the principal obligation, he is no longer liable as a guarantor. But the Bank did not discharge the obligation. Under the language of the settlement agreement, the Bank agreed not to pursue the Hospital for the deficiency on the notes and released the Hospital of any and all liability, claims, or causes of action related to the loans. The Bank did not release the indebtedness. To the contrary, the Bank expressly reserved its right to pursue any claims against Francis as guarantor. There is no factual support for Francis's claim that the Bank is precluded from enforcing the guaranty simply because it released its claims against the Hospital.

Francis contends that language in the settlement agreement improperly broadens the scope of the guaranty. The court disagreed. The settlement agreement is tied to Francis's obligations as set forth in the guaranty agreement. Notwithstanding language in the settlement agreement reserving the Bank’s claims against Francis, Francis expressly agreed as a guarantor to assume more extensive liability than Hospital. Although a guarantor's liability on a debt is normally measured by the principal's liability, a guarantor may agree to a more extensive or limited liability.

Perhaps most importantly, Francis waived "any and all rights or defenses based on suretyship or impairment of collateral other than actual payment." A waiver of "any and all rights" broadly waives all possible defenses.

PART III
ARTICLE 9 SECURITY INTERESTS

Airpro Mobile Air, LLC **v.** ***Prosperity Bank***, 631 S.W.3d 346 (Tex.App.—Dallas 2020, pet. denied). Airpro borrowed a loan from the Bank, secured by all of its assets. It later rented premises from the Landlord. When Airpro failed to pay rent, the Landlord locked it out of the premises and Airpro’s assets remained locked inside.

Airpro later defaulted on its loan with the Bank, so the Bank sought to foreclose on the collateral. The Landlord, however, maintained it had a superior lien on the collateral and denied the Bank possession of and unfettered access to it. The Bank then sued the Landlord for possession of the collateral and conversion. While the Bank's suit against the Landlord was pending, the Bank sold the collateral by private sale to Phoenix, the only bidder, for $17,500. A year later, the Bank and Landlord settled and the Bank then sued Airpro for the deficiency. Airpro countered that the collateral's sale was commercially unreasonable. The trial court entered judgment for the Bank.

Article 9 of the Uniform Commercial Code provides that a secured creditor may repossess collateral after default, dispose of it, and then sue for any deficiency that remains after proceeds from the collateral are applied to the debt. To recover a deficiency, however, a secured creditor must prove that it acted in a "commercially reasonable manner" regarding every aspect of the collateral's disposition.

Although commercial reasonableness is not precisely defined in Article 9, courts consider many non-exclusive factors when analyzing the commercial reasonableness of a disposition, including whether the secured party endeavored to obtain the best price possible; whether the collateral was sold in bulk or piecemeal; whether it was sold via private sale or public sale; whether it was available for inspection before the sale; whether it was sold at a propitious time; whether the expenses incurred during the sale were reasonable and necessary; whether the sale was advertised; whether multiple bids were received; what state the collateral was in; and where the sale was conducted. As these factors imply, commercial reasonableness is a fact-based inquiry that requires a balance of Article 9's two competing policies: (1) protecting debtors against creditor dishonesty and (2) minimizing interference in honest dispositions. The court examined the evidence and determined that the Bank had made commercially reasonable efforts to dispose of the collateral and that the sale price of $17,500 was commercially reasonable.

Airpro contended that the trial court improperly considered the Landlord's interference in determining whether the disposition was commercially reasonable. Specifically, Airpro argues the Bank failed to present any authority suggesting the Landlord's interference excused the Bank from conducting a commercially reasonable sale. The court did not construe this to be the Bank's argument at trial. At trial, the Bank argued its efforts to dispose of the collateral were commercially reasonable under the circumstances, given the Landlord's repeated interference. At no time did the Bank argue it was excused from conducting a commercially reasonable sale. Indeed, for the Bank to recover a deficiency, the disposition must have been commercially reasonable.

The court also rejected Airpro's contention that the time of the sale was unreasonable because the Bank sold the collateral to Phoenix while Bank's suit against the Landlord was still pending. The Bank sold the collateral to Phoenix on May 23, 2017 and settled its lawsuit with the Landlord on June 8, 2018. The court concluded that selling the collateral a year before the lawsuit settled was reasonable under the circumstances, particularly given that a substantial portion of the collateral was already obsolete at the time of sale.

PART IV
DEEDS AND CONVEYANCES

Aaron* v. *Fisher, 645 S.W.3d 299 (Tex. App.—Eastland 2022, pet. denied). The question in this case was whether the conveyances from Lilly to W.T. and Chester

were gifts or sales for consideration. If they were gifts, then the mineral interests would be separate property; if they were sales for consideration, the interests would be their community property that belonged equally to W.T. and Chester and their respective spouses.

Both deeds recite that Lilly "grant[s], bargain[s], sell[s], convey[s], transfer[s], assign[s], and deliver[s the disputed mineral interests] unto [W.T. and Chester, respectively]". The deeds further contain a provision that Lilly does so "for and in consideration of the sum of Ten & no/100 DOLLARS ($10.00) cash in hand paid and [for] other good and valuable considerations." No other deed language or recital indicates or suggests that Lilly intended to gift the disputed interests to W.T. and Chester. In fact, in both deeds Lilly clearly provided that "[t]his sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease heretofore executed and now of legal record" The court declined to go beyond the four corners of the documents and disregard its plain language. The deeds were sales for consideration.

Endeavor Energy Resources, LP* v. *Trudy Jane Anderson Testamentary Trust, 644 S.W.3d 212 (Tex. App.—Eastland 2022, no pet.). The Holcombs agreed to sell a part of their surface estate to the Tom and Trudy Anderson. The contract provided that the Holcombs would reserve all of the mineral, royalty, and executive rights and interests in their ranch. The general warranty deed that was executed and delivered at closing didn't reserve the minerals.

Believing that they had reserved to themselves all of the mineral rights and interests, the Holcombs later conveyed their executive rights to certain third parties, who then executed an oil and gas lease for the purpose of developing the minerals. Endeavor is the successor-in-interest of that lease, by way of a 2006 assignment. Further, Endeavor has been the lessee, and has operated on the property under the lease, ever since that assignment. Endeavor claims that, since it acquired the lease, Tom Anderson has executed multiple surface use agreements with Endeavor, in which the Andersons have purported to own the surface estate of the three tracts but have never claimed to own any mineral rights or interests in these tracts.

The parties later realized that the reservations in the original deed did not sufficiently memorialize and comport with their agreement and intent to reserve all mineral rights and interests in the subject property to the Holcombs. Upon recognizing this discrepancy, the Holcombs and Tom Anderson executed a correction deed which noted the mistake and included the mineral reservation.

Trudy did not join in executing the correction deed because she had died. Tom was appointed executor of her will and her will also established a testamentary trust which designated Tom as the trustee and gave all of Trudy's real property to Tom in trust.

The Trust filed a trespass to try title action, claiming that Tom's signature on the correction deed had no legal effect. The Trust alleged that for the correction deed to be effective, both Tom and his children would be required to sign. The Holcombs counterclaimed and asserted that the correction deed was valid. The trial court granted summary judgment in favor of the Trust and concluded that the correction deed did not substantially comply with Section 5.029 of the Property Code.

The Correction Instrument statutes, including Section 5.029, were enacted by the legislature in 2011 in response to a 2009 Texas Supreme Court decision in which the court held that correction deeds should not be used to convey additional, separate properties that were

not otherwise described in the original deed. These statutes permit the use of correction instruments to make both material and nonmaterial corrections under certain circumstances, including the conveyance of additional, separate properties that were previously prohibited by ***Myrad Props., Inc.*** **v.** ***LaSalle Bank Nat'l Ass'n*** 300 S.W.3d 746, 750 (Tex. 2009).

For a correction deed making a material correction to be a valid and enforceable instrument, Section 5.029 requires that either the original parties to the transaction or the heirs, successors, or assigns of an original party, if applicable, must execute it. The Correction Instrument statutes also contain a retroactive component: correction instruments that are recorded prior to the statutes' effective date of September 1, 2011, are required only to "substantially comply" with the provisions of Section 5.029. This retroactive component applies here because the correction deed in this case was executed and recorded in 2007. Nevertheless, the Correction Instrument statutes do not define what constitutes substantial compliance. Generally, that phrase means that one has performed the "essential requirements" of a statute, and it excuses deviations which do not seriously hinder the legislature's purpose in imposing such requirements.

In ***Broadway National Bank*** **v.** ***Yates Energy Corp.***, 631 S.W.3d 16 (Tex. 2021), the Supreme Court held that Section 5.029 permits the original parties to a conveyance to execute a valid correction deed even when the original grantees no longer own the property at issue. In so holding, the court rejected the argument (which is advanced by the Trust) that all current interest owners in the property must execute the correction deed. Thus, an "heir, successor, or assign" is required to execute a correction deed only if an original party to the transaction is unavailable.

Although the court in ***Yates Energy*** clearly held that Section 5.029 is satisfied when all original parties to the transaction execute the correction deed, in the case before us, all original parties to the 2003 general warranty deed did not sign the 2007 correction deed because Trudy had passed before the correction deed was executed and recorded. Importantly, the court in ***Yates Energy*** defined "successor" in a footnote: "In the context of this statute, the term 'successors' fills the gap between 'heirs' and 'assigns,' covering entities and legal representatives who succeed an original party other than as an heir or assign."

According to the arguments advanced by the parties, Trudy's successor or successors under Section 5.029 are either (1) Tom only or (2) Tom and the two Anderson children. Because the Anderson children do not have a vested interest in either Trudy's estate or the property held in the testamentary trust, the court held that Tom is Trudy's sole successor under, and for purposes of, Section 5.029. Tom's broad powers as executor and trustee permitted him to execute the 2007 correction deed as Trudy's sole successor because he possessed all decision-making authority regarding both Trudy's estate and the trust assets, with the exception of any conveyance of real property held by the trust, which, as Court of Appeals discuss below, is not an impediment to the execution of a valid correction deed.

The Trust argues that, even if Tom is Trudy's sole successor under Section 5.029, he failed to validly execute the 2007 correction deed because (1) he did not have the authority to do so and (2) when he signed the correction deed, he did so only in his individual capacity. In support of this argument, the Trust points out that the trust agreement explicitly limits Tom's authority as trustee with respect to any sale or conveyance of real property held by the trust. It is true that the joinder and consent of the

Anderson children is required under the trust agreement for any such action. However, the court did not agree that Tom exceeded his authority as trustee or executor of Trudy's estate when he executed the 2007 correction deed.

The Trust further contends that ***Yates Energy*** stands for the proposition that a correction deed is itself a conveyance, and not merely a clarification of the original instrument of conveyance. This argument misses the mark. In fact, the language in the Correction Instrument statutes that reference the purpose and effect of a correction deed clearly precludes that argument. The execution of a correction deed itself, without more, does not constitute a sale or conveyance of real property. In fact, a correction deed conveys nothing; it simply "replaces and is a substitute for the original instrument.

Parker **v.** ***Jordan***, 632 S.W.3d 108 (Tex.App.—El Paso 2021, pet. pending) Loyd III intended to gift to his daughters his 1/8 ownership in the ranch that he acquired from Ruthie. The gift deed, however, omitted any reference to Loyd III's remainder interest in Ruthie's life estate. The dispute in this case was the legal effect of such an omission on the breadth of the conveyance in the gift deed.

In Texas, deeds are construed to confer upon the grantee the greatest estate that the terms of the instrument will allow. A deed will pass whatever interest the grantor has in the land, unless it contains language showing the intention to grant a lesser estate. However, when conveying a future or expectancy interest in property, an instrument is not given effect as an assignment of an expectancy or future interest unless it clearly manifests the intention of the prospective heir to sell, assign or convey his expectancy or future interest.

Kathy contends in 1998 Loyd III's remainder interest was still only a future ownership interest because Ruthie's life estate had yet to expire. As such, Kathy argues, for the deed to convey that future ownership interest it must contain clear and express language manifesting Loyd III's intent to do so. And because the 1998 Gift Deed lacked such language, Elise's claim to the remainder is without merit.

Elise responds that the gift deed required no special language to effectuate conveyance of the remainder interest, but to the contrary, required special language in the deed expressly reserving the remainder interest to the grantor. The court agreed with Kathy's position. The deed did not convey the remainder interest.

The court also held that limitations did not bar Kathy's action. Kathy brought an action for trespass-to-title and, alternatively, a claim for deed reformation. Kathy's petition alleged both causes of action and they each rely on a different line of facts and seek different remedies. The trespass-to-title claim seeks to enforce Kathy's superior right over Elise's claim to Loyd III's remainder interest, which Kathy alleges Loyd III acquired at the end of Ruthie's Life Estate in 2006 and which she inherited through Loyd III's will after his death in 2014. The trespass-to-title claim is necessarily grounded in the factual allegation that Loyd III did not convey to Elise his remainder interest in 1998. Under these facts, Kathy's standing to enforce her right to the remainder interest did not arise until she inherited it upon Loyd III's death in 2014. Accordingly, Kathy's trespass-to-title claim could not have arisen sooner than 2014.

Kathy's claim for deed reformation, which was pled in the alternative, alleged if the language in the 1998 gift deed is interpreted to convey to Elise Loyd III's remainder interest then it was mistakenly conveyed and Kathy sought to correct that language to reflect Loyd III's true intent. Relying on ***Cosgrove*** **v.** ***Cade***,

468 S.W.3d 32 (Tex. 2015), Elise focuses only on Kathy's alternative claim for deed reformation and contends any claim that seeks reformation is barred by the four-year statute of limitations because the limitations period runs from the execution of the gift deed in 1998 and Kathy's suit filed in 2016 was filed outside the applicable limitations period.

Thompson* v. *Six Shooter Enterprises, LLC, 633 S.W.3d 107 (Tex.App.—El Paso 2021, no pet.). A conveyance of an interest in real property must: (1) be in writing, (2) be signed by the grantor, and (3) be delivered to the grantee. In Texas, it is settled that title to real property will vest upon execution and delivery of the deed. The recording of the deed is not necessary to pass title. The recording, however, establishes a prima facie case of delivery and the accompanying presumption that the grantor intended to convey the land according to the terms of the deed.

Although equitable title to real property passes at the time a deed is delivered, a delay in recording of the deed leaves open the possibility that the prior owner could illegally purport to convey the same property to a different purchaser. This possibility arises because the prior owner still appears to be the current, legal owner when the subsequent purchaser searches the public record. In such a case, of course, both purchasers would claim title to the property. Texas law settles such a dispute over competing deeds in favor of the first to record, even where the first to record is a subsequent purchaser, as long as such deed holder qualifies as a subsequent purchaser for value pursuant to Section 13.001(a) of the Property Code. Even so, with regard to the prior unrecorded deed, section 13.001(b) further provides that the unrecorded instrument remains binding on a party to that instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

Section 13.001 codified the long-held position of the Supreme Court of Texas that in cases where there exist competing deeds on real property, the first deed to have been properly recorded is valid and enforceable against the other. This legislative prerogative was intended to protect an innocent, subsequent purchaser of land from a prior purchaser who failed to exercise diligence in recording his or her deed.

Under Section 13.001 of the Property Code, an innocent—or bona fide—purchaser is one who acquires property in good faith, for value, and without notice, actual or constructive, of any third-party claim or interest. To receive protection as a bona fide purchaser, the buyer cannot have actual or constructive knowledge of the prior conveyance at the time of the purchase. Actual notice rests on personal information or knowledge. And, in a more comprehensive sense, the term "notice" also embraces knowledge of all those facts which reasonable inquiry would have disclosed. In such case, the duty of inquiry extends only to matters that are fairly suggested by the facts really known. Constructive notice, then, is notice the law imputes to a person who does not have actual notice. A recorded deed is one instance where notice of a conveyance is imputed to a subsequent purchaser.

Under certain circumstances, constructive notice can be established by the true owner's occupation or possession of the land even in the absence of a recorded deed. A purchaser of land may be charged with constructive notice of an occupant or possessor's claim of title if a court determines that the purchaser had a duty to ascertain the rights of a third-party possessor. When such a duty arises, the purchaser is imputed with notice of all the possessor's claims the purchaser might have reasonably discovered on proper inquiry. However, such a duty only arises where the possession is visible, open, exclusive, and unequivocal.

PART V
VENDOR AND PURCHASER

Dayston, LLC* v. *Brooke, 630 S.W.3d 220 (Tex.App.—Eastland 2020, no pet.). The property was described in the Farm and Ranch Contract as "[t]he land situated in the County of Erath, Texas, described as follows: 3379 FM Hwy 913, 515 Tennyson Dr, and +/- 81.50 AC of A0681 Smith Hancock and A0057 DW Babcock or as described on attached exhibit, also known as Exhibit A." Exhibit "A" further described the land as:

> 3379 FM HWY. 913 STEPHENVILLE, TX 76401To Include:Legal: Acres: 8.290, A0057 BABCOCK D W; & HOUSELegal: Acres: 1.740, A0057 BABCOCK D W;
>
> 515 TENNYSON DRIVE STEPHENVILLE, TX 76401To include:Acres: 8.246, S8010 SIMS CREEK SUBD, TRACT 1;Legal: Acres: 10.290, A0057 BABCOCK D W;
>
> 81.50 Acres Part of A0681 SMITH HANCOCK & A0057 D WBABCOCK (1.91 ACS) Parcel. *Please note the 81.50 acre parcel is being surveyed and renamed. Title company will convey the new legal address once completed.

Brooke, the buyer, sued Dayston, the seller, seeking a declaratory judgment to void the contract due to an inadequate property description. Dayston argued that the description was sufficient because a person familiar with the area could locate the land with reasonable certainty, including Brooke who had visited the land on multiple occasions. Dayston also argued that the contract allowed Daystont to provide a survey within 5 days of the effective date of the contract and that the survey was referenced by the contract, which satisfied the statute of frauds.

To be valid, a contract for the sale of real property must satisfy the statute of frauds; the contract must be in writing and signed by the person to be charged. Because the statute requires a signed writing, the knowledge and intent of the parties has no effect on the validity of the contract. Even when the record leaves little doubt that the parties knew and understood what property was intended to be conveyed, the knowledge and intent of the parties will not give validity to the contract and neither will a plat made from extrinsic evidence.

It is well settled that the writing must furnish "within itself or by reference to other identified writings then in existence, the means or data by which the particular land to be conveyed may be identified with specific certainty." Courts may construe multiple writings prepared for the same transaction as one contract. However, any documents referred to and incorporated in the contested agreement must be in existence at the time the parties executed the contested agreement. If the writing and other identified writings do not sufficiently describe the property to be conveyed, then the conveyance violates the state of frauds and is voidable.

Although the writing does not have to list metes and bounds, it must furnish data that identifies the property with reasonable certainty. The description must typically furnish enough information to locate the general area by tract survey and county, and it need contain information regarding the size, shape, and boundaries. When it is possible that more than one tract of land fits the description, the statute of frauds is not satisfied. For example, an unidentified portion of a larger tract is insufficient.

Texas courts have likewise held that a street

address, standing alone may be insufficient if there is uncertainty about the amount of land in the conveyance. However, a street address may be sufficient in other circumstances when only one tract of land meets the description.

Courts allow parol evidence when the writing contains a nucleus of description or descriptive words that can help clarify the property in question. The extrinsic evidence cannot be the sole means to supply the location or description of the land" and can only help identify the land from the data in the writing. For example, courts have held that words of ownership may be used as a nucleus of description to identify land with reasonable certainty.

Here, the Agreement appears to contemplate three separate tracts of land in a single conveyance. On its face, "+/- 81.50" acres is an indefinite amount and insufficient to describe land with certainty. The incorporated exhibit adds little clarity. The exhibit again describes the land as two street addresses, listing the accompanying acres, and 81.50 acres from two larger tracts of land. The court said this was insufficient to identify the property with reasonable certainty.

Dayston claimed the insufficiency was cured for two reasons. First, it argued that the conveyance can be located with reasonable certainty because Brooke personally visited the property on at least 3 occasions. This argument is directly opposed to the rule that the knowledge and intent of the parties will not validate the agreement.

Second, Dayston argued that the survey offered as an exhibit to the amended summary judgment response was incorporated into the Contract by reference because the contract said that the parcel was being surveyed and renamed and that the title company would convey the new legal address once completed. Dayston argued that the referenced survey was actually already completed and is part of the agreement as a document in existence. This argument is also unpersuasive. The contract may contemplate another document, but such document was not "then in existence" at the time the contract was executed, and incorporated documents must exist at the time of the contested agreement.

Nelson* v. *McCall Motors, Inc., 630 S.W.3d 141 (Tex.App.—Eastland 2020, no pet.). After closing, the buyer, McCall, learned after the sale that the land was subject to a surface lease to Vulcan for the strip-mining of rock. It sued the seller, the broker, the title company, and the law firm that prepared the closing documents. Specifically as to Nelson, McCall alleged common law and statutory fraud based on the representation in the contract that there would be no surface leases at the time of closing. McCall settled with the seller. The trial court ruled in favor of McCall.

On appeal, Nelson argued that McCall had failed to prove either a material misrepresentation or reliance, which are elements of both common law and statutory fraud.

The contract required the seller to provide a title commitment and title policy to McCall. McCall had twenty days to review and object to the title commitment. The title commitment was prepared and it listed the Vulcan lease as an exception. Gary McCall denied receiving the title commitment. However, at closing, he signed a document called "Representations of and Disclosures to Buyer at Closing," which included a statement that he acknowledged receiving the title commitment and exception documents and had sufficient opportunity to review them. Gary acknowledged that, even though this document was important, he chose to sign it without reading it or the title commitment.

To prevail on a common law fraud claim, a plaintiff must prove that (1) the defendant made a false, material representation; (2) the defendant 'knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth;' (3) 'the defendant intended to induce the plaintiff to act upon the representation;' and (4) the plaintiff justifiably relied on the representation, which caused the plaintiff injury.

To establish statutory fraud, the plaintiff must show the following: (1) the transaction involves real estate or stock; (2) the defendant made a false representation of a past or existing material fact or made a promise to do an act with the intention of not fulfilling it; (3) the defendant made the false representation or promise for the purpose of inducing the claimant to enter into a contract; and (4) the plaintiff relied on the false representation or promise in entering into the contract.

McCall asserted at trial that Nelson made a representation that there would be no surface leases on the property at the time of closing. McCall further asserted that Nelson made this representation to induce it to enter into the contract. McCall contended that this representation was a misrepresentation because there was in fact a surface lease on the property at the time of closing in the form of the Vulcan lease.

Nelson contended that McCall failed to establish that it justifiably relied on the statement in the contract that there would be no surface leases at the time of closing. McCall responded that the jury was not instructed that reliance must be justifiable, that Nelson failed to object to that omission from the charge, and that Court of Appeals should consider only whether the evidence was sufficient to support a finding that McCall relied on Nelson's misrepresentation.

In this case, the trial court's charge to the jury tracked the Texas Pattern Jury Charges for common law and statutory fraud and, as relevant here, instructed the jury that fraud occurred if McCall relied on a misrepresentation by Nelson. The charge did not explicitly instruct the jury that McCall's reliance must have been justifiable.

The Eighth and Fourteenth Courts of Appeals have held that, if the charge did not instruct the jury that the plaintiff's reliance must be justifiable, the Court of Appeals should consider only whether the evidence was sufficient to support a finding that the plaintiff relied on the misrepresentation. The Houston First Court of Appeals, however, reached a different conclusion. In ***Ginn* v. *NCI Building Systems, Inc.***, 472 S.W.3d 802 (Tex.App.—Houston [1st Dist.] 2015, no pet.), that court held that, in the case of a direct misrepresentation, justifiability is included in the determination of whether a party actually relied on the misrepresentation. This court agreed with the Houston First and held that McCall was required to show that its reliance was justified.

Justifiable reliance usually presents a question of fact, but justifiable reliance may be negated as a matter of law when circumstances exist under which reliance cannot be justified.

In this case, there were many red flags that indicated that McCall's reliance on the statement in the contract that there would be no surface leases at the time of closing was unwarranted. First, the quarry operation on the property was very apparent. Gary McCall, the principal of McCall, viewed the property at least twice before McCall decided to purchase it. On the upper portion of the property, there was a clearly visible mining quarry and a large sign, which stated that there was a quarry and identified Vulcan. There was no mining activity

on the lower portion of the property, but parts of the lower portion were within feet of the quarry.

The statement in the contract that there would no surface leases at the time of closing was contradicted by other provisions of the contract. Specifically, the contract stated that the seller would retain ownership of the royalty for the "current" mineral production on the property, which was some indication that the property was subject to an oil and gas lease. In this regard, the term "surface leases" in the sales contract would appear to also include mineral leases.

McCall had certain contractual obligations as to the existence of surface leases. McCall had a limited time after it received the title commitment to object to any exceptions to title listed in the title commitment or take title subject to those exceptions. Gary McCall, however, did not recall reading the section of the contract that related to McCall's duty to either object to the exceptions to title or take title to the property subject to those exceptions.

Finally, and most paramount, the title commitment gave notice that at least portions of the property that McCall was purchasing were subject to the Vulcan lease. Although McCall contends that it did not receive a copy of the title commitment, Gary McCall acknowledged at closing that McCall received the title commitment, that McCall had an opportunity to review the title commitment, and that McCall had been advised to discuss the title commitment with counsel of its choice.

Viewing the circumstances of this transaction in its entirety, the court concluded that there were sufficient red flags that the lower portion of the property that McCall was purchasing was subject to a surface lease to negate, as a matter of law, McCall's justifiable reliance.

PART VI
EASEMENTS

Couch* v. *Avila Aguilar, 631 S.W.3d 898 (Tex.App.—Ft. Worth 2021, no pet.). Avila's neighbors erected a barrier blocking his only means of access to his property: a gravel driveway that passed over his neighbors' lots. So, Avila sued his neighbors and won a necessity easement to cross their land. On appeal, the neighbors challenged the necessity easement. On cross-appeal, Avila contests the trial court's implied determination that he did not have an express easement.

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.

It is universally recognized that where the owner of a single area of land conveys away part of it, the circumstances attending the conveyance may themselves, without aid of language in the deed, and indeed sometimes in spite of such language, cause an easement to arise as between the two parcels thus created. When an owner conveys part of a tract of land and retains a landlocked portion, a necessity easement over the portion conveyed may be implied so the owner of the landlocked part can access it. To successfully assert a necessity easement, the party claiming the easement must demonstrate: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the claimed access remains a necessity and not a mere convenience (present necessity); and (3) the necessity also existed at the time the estates were severed (historical necessity). The party claiming a necessity easement has the burden to prove all facts necessary to establish it. For an easement to be necessary,

the claimant must show that he lacks any alternative route to legally access the public roadway from his property.

Cowan* v. *Worrell, 638 S.W.3d 244 (Tex.App.—Eastland 2022, no pet.). Private land may become public by dedication, which is "the act of appropriating private land to the public for any general or public use. Dedication occurs when a landowner sets apart his land for public use. Dedication of a road for public use may be express or, as in this case, implied. A property owner impliedly dedicates a road to public use when (1) the landowner's acts induce the belief that she intended to dedicate the road to public use; (2) the landowner is competent; (3) the public relies on the landowner's acts and will be served by the dedication; and (4) there is an offer and acceptance of the dedication. Whether a public right-of-way has been acquired by dedication is a question of fact.

Typically, intent to dedicate must be manifested by something over and above mere omission, failure to act, or acquiescence by the landowner. Direct evidence of the landowner's donative intent is not required. Nor is express acceptance by the public required.

When the origin of a road cannot be determined, evidence of long and continued use by the public raises a presumption that the landowner intended to dedicate the road. This presumption applies when the ownership of the land at the time that the road originated is "shrouded in obscurity," such that no evidence of the intent of the original landowner is available. Put differently, "evidence of long and continued use by the public raises a presumption of dedication by the owner when the origin of the public use and the ownership of the land at the time it originated cannot be shown, one way or the other, due to the lapse of time." This also demonstrates the public's acceptance of the offer of dedication as well as the public benefit component of implied dedication, as these are both implied by the fact of the public's continued use of the road over time.

Once a road has been dedicated to public use, that road remains subject to that use unless it is abandoned. A county road is statutorily abandoned "when its use has become so infrequent that one or more adjoining property owners have enclosed the road with a fence continuously for at least 20 years. A public road is abandoned under the common law when the use for which the property is dedicated becomes impossible, or so highly improbable as to be practically impossible, or where the object of the use for which the property is dedicated wholly fails. The purpose of a public road, particularly one of local character, is to provide access to property abutting upon it, as well as a thoroughfare between distant points. Thus, so long as a public road is still being used to access property abutting it, the road has not been abandoned under the common law. Nor does the State or county's failure to maintain a public road establish common-law abandonment.

Generally, commissioners courts have the power to lay out, open, discontinue, or alter any public road. However, landowners who purchase land abutting a public road acquire a right to use the road as a means of ingress and egress. Consequently, a commissioners court does not have the power to close a public road over the protest of an owner of land abutting that public road. A commissioners court may withdraw control and maintenance of such a road but may not close off the means of ingress and egress for abutting landowners.

Here, the court concluded that there was enough evidence to conclude that the road in question was a public road.

Target Corporation* v. *D&H Properties, LLC, 637 S.W.3d 816 (Tex.App.—Houston [14th Dist.] 2021, pet. pending). The easement and option at issue relate to real property once owned by NOV. In 2002, NOV sold the property to a real estate development company, Woodland Heights This tract is called the "Dominant Tract." When NOV transferred the Dominant Tract, it excepted from the transfer and retained ownership of a 0.8944-acre parcel within the Dominant Tract that was environmentally contaminated and subject to government-mandated remediation (the "Environmental Parcel").

When NOV transferred the Dominant Tract, it executed a Non-Exclusive Easement Agreement in favor of Woodland Heights. The original Easement Agreement granted Woodland Heights a perpetual non-exclusive Use Easement over the surface of the Environmental Parcel for ingress and egress, parking, landscaping, recreational purposes, and signage uses. NOV, on the other hand, retained the obligation to maintain the Environmental Parcel, including the duty to comply with all continuing environmental remediation activities. The Original Easement granted NOV access rights across the Dominant Tract, but NOV was prohibited from interfering with the use of the Dominant Tract.

Along with the original Easement Agreement, NOV and Woodland Heights signed an option agreement, which provided Woodland Heights the option to purchase the Environmental Parcel for a specified price depending on whether NOV completed the environmental remediation. The original Easement Agreement was amended several times and the Dominant Tract conveyed a few times as well, ultimately being conveyed to Target. The Option was also assigned to Target. The owners of the various parcels then entered into an Operations and Easement Agreement. Target built its store and parking lot on the Dominant Tract and paved over the Environmental Parcel as part of the parking lot. Later NOV sold the Environmental Parcel to Biloxi Bacon.

The deed to Biloxi Bacon referenced and attached the original Easement Agreement. Biloxi Bacon failed to pay 2014 ad valorem taxes on the property, and Harris County filed a tax foreclosure suit. Biloxi Bacon answered the suit but did not appear for trial, resulting in a default tax foreclosure judgment. Target did not become aware of the tax foreclosure suit or judgment until after the judgment.

As the tax foreclosure proceedings were ongoing, Biloxi Bacon obtained in 2017 a default judgment against Woodland Heights purporting to void the Original Easement Agreement. At that time, however, Woodland Heights no longer owned the Dominant Tract and, in fact, was no longer in existence, having dissolved in 2006.

Pursuant to the tax foreclosure judgment, the taxing authority sold the Environmental Parcel in 2018 to MRH Properties, LLC. Through a series of deeds, the Environmental Parcel is now owned by D&H.

As matters now stand, Target owns the Dominant Tract, and D&H owns the Environmental Parcel. Since Target acquired the Dominant Tract, it has exercised its right to use the Use Easement continuously. Target paved the Environmental Parcel and used it for guest and employee parking and for truck access to its loading dock.

In January 2019, D&H installed a chain-link fence on the parking lot around the Environmental Parcel's boundary, which prevented Target from exercising some of its rights under the Use Easement.

Target sued D&H on January 10, 2019, seeking injunctive relief and damages for breach of the Use Easement. At one point, Target attempted to exercise the Option to purchase the Environmental Parcel, but D&H refused to close the sale.

The trial court issued a final judgment in D&H's favor, declaring the Use Easement void and the Option extinguished and ruling that Target take nothing on its other claims against D&H.

Because easements are real property interests, easement agreements are subject to the statute of frauds. The trial court had held that the Use Easement was void under the statute of frauds because it does not sufficiently describe the interest conveyed because it has no means to describe its location or any point of ingress or egress or areas where parking is permitted. The Court of Appeals noted that the easement agreement contain metes and bounds descriptions of NOV's and Woodland Heights' respective properties. It is undisputed that Exhibit A describes the Dominant Tract and that Exhibit B describes the Environmental Parcel. And as the Original Easement Agreement makes clear, NOV granted Woodland Heights an easement over the entire surface estate of the Environmental Parcel, for the limited purposes of ingress and egress, parking, landscaping, recreational purposes and signage uses.

D&H also contends that the Court of Appeals should confirm the trial court's judgment on the theory that Target never acquired the Use Easement because the easement did not convey from Woodland Heights to Sawyer Heights, and thus, the easement could not have conveyed to Target. The Original Easement Agreement expressly states that the rights and obligations of the easement run with the land and are binding on NOV's and Woodland Heights' successors and assign as owners of the properties.

An easement in which the benefits are for a specific parcel of land, regardless of the identity of the owner, are easements appurtenant. At the time of the conveyance, the Use Easement was an easement appurtenant belonging to Woodland Heights. Thus, the Use Easement passed to Sawyer Heights through the express language of the deed, unless there are reservations or exceptions reducing the estate conveyed.

The Sawyer Heights Deed states that the conveyance is "subject to" the items listed in the "Permitted Exceptions." One of the items listed in the Permitted Exceptions is the Easement Agreement. D&H asserts that the Sawyer Heights Deed thereby "excepted" the Use Easement, meaning that Woodland Heights retained the Use Easement and did not convey it with the Dominant Tract. The court disagreed. By including the Easement Agreement in the Permitted Exceptions, Woodland Heights notified Sawyer Heights that the Dominant Tract was burdened by the Access Easement.

The trial court also determined that the tax foreclosure sale extinguished the Option. Those issues are discussed in Part XI.

PART VII
LEASES AND EVICTIONS

Harris* v. *Paris Housing Authority, 632 S.W.3d 167 (Tex.App.—Texarkana 2021, no pet.). Federal regulations state that no termination of a tenancy in a federally subsidized project is valid unless notice is provided to the tenant detailing the reasons for the eviction with enough specificity so as to enable the tenant to provide a defense. If the landlord fails to provide proper notice to a tenant in federally subsidized housing, the tenant's lease will not be terminated and the landlord will have no right to possession. Termination notices for federally subsidized housing have been found to be insufficient where they contain only one sentence, are framed in vague and conclusory language, or fail to set forth a factual statement to justify termination. Notices that fail to specify dates of alleged violations or the individuals involved, recite broad language from regulations, reference unspecified illegal acts, or list generic adverse impacts are insufficient.

Here, while the notice stated that Housing Authority had received "multiple complaints" of the tenant "cursing and screaming at tenants/neighbors," it failed to specify the dates of the alleged incidents or the people involved. While it alleged that the tenant was "belligerent and aggressive" and "harass[ed]" maintenance workers on a particular day, the language was vague and conclusory. Although the notice alleged that the tenant had violated a tenant obligation described in the lease, there were no specific factual allegations setting forth any criminal activity or unlawful or disorderly behavior that was a hazard to safety or created a nuisance. The complaint that the tenant had exhibited activity that threatened the health, safety, or right to peaceful enjoyment of the premises by other residents or employees of the Housing Authority was also vague and conclusory and parroted the broad language of the Housing Authority regulations. Thus, the court concluded that the notice to the tenant failed to set forth a factual statement to justify termination.

SH Salon L.L.C.* v. *Midtown Market Missouri City, TX, L.L.C., 632 S.W.3d 655 (Tex.App. 2021—Houston [14th Dist.], no pet.). The tenant's lease included a forum selection clause that said that the lease was governed by New York law and that any action under the lease would be adjudicated exclusively in Monroe County, New York, and including a waiver of all objections to venue based on forum non conveniens. When the tenant sued the landlord in Fort Bend County, Texas, Midtown filed a motion to dismiss based on the forum selection clause. The trial court granted the motion.

Even though the lease is governed by the laws of New York, the question of whether the Salon's claims should be dismissed based on the forum-selection clause is a matter governed by Texas law. Under Texas law, courts look at the factual allegations undergirding the claims when deciding whether the claims are encompassed by the forum-selection clause.

The tenant's brief argued that the forum selection clause should not apply because it wasn't seeking relief under the terms of the lease. The tenant's claims of the landlord's negligence were based on the landlord's failure to keep the shopping center safe. The tenant's DTPA claims were based on landlord's alleged misrepresentations. The tenant's claim for declaratory relief requested the court to determine what the tenant owed under the lease. The tenant's brief argued that the forum selection clause should not apply because it wasn't seeking relief under the terms of the lease. The court held that all of the tenant's claims arose out of the lease, so the forum selection clause applied to the tenant's claims.

The court then addressed whether the forum selection clause was enforceable. Forum-

selection clauses are generally enforceable, and there was a presumption that the clause here is valid. As the opponent of that presumption, the tenant had the "heavy" burden of showing that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.

At trial, the tenant relied on the affidavit testimony of its majority owner, who asserted that Monroe County was a seriously inconvenient venue. The owner's testimony consisted of just two sentences: "All potential witnesses I could call to testify on my behalf concerning my claims work and live in Texas, predominantly Fort Bend County. Said witnesses consist of former fellow shop owners in the previously stated shopping center, or employees of these shop owners, all residents of Texas."

The court held that the trial court did not abuse its discretion by refusing to give this testimony more weight. When, as here, a party could have foreseen at the time of contracting the inconvenience of having to litigate a claim in a foreign forum, the party cannot escape the contract's forum-selection clause unless the party shows that trial in the contractual forum will be so gravely difficult and inconvenient that the party will for all practice purposes be deprived of its day in court. The mere fact that most of the tenants witnesses reside in Texas does not establish as a matter of law that the tenant would be deprived of its day in court if the venue were moved to New York.

The tenant also argued that enforcing the forum-selection clause would subvert the public policy of this state because the Salon has asserted a DTPA claim and the forum-selection clause does not comply with the DTPA's anti-waiver provision. The tenant did not cite any authority in which a court has invalidated a forum-selection clause under the DTPA's anti-waiver provision. To the contrary, courts have enforced forum-selection clauses, despite a supposed noncompliance with the DTPA's anti-waiver provision. The court cited the Fifth Circuit's opinion in ***Haynsworth* v. *The Corporation***, 121 F.3d 956, 969 (5th Cir. 1997), which stated: "It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his [state's] tort law or his [state's] statutory law or his [state's] property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. Court of Appeals refuse to allow a party's solemn promise to be defeated by artful pleading."

Adams* v. *Godhania, 635 S.W.3d 454 (Tex.App.—Austin 2021, pet. denied). The Landlord filed suit to evict the Tenants. The Landlord prevailed before the justice of the peace, and the Tenants appealed to the County Court at Law. The Justice of the Peace set a total bond of $7,000 pending appeal to the County Court.

At trial, the County Court ruled in favor of the Landlord as to the Tenants' right of possession. To set the bond amount for appeal to the Court of Appeals, the County Court heard evidence of the rental value of the house. It set the supersedeas bond amount at $168,000, to be paid up-front. The Tenants deposited in cash the total amount owed into the County Court's registry.

About a year later, the Court of Appeals affirmed the County Court's judgment as to the Tenants' right to possession. The Tenants filed a petition for review with the Texas Supreme Court, and while that was pending, the County

Court ordered additional amounts to be added to the bond. The Tenants did not pay those amounts. The Supreme Court denied Tenants' petition and a writ of possession was issued. The Tenants surrendered possession.

The Landlord moved for the release of the bond. The County Court held a hearing on the motion. At the hearing, the Tenants contested the motion, arguing that the court's determination of the supersedeas bond is not equivalent to a determination of damages and that because the Landlord did not plead or prove damages at trial, but sought only possession of the property, they were not entitled to recover any of the bond amount. At the conclusion of the hearing, at which no evidence was presented, the County Court granted the motion and ordered the release to the Landlord of "the full amount of the funds deposited into the registry of the court plus any applicable interest." The Tenants have appealed from that order.

The release of a supersedeas bond is reviewed for abuse of discretion.

the Tenants argue that the County Court abused its discretion in disbursing the supersedeas bond to the Landlord. According to the Tenants, the Landlord never made a claim for, nor offered proof of, damages that they "actually incurred during the appeal, and the judgment appealed from awarded neither damages, costs nor attorney fees. Thus, in the Tenants' view, the Landlord had waived its right to recover any amount from the bond, and the County Court is prohibited from awarding the Landlord any amount of the bond.

The court agreed with the Tenants to the extent that the Landlord is required to prove the amount of damages actually incurred during the appeal. The supersedeas bond is part of the right of appeal and is only intended to indemnify the judgment holder from losses caused by delay of appeal. The supersedeas bond is not an unconditional agreement to pay a stated sum of money; but imposes only a contingent or conditional liability, and its primary purpose is security. If the judgment holder suffers no loss during the appeal, then nothing is due him under the bond. Moreover, the initial calculation of a supersedeas bond for appeal is different from the final calculation of loss or damage that results from the appeal. Evidence presented at a hearing setting the amount of supersedeas is evidence of what damages the appeal might cause the judgment holder if its judgment were not immediately enforced, not what damages the appeal actually did cause it. Thus, the amount of the supersedeas bond set by the County Court may be different than the amount of damages actually incurred during the appeal.

A court may not summarily ascertain the amount of monetary damages occasioned by delay in appeal. When a judgment holder claims loss or damages resulting from the appeal, the judgment holder must prove the extent of the damage. When the supersedeas bond covers rental amounts that accrue while the case is on appeal, the rental amounts cannot be determined on appeal, but instead must be determined by proof of facts transpiring after judgment and during the pendency of appeal.

In this case, there was evidence presented at the original trial as to the value of the property and other factors that the County Court considered in setting the amount of supersedeas, and similar evidence was presented at the hearing to increase the supersedeas amount. However, at the hearing to disburse the bond, the County Court did not hear evidence as to the amount of loss or damage that the Landlord actually incurred after judgment and during the pendency of appeal. In fact, the County Court granted the motion to disburse funds without hearing any evidence, remarking that it believed the release

of the bond in its entirety to the Landlord was merely administerial.

The court agreed with the Tenants that the County Court's release of the full amount of the bond to the Landlord, without hearing any evidence as to the loss or damage actually incurred during the appeal, was an abuse of discretion; however, the court disagreed with the Tenants that the Landlord had waived its right to recover any amount of the bond by failing to plead for damages incurred during the appeal. The court remanded the case to hear evidence and determine actual damages.

Kinsella* v. *Kent Sports Holdings, L.P., 636 S.W.3d 331 (Tex.App.—Amarillo 2021, no pet.). A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. Here, the county court at law did not make a finding that the premises are being used for residential purposes only, nor does the record evidence support such a finding. Rather, the evidence demonstrated that the premises are being used for commercial purposes. Accordingly, this appeal was dismissed for want of jurisdiction.

PART VIII
PROPERTY OWNERS ASSOCIATIONS AND RESTRICTIVE COVENANTS

JBrice Holdings, L.L.C.* v. *Wilcrest Walk Townhomes Association, Inc., 644 S.W.3d 179 (Tex. 2022). JBrice purchased two townhomes in the Wilcrest Walk subdivision. JBrice then offered the townhomes for lease on a vacation rental website. The record does not contain a copy of any lease agreement, but website listings advertise the townhomes for rent for two- and three-night minimums. The townhomes in Wilcrest Walk are subject to neighborhood deed covenants. The covenants also empower the Wilcrest Walk Townhomes Association, the respondent, to enforce the covenants and otherwise govern the community.

One of the Wilcrest Walk covenants governs leasing activity. Leases must be in writing and tenants must comply with the neighborhood covenants. This covenant, however, limits additional restraints on an owner's right to lease. A leasing restriction must be found within the covenants or in the Association's governing documents, otherwise, there is no restriction on leasing. The governing documents provide that all leases must (i) be in writing, and (ii) provide that such leases are specifically subject in all respects to the provisions of the Declaration, Articles of Incorporation and By-laws of the Association, and that any failure by the lessee to comply with the terms and conditions of such documents shall be a default under such leases.

Another covenant limits townhome occupancy to private single family residences for the Owner, his family, guests and tenants, and it forbids commercial uses.

The Association demanded that JBrice stop leasing its townhomes for short-term rentals. In response, JBrice sued to enforce the covenant granting it the right to lease without restriction. JBrice observed that neither the residential-use clause nor any other covenant limits an owner's right to rent his property for a minimum duration. The Association counterclaimed, alleging breach of the residential-use provision, and it further asserted a nuisance claim.

Meanwhile, the Association adopted rules forbidding townhome rentals that would require an owner to remit state hotel tax, effectively banning rentals of fewer than thirty days. JBrice amended its suit, seeking a declaration that the Association's new rules are unenforceable

because they conflict with the Wilcrest Walk covenant limiting restraints on an owner's right to lease.

The trial court granted partial summary judgment to the Association, ruling that JBrice had violated the residential-use restriction. After an evidentiary hearing, the court permanently enjoined JBrice from leasing its townhomes for periods of fewer than seven days.

The Court of Appeals affirmed on different grounds. It held that Property Code Section 204.010(a)(6) authorized the Association to adopt rules banning short-term rentals. Section 204.010(a)(6) grants owners' associations in Harris County the authority to regulate property uses within their neighborhoods, provided that the regulations do not conflict with the neighborhood's deed covenants. Despite the Wilcrest Walk covenant limiting the Association's power to impose restraints on an owner's right to lease, the Court of Appeals concluded that the Association could impose rules limiting short-term rentals because the governing documents are silent as to the specific duration of any lease.

Restrictive covenants are contracts that run with the land, and are subject to the general rules of contract construction. A covenant under review may not be enlarged, extended, stretched or changed by construction. Thus, to validly limit an owner's property use, a covenant must plainly prohibit that use. Otherwise, an owner who purchases for value and without notice takes the land free from the restriction. As with contracts, courts should avoid an interpretation of one covenant that nullifies another.

Relying primarily on its prior opinion in ***Tarr* v. *Timberwood Park Owners Association***, 556 S.W.3d 274 (Tex. 2018), the Supreme Court rejected all of the Association's arguments. It held that the short-term rentals did not violate an existing covenant. It held that the residential-use covenant imposes no minimum on the duration of a lease agreement.

It held that the covenants at hand do not preclude rental income generated by residential occupancy. The townhomes are not to be occupied or used for any purpose other than as a private single-family residence for the Owner, his family, guests and tenants. Thus, the Wilcrest Walk covenants except tenant use from commercial activity by equating tenant use with owner, family, and guest use. When the income derived from a use is in the form of rent, and the nature of that use is residential occupancy, then this residential-use provision does not prohibit it. As JBrice notes, its leasing business does not occupy the premises; its tenants do. Because tenants are included among those permitted to use the townhomes, with no expressed restriction as to the minimum duration of such use, a short-term tenant does not violate the residential-use covenant.

Nor does the required "private" character of the use impose a minimum limit on the duration of a lease. In this context, "private" means "for the use of one particular person or group of people only." In the Wilcrest Walk covenants, such a group expressly includes "tenants," which deprives "private" of the meaning the Association assigns the term. To conclude that "private" use means "noncommercial" use would render the commercial-use prohibition—and its exception for tenants—superfluous. Even if "private" ordinarily could evoke non-commercial use, the commercial use provision excepts tenant occupancy, and it requires no minimum duration for the exception to apply. In ***Tarr***, the court held that commercial- and business-use prohibitions do not, without more, impose a durational limit on leasing. The addition of "private" in the covenant does not do so either.

The court also declined to categorize leases of a particular term as something other than a lease. A lease is contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration. The court observed in ***Tarr*** that a short-term rental is a lease so long as it maintains the characteristics of a lease; namely, the right to use and occupy the property. JBrice contracts with tenants to allow them the right to exclusively occupy the townhomes for the duration specified in the rental agreements; the evidence does not indicate otherwise. The trial court had no basis from which to conclude that JBrice's rental agreements were not leases.

Of the limits on leasing that exist within the Association's covenants, none imposes a minimum lease term. In interpreting covenants, courts do not extrapolate restrictions beyond those to which the owners agreed—particularly here, where the covenants expressly forbid it. Because the Wilcrest Walk covenants do not require owners who choose to rent their townhomes to do so for a particular duration, the trial court erred in imposing a minimum lease term by injunction.

Having concluded that the Wilcrest Walk covenants do not prohibit short-term rentals, the court next determined whether the Property Code independently authorizes the Association to prohibit them.

Property Code § 204.010(a)(6) permits property associations within Harris County to regulate property uses within a given subdivision, unless the governing documents say the association cannot. The important caveat at the outset of the statute prevents association actions contrary to the owners' agreements found in the deed restrictions. The Supreme Court has upheld the statute's limitation when the deed restrictions "otherwise provided" that the association lacked authority to adopt contrary rules.

Here, the court held that the Association's rules prohibiting short-term rentals conflict with the Wilcrest Walk deed restrictions because the restrictions "otherwise provide" that the Association must not restrain an owner's right to lease a townhome beyond restrictions found in the neighborhood's governing documents. Because the Association's rules conflict with the deed restrictions, the court held that Section 204.010(a)(6) did not grant the Association the independent authority to adopt them.

The court noted that Association is not without recourse against conduct of short-term tenants or rental-property owners that unduly interferes with the use and enjoyment of other owners within the community. Should seventy-five percent of the townhome owners agree, the deed restrictions permit the neighborhood to amend the covenants to restrict leasing. And, under the current version of the deed restrictions, the Association may pursue relief from a tenant's nuisance or annoyance.

Sunchase IV Homeowners Association, Inc. **v.** ***Atkinson***, 643 S.W.3d 420 (Tex. 2022). This case concerns whether a defendant condominium association is entitled to attorney's fees after obtaining a take-nothing judgment on claims by a plaintiff unit owner. Sunchase IV is a condominium complex in South Padre Island. The property is administered and managed by the Homeowners Association, Sunchase, a non-profit corporate entity of which each unit owner is a member. Its Board operates the property subject to rules and regulations contained in its governing documents.

Atkinson owns a unit in the Sunchase IV complex. In July 2008, Hurricane Dolly caused damage to Sunchase IV, including Atkinson's unit. Following a lengthy repair and insurance disbursement process, Atkinson sued Sunchase

and its Board for fraud, civil conspiracy, breach of fiduciary duty, breach of contract, negligence, gross negligence, conversion, and trespass. Ultimately, the trial court entered a take-nothing judgment against Atkinson and awarded over $200,000 in attorneys' fees.

The Court of Appeals affirmed the take-nothing judgment, but it held that Sunchase was not entitled to attorneys' fees. It held that Sunchase was not a prevailing party under Property Code § 82.161.

Property Code § 82.161 says that the prevailing party in an action to enforce the declaration, bylaws, or rules of a condominium is entitled to reasonable attorney's fees and costs of litigation from the nonprevailing party. Because it provides that a prevailing party "is entitled to" attorney's fees, this is a mandatory fee-shifting provision. The Legislature did not define "prevailing party" in Chapter 82, but the court has previously construed the term in other contexts.

The Court of Appeals concluded that to qualify as the prevailing party, Sunchase must have shown that it was adversely affected by a violation of the Property Code, the declaration, or the bylaws and that it suffered damages or otherwise obtained affirmative relief from the trial court. This is a correct statement of the two-pronged test for identifying prevailing plaintiffs. But neither the text of Section 82.161 nor cases support applying such a test to defendants.

First, the Court of Appeals incorrectly applied subsection (a) to Sunchase, holding that it must have been adversely affected by a violation of Chapter 82. But subsection (a) just restricts the class of plaintiffs who may bring a cause of action under the act. In contrast, a defendant seeking fees need only satisfy subsection (b), which requires that it prevail in an action to enforce a condominium's governing documents or rules. It does not require the party seeking fees to be the same party who brought the action.

Second, the Court of Appeals incorrectly concluded that Sunchase must have suffered damages or obtained affirmative relief to qualify as a prevailing party. But the text of subsection (b), unlike some other fee-shifting statutes, does not contain a requirement that the prevailing party obtain damages or affirmative relief.

Purvis* v. *Stoney Creek Community Association, Inc., 631 S.W.3d 287 (Tex.App.—Houston [14th Dist.] 2020, no pet.). Purvis alleged that the HOA failed to maintain a Drainage Pipe that collapsed after the Memorial Day flood of 2015, resulting in structural damage to the back of his home, as well as damaging his retaining wall, sidewalk, concrete patio, deck, and balcony. Purvis claimed that the HOA had a duty under the Declaration to maintain the Drainage Pipe. He sued the HOA, asserting claims for breach of contract and negligence.

Purvis asserts that under the Declaration's unambiguous language, the HOA had a duty to maintain the Drainage Pipe as a matter of law because the Drainage Pipe falls under the definition of "Common Properties" in the Declaration. "Common Properties" means "all those areas of land within the Properties as shown on the Subdivision Plat, except the Lots and the streets not designated as Private Streets or Private Drives, together with such other property as the Association may, at any time, acquire by purchase or otherwise" The Declaration required the HOA, as a common expense, to perpetually care for, maintain and keep the Common Properties in good repair, including utility facility owned by the HOA. The court held that the evidence proved that the location of the Drainage Pipe showed that it sits outside of the subdivision and does not fall

within the definition of Common Properties. Purvis also claimed that the HOA had a duty to maintain the Drainage Pipe because if fell within the definition of Common Facilities, which the HOA was required to maintain. "Common Facilities" were defined to include improvements such as "sidewalks, private streets, common driveways, guest parking spaces, landscaping, force main, and other similar improvements." The court held that under this wording raises a fact issue as to whether the Drainage Pipe is an improvement constructed on one or more lots and as to whether the Drainage Pie falls within the definition of Common Facilities, so that the Association had a duty to maintain the Drainage Pipe under the terms of the Declaration.

PART IX
ADVERSE POSSESSION, QUIET TITLE, TITLE DISPUTES, PARTITION

Pape Partners, Ltd.* v. *DRR Family Properties LP, 645 S.W.3d 267 (Tex. 2022). 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.

A divided Court of Appeals affirmed. The majority concluded, with no supporting analysis, that "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. It thus agreed with DRR that Pape's only remedy was a suit for judicial review under Chapter 5 of the Water Code, which by then was time-barred.

The Supreme Court began with the basic, constitutional rule that a district court has subject-matter jurisdiction to resolve disputes unless the Legislature divests it of that jurisdiction. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. Thus, the district court has subject-matter jurisdiction to resolve a claim. And historically, the power to determine controverted rights to property has been vested in the judicial branch.

By contrast, there is no presumption that administrative agencies are authorized to resolve disputes. Rather, they may exercise only those powers the Legislature, in clear and express statutory language, has conferred upon them. Courts will not imply additional authority to agencies, nor may agencies create for themselves any excess powers. Because of the presumption in favor of jurisdiction and the narrowness of administrative agency jurisdiction, the burden to demonstrate that exclusive jurisdiction rests with an

administrative agency falls on the party resisting the district court's jurisdiction.

Whether an agency has exclusive jurisdiction depends on statutory interpretation. Specifically, Court of Appeals courts look for either an express grant of exclusive original jurisdiction to the agency or a pervasive regulatory scheme indicating that the Legislature intended the administrative process to be the exclusive means of remedying the problem presented.

The relevant statutes here are in Chapters 5 and 11 of the Water Code. The court reviewed both chapters and concluded that nothing in that act gives TCEQ authority to decide conflicting claims to water rights acquired with the title to land. Indeed, the administrative process that Pape initiated after purchasing Robinson's farm is provided for not by statute but by two of the commission's administrative rules. All the rules say is that an owner of a water right shall promptly inform the executive director of any transfer of water right or change of the owner's address and then file a form, chain-of-title documents, and a fee with the director. The court noted that TCEQ agrees with this. In TCEQ's amicus brief, it referred to these provisions as an administrative record-keeping function.

The court held that TCEQ lacks jurisdiction to decide conflicting claims of ownership to surface-water rights.

Stelly* v. *DeLoach, 644 S.W. 3d 657 (Tex. 2022). Stelly had lived on and rented the land in question from the original owners since 1999. In April 2000, Stelly and DeLoach decided to form a joint farming venture. They purchased farming equipment and the 600 acres Stelly lived on from the original owners. They closed on the land transaction in October 2000, with DeLoach securing a loan for the land from Capital Farm Credit. DeLoach's name alone was on the original warranty deed.

The handwritten agreement between Stelly and DeLoach said that Stelly would pay DeLoach the total notes, taxes and fees for the land along with all notes on equipment financing by DeLoach. DeLoach agreed to pay Stelly $4,500 a month for Stelly to manage farming operations. In exchange, Stelly made payments on the note and allowed DeLoach to use farm equipment owned by Stelly. The agreement concluded by saying that, upon final payment, DeLoach will deed the property to Stelly. "Same with all equipment purchased."

Stelly had fully repaid DeLoach by May 2005. In September of that year, they both signed a deed of two and a half acres to Stelly's parents for their home. However, despite Stelly's performance, DeLoach did not transfer ownership to Stelly. DeLoach stopped paying Stelly and announced that Stelly owned nothing and that he intended to sell the 600 acres.

Stelly sued for breach of the contract for the sale of the land. The trial court rendered judgment holding that Stelly owned the real property and the equipment free and clear.

The Court of Appeals reversed holding (i) that Stelly had pleaded only a breach of contract claim, not a trespass to try title claim, (ii) the cause of action on the breach of contract claim accrued in 2005, and (iii) therefore, limitations had run on the claim. The Court of Appeals noted that a trespass to try title claim would have been timely.

Based upon the Supreme Court's earlier holding in ***Brumley* v. *McDuff***, 616 S.W.3d 826 (Tex. 2021), it held that Stelly had adequately pleaded a trespass to try title claim and had acquired equitable title upon completing the payments to DeLoach.

A trespass-to-try-title action requires the

petition to allege: (1) the parties' real names and residences; (2) a legally sufficient description of the premises; (3) the plaintiff's claimed interest; (4) that plaintiff possesses the premises or is entitled to possession; (5) that the defendant unlawfully entered and dispossessed the plaintiff of the premises and withholds possession; and (6) a prayer for relief. The court held in ***Brumley*** that these pleading requirements are detailed, but they are not arduous. Stelly satisfied these requirements.

DeLoach does not contest that a trespass-to-try-title action where equitable title vested would be exempt from the four-year limitations period. The jury found that an agreement existed between DeLoach and Stelly, that Stelly had not breached the agreement, and that DeLoach had failed to comply. Under our precedents, this jury determination is sufficient to find that Stelly was vested with an equitable title to the property sufficient to enable him to maintain his action in trespass to try title.

Moroney* v. *St. John Missionary Baptist Church, Inc., 636 S.W.3d 698 (Tex.App.—Houston [14th Dist.] 2021, pet. pending). In 1935, Dew conveyed two acres to the Church. The deed conveyed surface rights in the property to the Church. It required the land to be used for church purposes and provided that if it was not used for that or was abandoned, title would revert to the grantor. Dew died shortly after the conveyance. Moroney is one of Dew's heirs. It is undisputed that the Church has not breached the condition subsequent.

The Church sued Dew's heirs, including Moroney, to quiet title and for a declaration that the reversionary interest terminated upon Dew's death. The Church claimed that donors and investors were denying financial assistance to the Church because of the possibility that Moroney had a future nonpossessory vested interest in the land. Moroney counterclaimed for a declaratory judgment that she is the holder of a reversionary interest under the terms of the deed.

The trial court concluded that Dew granted a fee simple surface estate subject to a condition subsequent, not a fee simple determinable with possibility of reverter and that any right of entry for breach was solely for the life of Dew and terminated at his death. The trial court also held that, if the foregoing is erroneous and the right of entry was not terminated by Dew's death, the right of entry expired upon the adverse possession limitations statues or the expiration of a reasonable length of time. The trial court awarded over $80,000 in attorneys' fees to the Church.

Moroney contends that the trial court erred by concluding that Dew's interest was a right of entry rather than a possibility of reverter and that Moroney's interest was invalid because the phrase "and his heirs" was not included in the portion of the deed stating that the property would "revert to the grantor." Within these issues, Moroney also contends that her interest did not lapse due to a statute of limitations, laches, or other waiver. She also disputed the award of attorneys' fees.

The parties disagreed as to whether Dew's reversionary interest in the property was a "possibility of reverter" or "right of entry"—the latter also known as a "power of termination." The historical distinction between the two types of reversionary interests is that a possibility of reverter is said to transfer possession of the property automatically to the holder of the reversionary interest upon satisfaction of a condition, while a right of entry requires some action on behalf of the holder of the interest to take possession of the property after the condition is broken.

The parties agree that the deed uses language that has been associated with creating either a possibility of reverter or a right of entry.

Language such as "so long as" and "revert" may indicate a possibility of reverter while language such as "subject to the condition" may indicate a right of entry. When there is doubt which type of interest was intended, the doubt must be resolved in favor of a right of entry as it is "in a sense less onerous upon the grantee in that, under such a construction, the estate does not terminate automatically with the occurrence of the stated contingency, but only after re-entry or its equivalent is made by the grantor. Accordingly, the court resolved any doubt in the Church's favor and held that Dew retained a right of entry rather than a possibility of reverter under the deed.

The central issue in this case is whether the deed, by referring to the reversion of the property "to the grantor" rather than "to the grantor and his heirs," had the effect of limiting the term of the condition to Dew's life. The parties agree that a right of entry is a future interest in property that may be devised under Texas law. Moroney contends that because a right of entry is a future interest that may be inherited, and no special words of inheritance are required to convey a fee simple estate, the right of entry would pass to Dew's heirs although the deed did not refer to them specifically.

Although Texas case law on this subject is sparse, a review of authorities shows that, generally, heirs have not needed to be referenced in a deed to enforce the grantor's right of entry. Generally, heirs have always had the right of entry of their ancestors, even in jurisdictions where the right is not devisable or assignable. The court held that the reversionary interest did not terminate at Dew's death.

Moroney contends that neither limitations nor laches apply because the right of entry has never become exercisable, as the property has been used for religious purposes since the deed was executed in 1935. Indeed, no statute of limitations or equitable requirement for the exercise of the right of entry could arise unless the Church breached the condition. Accordingly, the trial court erred by concluding that the right of entry expired based on limitations or the expiration of a reasonable length of time.

Because the court reversed the trial court's declaratory judgment, it also reversed the award of attorney's fees as it is no longer equitable and just. In addition, Moroney contends that the Church may not recover attorney's fees as a matter of law under the Declaratory Judgments Act because its claim is one to quiet title. The court agreed. The Declaratory Judgments Act permits the recovery of attorney's fees to a party "interested under a deed" who seeks to have determined "any question of construction or validity arising under the instrument; however, the Act may not be used to obtain attorney's fees when the plaintiff's claim is to quiet title.

The court held that the Church's action is properly considered one to quiet title, and the quiet title claim was, admittedly, the "basis for the declaratory judgment action." The basis for the declarations sought was the purported invalidity of Moroney's claimed interest in the property. Thus, attorney's fees were not recoverable under the Act as a matter of law.

Pate* v. *Ballard, 634 S.W.3d 957 (Tex.App.—Waco 2021, no pet.). Ballard and Pate are sisters. Their father died, leaving them real and personal property. The real property consists of 3 tracts: a 5.6- acre tract, a 95.2-acre tract, and a 153-acre tract. Pate has been in possession of much of the personal property in dispute, consisting mainly of guns, knives, and some equipment, since 2001. At some point, the sisters attempted to conduct a drawing to divide the personal property, but that was unsuccessful. Pate filed a lawsuit in 2010 against a third party for damages when an adjacent landowner cut down some trees and

fences on one of the tracts of property owned by Ballard and Pate. Ballard did not join in the lawsuit. Pate received a $30,000 settlement from that lawsuit.

In 2018, Ballard filed suit against Pate seeking a partition of the real and personal property and also to partition the settlement proceeds that Pate received in the 2010 lawsuit concerning the real property. Pate answered asserting the affirmative defense of statute of limitations. Pate contends that Ballard was required to bring her claim for conversion of personal property within two years of demand and refusal. Pate asserts that she and Ballard conducted a drawing for the personal property in 2001, but Ballard disputes that a drawing occurred in 2001. Pate argues that notwithstanding the disagreement over the 2001 drawing, Ballard demanded return of the personal property in 2007, 2014, and 2015, and on each occasion, Pate refused to return the property. Pate maintains that at the latest the limitation period began to run in 2015, and Ballard did not bring suit until February 2018, more than two years after the 2015 refusal.

Ballard's petition asks the trial court to partition the real and personal property. A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under the Property Code and the Texas Rules of Civil Procedure. Ballard continuously referred to the suit as one for partition. Although Pate seeks to characterize it as a suit for conversion, Court of Appeals find that the suit was for partition. There is no statute of limitations on partition. Therefore, Ballard's claims for the partition of personal property are not barred by the statute of limitations.

Pate also argues that limitations bars the recovery of the settlement proceeds. There is no dispute that Ballard and Pate were joint owners of the real property at the time of the 2010 lawsuit. In her petition, Ballard sought to partition the proceeds from the 2010 lawsuit and asked the trial court to consider ordering her a greater portion of the property or proceeds in determining the just and equitable division of the property. Because Ballard seeks to partition the proceeds from the 2010 lawsuit, her claims are not barred by limitations.

Chief Justice Gray's dissent begins with this: "There are 242 ways to accurately make change for a dollar. There are more ways than that to make an error in making change for a dollar. It is because the unit of measures are well-defined that you can attain accuracy in making change and determining if there is an error. The law is different. To be able to review what the trial court did and thus determine if the trial court made an error, it is important to know what the trial court did. To do this, and to facilitate our review of what the trial court did, the rules of appellate procedure require the trial court to make findings of fact and conclusions of law in support of the trial court's judgment. After all, there may be 242 ways to get to the right judgment; but because the unit of measure is not as well-defined as a dollar, there are a lot more ways for an error to have been made that adversely affects an appellant's ability to obtain a meaningful review. Without the findings of fact and conclusions of law, Court of Appeals are left to look at a handful of coins and conclude that it is close enough. The law requires more."

West Gulf Marine, Ltd.* v. *Texas General Land Office, 636 S.W.3d 268 (Tex.App.—Houston [14th Dist.] 2021, no pet.). The general rule is that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly added to or taken from his shoreline. The law governing ownership of submerged lands in Texas has a long history. Title to land covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater

limits rests in the State, and those lands constitute public property that is held in trust for the use and benefit of the people. Only the Legislature can grant to private parties the title to submerged lands that are part of the public trust, and it must expressly provide for such a grant in plain and positive language.

A suit to try the State's title is barred by sovereign immunity. However, a suit against a state official for acting outside his authority is not barred by sovereign immunity. If a government official acting in his official capacity possesses property without authority, then possession is not legally that of the sovereign. Under such circumstances, a defendant official's claim that title or possession is on behalf of the State will not bar the suit.

A suit to recover possession of property unlawfully claimed by a state official is essentially a suit to compel a state official to act within the officer's statutory or constitutional authority, and the remedy of compelling return of land illegally held is prospective in nature. However, if the evidence establishes superior title and right of possession in the sovereign, then the officials are rightfully in possession of the sovereign's land as agents of the sovereign and their plea to the jurisdiction based on sovereign immunity should be sustained.

Here, West Gulf's suit for inverse condemnation and trespass to try title is a suit over ownership of the submerged lands, which West Gulf alleges is unlawfully claimed by GLO and its Commissioner. Thus, if the State owns the submerged lands, sovereign immunity bars West Gulf's suit against appellees as to the submerged lands.

The court reviewed the extensive history of these submerged lands and determined that West Gulf did not own the submerged lands, that the GLO did not act ultra vires, and that sovereign immunity deprived the court of jurisdiction.

Castillo* v. *Luna, 640 S.W.3d 256 (Tex. App.—Houston [14th Dist.] 2021, pet. pending). To prevail under the ten-year statute of limitations, a person must prove by a preponderance of the evidence that the possession of the disputed property by the person, or by the person's predecessors in interest, was (1) actual and visible; (2) adverse and hostile to the claim of the owner of record title; (3) open and notorious; (4) peaceable; (5) exclusive; and (6) involved continuous cultivation, use, or enjoyment for ten years. Property Code 16.026(a).

"Claim of right" means that the claimant entered into and possessed the property as his own. Although the Luna family entered onto the property in 1966, they did so as tenants. At that time, they did not claim ownership of the disputed strip of land. Sylvia and Garcia claim only that the Luna family initially rented Lot 11, and that they believed the disputed strip to be part of that property. The earliest date that the Luna family would have claimed ownership of the disputed strip was October 10, 1973, when Manuel and Alice Luna bought Lot 11.

Adverse possession need not continue in the same person; rather, limitations may be proved by "tacking," that is, by cumulating the periods of possession of each holder and successor between whom there is privity of estate. Sylvia and Garcia argue that the period of the Luna family's claim of right to the disputed strip can be tacked onto the prior owner's claim to the same land.

The problem with this argument is that the prior owners of Lot 11 were not shown to have asserted over the disputed strip a similar claim of right hostile to the owners of Lot 10. Garcia testified that her family rented Lot 11 from Samuel Sikes, and both Garcia and Castillo testified that the owner of Lot 10 also had the

surname "Sikes." Garcia further testified that Samuel Sikes's sister Alberta Sikes lived next door in Lot 10. Garcia and Sylvia further introduced into evidence the deed evidencing Manuel and Alice Luna's purchase of Lot 11, and the deed shows that the Lunas purchased the property from Samuel T. Sikes.

Significantly, however, Samuel Sikes sold the property both in his individual capacity and in his capacity as the independent executor of Alberta Sikes's estate. A reasonable factfinder could not ignore the evidence that the Sikes family owned both lots, and more particularly, that Alberta Sikes both resided at Lot 10 and co-owned Lot 11. Under these circumstances, it would not be reasonable to infer that, regarding the disputed strip, Samuel and Alberta Sikes, as owners of Lot 11, asserted a claim of right hostile to the owners of Lot 10 in a manner that would allow Sylvia and Garcia to "tack" their family's period of alleged adverse possession onto the Sikes family's ownership. Thus, to prove adverse possession, Sylvia and Garcia needed to show that the resident members of the Luna family cultivated, used, or enjoyed the disputed strip for at least one continuous ten-year period after the Lunas purchased Lot 11 in October 1973.

In determining whether adverse possession has been proved, the court must consider the nature of the land and the use to which it was put. The claimant need only use the land for a purpose to which is adaptable, and in the same manner an ordinary owner would use the property. Sylvia and Garcia rely on the use of the disputed strip as a garage and driveway. The court found there was legally insufficient evidence that the disputed strip was continuously used as a driveway for the requisite period of time.

PART X
CONDEMNATION

City of Baytown* v. *Schrock, 645 S.W.3d 1274 (Tex. 2022). Schrock owned a lot in Baytown with a mobile home on it. He leased the mobile home for rental income from Tenants. Until 2011, the City required landlords to either guarantee payment for utility bills or to file a declaration with the City stating that the landlord would not guarantee its tenant's utility payments. The City also had an ordinance prohibiting the connection of new utility service at properties encumbered by outstanding utility bills.

Although Schrock had rented out the property, he did not file a rental declaration with the City until 2009, after the City had assessed Schrock $1,999.67 in past unpaid utility bills. Schrock contested the assessment, and after a hearing, the City reduced the amount he owed to $1,157.39. The City placed a lien in that amount against the property.

In 2010, the City refused to connect utilities to the property when one of Schrock's tenants requested it, which caused the tenant to cancel the lease. The City's refusal to connect service violated Texas Local Government Code section 552.0025. Section 552.0025 prohibits municipalities from conditioning utility service connections on payment of outstanding utility bills incurred by other customers residing at the same address.

Later that year, Schrock attempted to tender payment, but the City refused to accept his check. Schrock returned to the City offices to make payment in cash but ultimately refused to pay. In the years that followed, Schrock neither paid the assessment nor attempted to sell or lease the property. It fell into disrepair and was vandalized.

In 2012, Schrock sued the City for inverse condemnation and other claims, primarily alleging that the City's refusal to reconnect his

utility service violated section 552.0025 and caused damage to his property. The City filed a plea to the jurisdiction, claiming that it is immune from Schrock's claims. After a lengthy procedural history in state and federal court, only Schrock's regulatory takings claim remained for trial. During trial, Schrock testified about his attempts to resolve the lien and to the property's deterioration, which he attributed to the City's wrongful refusal to connect utilities to the property. The assistant city manager testified about the City's efforts to collect payment for the outstanding bills. The trial court directed a verdict for the City, concluding that Schrock had failed to adduce evidence of a taking.

The Court of Appeals reversed. The Court of Appeals concluded that fact issues existed as to whether the City had interfered in bad faith with Schrock's investment backed expectations, which, in turn, presented some evidence of a regulatory taking.

A city is immune from suit unless its immunity is waived. Under the Texas and United States Constitutions, waiver occurs when the government refuses to acknowledge its intentional taking of private property for public use. A suit based on this waiver is known as an "inverse condemnation" claim. To establish an inverse condemnation claim, a plaintiff must show that the government intended to or was substantially certain that its actions would take or damage the property for public use; otherwise, the doctrine of governmental immunity bars the claim.

The parties dispute whether a claim of economic harm to property resulting from the improper enforcement of a municipal collection ordinance alleges a regulatory taking. The City contends that Schrock's evidence fails to show that the City took or damaged his property for public use. The City argues that the enforcement of municipal ordinances that do not themselves regulate property use cannot constitute a regulatory taking, even when such enforcement was improper as a matter of state law. According to the City, the ordinance in this case was not a property use regulation; instead, the ordinance was a means to collect outstanding bills for utility services provided to the property. Further, the City argues, it did not deprive Schrock of the use of his property, even though it indirectly caused the property to be without utility service and temporarily placed a lien against it.

Schrock responds that the City's improper actions caused a loss in his rental income and a diminution in the property's value even if its collection ordinance is not a land-use regulation. He alternatively contends that the City's actions constitute either a physical taking or an exaction, entitling him to compensation.

The right to own, use, and enjoy one's private property is a fundamental right. When the government takes, damages, or destroys private property for public use, it must provide compensation.

A regulatory takings claim is one in which "the plaintiff complains that the government through regulation so burdened his property as to deny him its economic value or unreasonably interfere with its use and enjoyment. The Supreme Court observed in ***City of Houston* v. *Carlson***, 451 S.W.3d 828, 830 (Tex. 2014) that courts historically have limited regulatory takings claims to those arising directly from land-use restrictions. In that case, the City of Houston ordered several condominium owners to vacate their property because they failed to make mandated repairs. The owners sued, claiming a regulatory taking based on Houston's improper application of its regulations. In holding that the owners failed to state a regulatory taking, the court contrasted between an ordinance that directly regulates land use and one that does not—even though it

could impair use of the property as a result of its enforcement. The property owners in ***Carlson*** failed to show a taking because the repair ordinance there did "not implicate any property-use restriction.

Like Houston's ordinance in ***Carlson***, the Baytown ordinance in this case did not regulate land use. The ordinance permitted the City to refuse to connect utility service to the property until outstanding utility bills associated with the property were satisfied. The City's provision of utilities to the property was a service; its regulation of that service was not a regulation of the property itself. As with the claims in ***Carlson***, the true nature of Schrock's claim lies in the City's wrongful enforcement of its ordinance, not in an intentional taking or damage of his property for public use. In ***Carlson***, the plaintiffs similarly alleged that Houston wrongfully applied its regulations. The court reiterated in ***Carlson*** that governments generally are immune from such claims. Schrock's challenge is no different from the challenge in ***Carlson*** to the city's alleged misapplication of its building ordinance.

While the court would not foreclose the possibility that enforcement of an ordinance that does not directly regulate land use could amount to a taking, this one does not. A regulation with a condition of use so onerous that its effect is tantamount to a direct appropriation or ouster may impair a property so restrictively, or intrude on property rights so extensively, that it effectively takes the property. However, nearly every civil-enforcement action results in a property loss of some kind. Property damage due to civil enforcement of an ordinance unrelated to land use, standing on its own, is not enough to sustain a regulatory takings claim.

City of El Paso* v. *Ramirez, 633 S.W.3d 246 (Tex.App.—El Paso 2021, pet. denied). The city purchased a pre-existing dump which was "loosely operated" by the county. It converted the dump into a solid waste disposal site. There were no complaints about the landfill from 1983 to 2002. Following two continuous rainfall events in July 2006, the plaintiffs filed an inverse condemnation suit against the city.

At the close of liability evidence, the trial court found the plaintiffs had established all required elements of a taking under the Texas Constitution ruling the evidence sufficiently established the city's continued operation and maintenance of the landfill after 2002—while knowing its history of wash out, runoff and drainage problems—established the city knew that specific property damage was substantially certain to result from such action. The trial court further found the remedial measures taken by the city were inadequate since problems occurred in July 2002, September 2004, and again in July 2006. Along with issuing findings of fact and conclusions of law, the trial court entered an interlocutory judgment on liability for the plaintiffs. The city appealed.

Article 1, Section 17 of the Texas Constitution provides: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person...." Constitution article I, § 17. Sovereign immunity does not shield the government from liability for compensation under the takings clause.

Generally, a takings claim consists of three elements: "(1) an intentional act by the government under its lawful authority, (2) resulting in a taking, damaging, or destruction of the plaintiff's property, (3) for public use. To prevail, plaintiffs must prove there was an affirmative act intentionally committed by the entity that causes identifiable harm, or that the government knows that specific harm is substantially certain to occur to specific property and the taking, damage, or destruction

was for public use. This affirmative conduct encompasses the element of causation because, without causation, there can be no takings claim.

The city claimed there was no evidence proving causation. The two elements of proximate cause are cause in fact and foreseeability. For a case involving floodwater effects, the cause in fact prong can be established by evidence that a governmental entity's affirmative act changed the character of the floodwater. And the specific affirmative act alleged must be the cause of such change. Under a but-for causation standard, a plaintiff must offer evidence allowing a fact finder to exclude alternative causes of the alleged injury or condition if such plausible causes exist. The court held that there was sufficient evidence of foreseeability and causation.

The city also claimed there was no evidence to show the city intended to cause runoff onto the plaintiffs' property. The requisite intent to establish a taking exists with proof that a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. A governmental entity is substantially certain that its actions will damage property when the damage is necessarily an incident to or a consequential result of the governmental entity's action. A takings claim must be based on some affirmative "act" or "action" of the government and it must be that specific act that causes identifiable harm. Thus, a taking cannot be established by proof of mere negligent conduct by the government. Awareness of the possibility of damage is no evidence of intent. Lastly, the government's knowledge must be determined as of the time it acted and not with the benefit of hindsight.

The affirmative conduct asserted by the plaintiffs as a basis for their complaint was the city's continuous operation of the landfill—that is, the continuous depositing of solid waste and other refuse on the site—even as it grew closer to capacity, thereby causing escalated damage to the plaintiffs' properties following a series of three floods over four years. The court held that there was sufficient evidence the city continued to operate and maintain the landfill knowing with substantial certainty that such activity would damage the plaintiffs' properties.

City of Robinson* v. *Leuschner, 636 S.W.3d 48 (Tex.App.—Waco 2021, pet, pending). The Leuschners have owned and resided in a home located in Robinson, Texas, since 1987. In January 2000, the City completed the construction of a sewer lift station located near the Leuschners' home as part of a sewer system reroute of the South Pond sewer treatment plant. Once the lift station was brought into service, the Leuschners noticed a foul sewer odor in and around their home. According to the Leuschners, the sewer odor varies but has been continuous since the lift station was put into service. The Leuschners complained to the City early on about the odors and ultimately filed a lawsuit against the City. The City filed a plea to the jurisdiction alleging that the Leuschners had failed to invoke the trial court's jurisdiction on their nuisance, constitutional takings, and tort claims.

A plea to the jurisdiction is a dilatory plea, filed to defeat a cause of action without regard to whether the claims asserted have merit. The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached.

A plea to the jurisdiction can challenge whether the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case, or it can also challenge the existence of jurisdictional facts. A plaintiff in a suit against a governmental unit must affirmatively demonstrate the court's

jurisdiction by alleging a valid waiver of immunity. The plaintiff bears the burden of alleging facts that affirmatively demonstrate that the trial court has subject matter jurisdiction over a case. Where a plea to the jurisdiction challenges the existence of jurisdictional facts, the court can consider evidence as necessary to resolve any dispute over those facts. The evidence considered by the court may implicate both the subject matter jurisdiction of the court and the merits of the case.

If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.

The Texas Constitution waives governmental immunity with respect to inverse-condemnation claims. An inverse condemnation claim is based upon a viable allegation of a taking. A taking is defined as the acquisition, damage, or destruction of property via physical means. A properly pled inverse-condemnation claim must allege an intentional government act that resulted in the uncompensated taking of private property.

The government's mere negligence which eventually contributes to the destruction of property is not a taking; rather, the government must act intentionally. The requirement that the government act intentionally is rooted in the constitutional provision that a compensable taking occurs only if property is damaged or appropriated for or applied to public use. When damage is merely the accidental result of the government's act, there is no public benefit and the property cannot be said to be taken or damaged for public use. The limitation that the taking be for public use is the factor which distinguishes a negligence action from one under the constitution for destruction.

For purposes of article I, section 17 of the Constitution, a governmental entity acts intentionally if it knows either that a specific act was causing identifiable harm or that the specific property damage was substantially certain to result from" the act. A governmental entity is substantially certain that its actions will damage property only when the damage is necessarily an incident to, or necessarily a consequential result of the entity's action. The government's knowledge must be determined as of the time it acted, not with benefit of hindsight.

The court reviewed the evidence and concluded that the Leuschners failed to raise a fact question on the jurisdictional issue of intent, and concluded, as a matter of law, that they have failed to present evidence that creates a genuine issue of material fact that the City's acts were intentional thereby failing to invoke the trial court's jurisdiction over the Leuschners' constitutional takings claim. Furthermore, because the Leuschners have not asserted any other grounds for waiver of immunity, the Court concluded that the City is immune from the plaintiffs' nuisance and nuisance per se claims

In re *State of Texas*, 629 S.W.3d 462 (Tex.App.—Austin 2020, pet. dism'd). The State filed a condemnation action against the Taylors, fee owners of the property to be acquired, and against Patterson, who holds an ingress-egress easement across the Taylors' property. Before filing the suit, the Transportation Commission and TXDOT contacted the Taylors to discuss settlement. The State filed suit when it could not reach a settlement with the Taylors.

Patterson filed a plea in abatement based on the State's failure to make a bona fide offer to

acquire the property. Among other things, the State claimed that it was required to make an offer to Patterson because he held an easement, the Taylors were the property owners and it had made an offer to them, and Texas law does not require a condemning entity to negotiate with all of the interest-holders to a property. The trial court ruled in favor of Patterson and granted the plea in abatement.

Under the Property Code, the first phase of a condemnation proceeding is an administrative proceeding; then, if necessary, a judicial proceeding follows. When a party with eminent-domain authority desires to condemn land for public use but cannot agree on settlement terms with the property owner, the condemning party must file a petition in a proper court in the county in which the land is located. The administrative phase is designed to provide a means to quickly award damages without the delays that occur in court proceedings.

The State contends that it was not required to make an offer to Patterson because he is not the property owner as contemplated by the statute; instead, he is merely an easement holder. The State argues that when the portions of the Property Code detailing the required procedure for making a bona fide offer are read together and in context, the statute provides that the duty of a bona fide offer is owed to the person in whose name the property is listed on the most recent tax roll of any appropriate taxing unit authorized by law to levy property taxes against the property.

In response, Patterson asserts that the State should be required to make him a bona fide offer because the State's taking of the Taylor's parcel also affects his adjacent 19.843-acre property by taking that property's only access to a public road. He argues that the portion of the Taylors' property being taken by the condemnation proceeding is subservient to and encumbered substantially by the dominant easement in favor of Patterson. He further asserts that the proposed taking makes both his tract and the Taylors' tract landlocked, but that he is clearly the most adversely affected party and is therefore entitled to the bona fide offer.

Chapter 21 of the Property Code (the eminent-domain chapter) does not define the term "property owner." The court held that, here, the term "property owner" is used throughout the eminent-domain statute, as well as the terms "the owner of the property" and "landowner." When the provisions that govern the procedure for initiation of condemnation proceedings are read together and in context, it is clear that the statute contemplates that the "property owner" is the fee owner of the real property that the condemnor seeks to acquire.

In addition, the law is well settled that the condemnor is not required to negotiate with every interest holder. The undivided-fee rule states that when real property has been carved into different interests, the property is valued for condemnation purposes as if it were owned by a single party. The rule's purpose is to award full compensation for the land itself, not for the sum of the different parts. Although the interest holders are each entitled to a share of the condemnation award, the award should be paid for the property itself, then apportioned between them. Moreover, if the condemnor is unable to agree with one condemnee after a good-faith effort to do so, then it is not required to enter into negotiations with other condemnees because such negotiations will not avoid the need for condemnation litigation.

Although Patterson asserts that he is the most adversely affected party to the ‘taking and thus entitled to the bona fide offer, the only real property that the State seeks to acquire belongs to the Taylors. As an interest holder and a party to the condemnation petition, Patterson may participate in the special commissioners'

hearing and advocate his position regarding the amount of compensation owed for the easement so that it is incorporated into the total compensation paid for the property. Then if he is dissatisfied with the amount awarded, he may object to the special commissioners' findings and seek a trial de novo.

In re *Breviloba, LLC*, No.21-0541 (Tex. June 24, 2022). District courts and county courts have concurrent jurisdiction in eminent domain cases. But if an eminent domain case involves an issue of title or any other matter that cannot be fully adjudicated in the county court at law, that court must transfer the case to the district court. In addition to county courts at law's eminent domain jurisdiction, some county courts at law also have concurrent jurisdiction with district courts in civil cases, limited by a dollar cap on the amount in controversy. Government Code § 25.0003(c)(1).

The question in this case is this: in an eminent domain case brought in a county court at law, do counterclaims that challenge the authority to condemn and seek damages in excess of the amount-in-controversy cap on the court's additional jurisdiction require a transfer to the district court? The Supreme Court held that it does not. The amount-in-controversy cap under Government Code § 25.0003(c)(1) does not apply to Property Code § 21.001's self - contained grant of jurisdiction over eminent domain cases.

Miles* v. *Texas Central Railroad & Infrastructure, Inc., No. 20-0393 (Tex. June 24, 2022). This case involves the long-proposed high-speed rail line between Dallas and Houston. Texas Central Railroad was formed "to plan, build, maintain and operate an interurban electric railroad. Texas Logistics was formed to "construct, acquire, maintain, or operate lines of electric railway between municipalities in this state for the transportation of freight, passengers or both" and to "operate and transact business as a railroad company."

The question in this case is whether these two private entities have been statutorily granted the power of eminent domain, a power otherwise reserved to the State and its political subdivisions because of the extraordinary intrusion on private-property rights that the exercise of such authority entails.

The entities rely on the Transportation Code's grant of eminent-domain authority to legal entities chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state. The court held that the entities have that eminent-domain authority.

The majority opinion was written by Justice Lehrmann. Chief Justice Hecht and Justice Young filed concurring opinions, Justices Devine, Huddle and Blacklock filed dissenting opinions. Justice Bland did not participate.

PART XI
TAXATION

Mitchell* v. *MAP Resources, Inc., 649 S.W.3d 180 (Tex. 2022). Elizabeth S. Mitchell owned a mineral interest in property in Reeves County, and she died in 2009. Her heirs, the petitioners, sued to declare void a 1999 default judgment foreclosing a tax lien on Elizabeth's interest, alleging that she was not properly served with notice of the underlying foreclosure suit and thus the judgment violated her constitutional right to procedural due process. The taxing authorities that brought the foreclosure suit served Elizabeth and almost 500 other defendants by posting citation on the courthouse door.

Elizabeth's heirs contend that she should have been served personally because her name

and address were available in eight publicly recorded warranty deeds and in the county's tax records. Respondents, the current owners who purchased the property at a tax sale or later acquired an interest in it, reply that those deeds and records cannot be considered in this collateral attack on the foreclosure judgment because they are outside the record of the underlying suit.

The trial court granted summary judgment for the current owners, ordering that the heirs take nothing. A divided Court of Appeals affirmed, holding the heirs did not conclusively establish a violation of Elizabeth's due process rights and declining to consider the warranty deeds because of the bar on extrinsic evidence collateral attacks.

The questions before the Supreme Court were whether information available in relevant public records be considered in a collateral attack on a judgment that alleges constitutional due process violations and, if those records are considered here, were Elizabeth Mitchell's due process rights violated in the 1999 suit? The court answered both questions "yes."

When public property or tax records include contact information for a defendant that was served by publication, a court hearing a collateral attack on a judgment on due process grounds may consider those records. And because the deed records here featured Elizabeth's mailing address, the court held that serving her by posting did not comply with procedural due process.

Holcim (US) Inc.* v. *Ellis County Appraisal District, 642 S.W.3d 840 (Tex. App.—Texarkana 2021, pet. denied). Holcim filed a protest challenging the District's valuation of its property and hired counsel to represent it in front of the Ellis Appraisal Review Board. Notices were sent by regular mail and email to Holcim's counsel. The notices clearly explained that evidence was required at the hearing and warned that the appeal would be dismissed "if you fail to appear."

No one appeared on Holcim's behalf on the date of the hearing. Because no evidence was received at the hearing and no request was made to postpone, the ARB issued a notice of dismissal. The notice stated that the protest was forfeited.

When an employee of Holcim's counsel called the ARB to inquire as to whether the hearing had been rescheduled, the ARB requested a "good cause letter." Holcim's counsel responded with a letter stating that it had mailed the affidavits but that the postal service had failed to log the package into its system and had failed to deliver it.

Holcim filed an appeal in District Court. Its petition requested that the protest be remanded to the ARB. The Appraisal District filed plea to the jurisdiction arguing that the trial court lacked jurisdiction because Holcim failed to exhaust administrative remedies and never requested a new hearing under Section 41.45(e-1). In its response to the plea to the jurisdiction, Holcim argued that the ARB knew on the day of the hearing that Holcim had timely mailed the affidavits, that Holcim wanted to pursue its protest and that there was good cause to reschedule the hearing. Holcim also argued that Section 42.231 allowed the trial court to remand the protest.

The trial court granted the District's plea to the jurisdiction after finding that (1) the ARB did not receive the hearing affidavits before the hearing, (2) Holcim was notified that the ARB had not received the affidavits before the protest hearing but did not request a postponement of the hearing, (3) the ARB dismissed Holcim's protest due to failure to appear, (4) Holcim was entitled to a new hearing if requested not later than the 4th day after the scheduled hearing date

but did not timely request a hearing or timely submit a letter showing good cause, (5) Holcim did not avail itself of the administrative remedies outlined in Section 41.45(e-1), and (6) exhaustion of administrative remedies was a prerequisite to appeal. As a result, the trial court dismissed Holcim's petition for want of jurisdiction.

The Court of Appeals affirmed. It is undisputed that Holcim received timely notice of the hearing but failed to appear in person, by affidavit, or by any other method. As a result, the ARB had no evidence to consider at the hearing and dismissed Holcim's protest. Holcim argues that the postal service's failure to deliver timely mailed documents constituted good cause for a new hearing, but it is also undisputed that Holcim failed to request, within four days of the hearing, a new hearing based on good cause and that no determination on the issue of good cause was made by the ARB.

Holcim's petition requested an appeal on the merits of his property tax protest, but the ARB never decided the merits, which was a prerequisite to obtaining the relief requested by Holcim's prayer. Even so, Holcim argues that the provisions of Tax Code Sections 42.01 and 42.231 apply and confer jurisdiction on the trial court. The court disagreed.

Section 42.01 allows an appeal from a lack of jurisdiction determination. Holcim's petition sought a judicial determination of the appropriate tax treatment of its property for the tax year. Holcim requested that the trial court, among other things, fix and determine the Property's appraised value to be no more than its market value, order the Property's appraised value according to the appraisal roll reduced to no more than the appraised value determined by the Court, order the Property appraised equally and uniformly in accordance with the law, and remove or reduce to the lawful amount any tax liens upon the Property in favor of the taxing units. Essentially, the petition sought a trial de novo of the valuation of the property even though the ARB did not make a final determination on the protest. The petition did not mention Section 42.01 and did not appeal any lack of jurisdiction determination to the trial court. The District points out that it did not dismiss the protest for lack of jurisdiction, but because it determined that Holcim forfeited the protest by failing to appear. Because Holcim did not appeal a lack of jurisdiction determination, Section 42.01 did not serve to confer jurisdiction over the claims asserted or the relief requested by Holcim.

Holcim also requested a remand for a new hearing under Section 42.231, but that section only applies when an appraisal review board has entered an order determining the protest. Because Holcim's protest was dismissed, rather than determined, Section 42.231 does not apply.

Haynes* v. *DOH Oil Company, 647 S.W.3d 793 (Tex. App.—Eastland 2022, pet. pending). Mary's property was sold at a tax foreclosure and sheriff's deeds were delivered to the foreclosure buyer. Over a decade later, Mary sued, alleging that the sheriff's deeds were void for an inadequate property description and also claiming that the sheriff's deeds conveyed only royalty interests, not her entire mineral interests. DOH claimed that Mary's suit was barred by the limitations provision in Tax Code § 33-54 and also by Mary's failure to comply with Tax Code § 34.08(a) which requires a deposit into the court's registry before bringing suit.

Although Mary brought suit nearly a decade after DOH purchased the disputed property by sheriff's deed, she argues that her claims are not barred by the Tax Code's statute of limitations because, due to the void description, title to the real property never passed. In other words, because the DOH deed was void ab initio, the Tax Code's statute of limitations period never

began to run against Mary. The court disagreed.

Under § 33.54(b) of the Tax Code, so long as the original property owner exercises diligence in performing their obligation to pay property taxes, they will not lose their right to challenge the validity of a tax sale following a foreclosure suit for which they were not served; the statute of limitations is tolled during that time. In this case, the corrected DOH deed was recorded on March 13, 2009. Mary did not commence her suit against DOH until October 15, 2019, more than a decade later. It is undisputed that Mary failed to pay taxes on the disputed property at any point during those ten years. Moreover, at no point during the proceedings below or now on appeal has Mary contended that she was not served in the suit to foreclose the tax liens on the disputed property. Accordingly, the statute of limitations ran on Mary's claim for trespass to try title about nine years before she commenced her suit against DOH. Thus, her claim is barred.

The court also held that Mary's title claims were also barred by § 33-54. Mary contends that her trespass to try title claim was merely asking for a declaration of the parties' rights resulting from the sheriff's deeds. She argues that suits to quiet title which merely seek a declaration as to the scope of the conveyance in a sheriff's deed—styled as a question of interpretation rather than a collateral attack on the deed's validity—are not barred by the Tax Code's statute of limitations. Again, the court disagreed.

The legislature did not condition the Tax Code's application on whether a plaintiff's cause of action amounts to a trespass to try title; rather, whatever it may be and however the claim is drafted, it is conditioned on the action "relating to the title to property." Here, Mary's suit to remove cloud on her title—whether pleaded as an attack on DOH's title, a request for a declaration to limit Appellees' DOH's title, or a defense of Mary's own asserted title—is "an action relating to the title to property" and is thus subject to the Tax Code's statute of limitations.

While a claimant may artfully plead claims in an effort to avoid the Tax Code's limitations period, the legislature forestalled such attempts when it settled upon the phrase: "relating to the title to property." The plain meaning of the phrase "relating to" is quite sweeping. It means to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with. To satisfy this chosen broad language, nothing more than a tangential relationship is necessary.

Sunnova Ap5 Conduit LLC* v. *Hunt County Appraisal District, 629 S.W.3d 244 (Tex.App.—Dallas 2019, pet. denied). Sunnova leased and installed a solar system to a residence in Hunt County. It filed for an exemption from HCAD, which HCAD denied.

Section 11.17 of the Tax Code provides: "(a) A person is entitled to an exemption from taxation of the amount of appraised value of his property that arises from the installation or construction of a solar or wind-powered energy device that is primarily for production and distribution of energy for on-site use."

Sunnova, as the owner and lessor of the solar device, argues it is entitled to the Exemption, noting the statute's language (1) does not require the solar device to be used on the owner's real property and (2) does not disqualify for-profit lessors from receiving the exemption. Sunnova asserts it qualifies as a "person" and the parties' stipulation demonstrates satisfaction of all other requirements of the Exemption.

HCAD asserts the exemption does not apply to the actual solar device or related equipment, but instead applies only to the amount of the

appraised value of his property that arises from the installation or construction of solar devices. HCAD therefore frames the exemption as applying only to the incremental property value arising from the installation or construction of the solar device.

Although Sunnova agrees the exemption includes HCAD's asserted application, it asserts the exemption is not limited to instances in which a portion of a homeowner's real property assessment includes the value of a solar device. Sunnova instead contends the exemption also includes any property, not just real property, and suggests the legislature could have provided the exemption to just "owners of real property" rather than including all "persons" if it had intended to so limit the exemption.

The court agreed with HCAD's interpretation, holding that the exemption is intended for the person whose property receives enhancement through installation of the solar device.

The court found support for its position from the Comptroller's construction of the Tax Code. Texas courts have long recognized that an agency's construction of a statute may be taken into consideration by courts when interpreting statutes. Government Code § 311.023 provides that, in construing a statute, a court may consider administrative construction of the statute. And Section 5.05(a) of the Tax Code authorizes the Comptroller to prepare and issue publications related to the appraisal of property and the administration of taxes. In its handbook entitled "Texas Property Tax Exemptions," the Comptroller summarizes § 11.27 as, "[p]ersons who install a solar-or-wind-powered energy device to produce energy for onsite use are entitled to exempt the amount of value the device contributes to their property."

Target Corporation* v. *D&H Properties, LLC, 637 S.W.3d 816 (Tex.App.—Houston [14th Dist.] 2021, pet. denied). Target owned an easement over and Option to purchase an adjacent parcel, as described in the discussion of this case in Part VII. The trial court had held that the tax foreclosure of the adjacent parcel extinguished the Option. Target contended that it did not, claiming that it had a protected property interest in the adjacent parcel.

Before any action that will affect a protected property interest, due process requires notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Target received no such notice and claimed that the lack of notice meant it was not bound by the sale.

An option agreement, however, does not pass title or convey an interest in property. Instead, it "merely gives the optionee the option to purchase property or execute a lease within a certain time period. Because an option holder does not hold a legally protected interest in the property, the due process concerns applicable to lienholders do not arise when an option holder is not notified of a delinquent tax suit. Thus, Target's reliance on cases involving lienholders is misplaced. And Target has not cited any cases holding that due process rights are implicated when the holder of a purchase option in real property does not receive notice of a tax foreclosure suit.

The Court of Appeals held that the purchaser at the foreclosure sale was not subject to the Option. A tax sale deed vests title to the interest owned by the taxpayer, subject to the taxpayer's right of redemption, the terms of a restrictive covenant running with the land recorded before January 1 of the year in which the tax lien arose, a recorded lien that arose under that restrictive covenant that was not extinguished in the judgment foreclosing the tax lien, and each valid easement of record as of

the date of the sale that was recorded before January 1 of the year the tax lien arose. Thus, a purchaser at a tax sale takes title to the property interest without encumbrances other than those just detailed. Target failed to show how the Option fit into any of those categories.

Target argued that the Option was a recorded restrictive covenant running with the land. The court held that the Option did run with the land; however, the court said only recorded "restrictive" covenants survive a tax foreclosure. A "restrictive covenant" is a negative covenant that limits permissible uses of land. In contrast, an affirmative covenant requires the covenantor to do something. A purchase option that runs with the land is an affirmative covenant because it requires the covenantor to do something to invoke the right or rights existing by the option—i.e., convey title to the property on certain conditions.

PART XII
BROKERS

Perthuis* v. *Baylor Miraca Genetics Laboratories., LLC, 645 S.W.3d 228 (Tex. 2022). When a seller agrees to pay sales commissions to a broker (or other agent), the parties are free to condition the obligation to pay commissions however they like. But if their contract says nothing more than that commissions will be paid for sales, Texas contract law applies a default rule called the "procuring-cause doctrine." Under that rule, the broker is entitled to a commission when "a purchaser [was] produced through [the broker's] efforts, ready, able and willing to buy the property upon the contracted terms ***Goodwin* v. *Gunter***, 109 Tex. 56, 185 S.W. 295, 296 (1916). In this case, the agreement between the parties was silent about any exceptions to the duty to pay commissions for sales that petitioner procured. The procuring-cause doctrine therefore applies.

Jones* v. *Coppinger, 642 S.W.3d 51 (Tex. App.—El Paso 2021, no pet.). Jones sued the broker, Coppinger. Two years after the sale of the house closed, Jones sued her broker, Coppinger claiming that, during contract negotiations, Coppinger had failed to inform her that the buyer was engaged in a 1031 exchange. In addition, during negotiations, Coppinger disclosed to the buyer, without telling Jones, that there was a tax lien on the property to be paid out of the closing proceeds and that the sellers had an "urgency" to sell the property. Jones claimed the failure to disclose the 1031 during the negotiations meant that Jones was not able to use the time deadline imposed by the 1031 to negotiate a higher price. The trial court granted summary judgment in favor of Coppinger and awarded attorneys' fees and costs.

The Court of Appeals noted that the allegations based on non-disclosures, regardless of what was allegedly not disclosed, all lead back to a common issue: Jones's theory of damages.

Under each of the alleged claims, some damages must generally result from the complained of conduct. At the trial court, Jones's theory was based upon the claim that she could have negotiated a better price for the property. However, noted the court, Jones presented no evidence that any of the allegedly non-disclosed information would have raised the purchase price.

First, Jones argues that if she had known of the 1031 exchange, she could have negotiated with the buyer to pressure him into paying the "equitable value" of the property, which she said was $1.5 million. However, Jones presented no summary judgment evidence to establish that the fair market value of the house was $1.5 million, or that it was in fact any higher than the price agreed upon in the sale

contract. Instead, when asked at her deposition why she believed the house had a fair market value of $1.5 million, her only response was that the property was "pretty."

More importantly, there is no evidence in the record to support Jones's allegation that the buyer would have been willing to pay $1.5 million for the property, or that, in fact, he would have paid any more than the agreed-upon amount in the sales contract simply because he was utilizing a 1031 exchange. And faced with a higher counter-offer, the eventual buyer had three options: (1) accept the higher counter-offer; (2) make his own counter-counter-offer; or (3) walk away from the deal. Based on this record, a court can only speculate which option he would have pursued. Yet, a party may not recover damages that are too remote, too uncertain, or purely conjectural. When a plaintiff's claim for damages is based solely on speculation or conjecture, summary judgment is appropriate.

In addition, Jones's claim that she was damaged by the undisclosed email communications that Coppinger had about the IRS suffers from the same defect. Jones complains that the email exchange reflected that Coppinger was concerned that the IRS might foreclose on the property, which created an "urgency" on her part to make a "quick" sale of the property, so that she would not lose her commission. But her theory of how she was damaged by the failure to disclosure that information is virtually identical to the alleged failure to disclose the 1031 exchange information. That is, she claims she could have negotiated a better sales price if she had known of the email exchanges. In addition to not presenting evidence that the buyer would have paid a higher sales price if negotiations had continued, she provides no explanation for how this information would affect the sales price of the property, or how it could have had any impact on the parties' negotiations.

PART XIII
ZONING AND LAND USE PLANNING

Draper* v. *City of Arlington, 629 S.W.3d 777 (Tex.App.—Fort Worth 2021, pet. denied). Given all of its attractions, the City has experienced an uptick in the short-term rental of residential properties. But for some Arlington residents who live near STRs, this influx of transitory tenants into residential neighborhoods has created problems: noise disturbances, wild parties, and excessive street parking, as well as trash overflowing into the streets and tenants' engaging in fistfights and urinating in front yards. According to Arlington resident Kari Garcia, STRs are a "nightmare for the neighbors."

In response to the increasing use of homes as STRs and their attendant issues, the City engaged in an extensive period of public comment, public input, and work sessions with the legislative body and planning commission to strike a reasonable balance between the interests of residents and of STR owners and operators. The city hired consultants, prepared maps, and sought citizen input. For over two years, the STR issue was discussed at almost 20 Arlington city-council meetings at which citizens on both sides of the issue voiced their opinions. Ultimately, the city council enacted the Zoning Ordinance and the STR Ordinance.

The Zoning Ordinance created an STR Zone to allow houses within the zone to be used as STRs. The STR Ordinance in turn prescribes the permitting process and imposes regulations on STR owners and tenants.

The Homeowners in this lawsuit own properties in the City. Two of them live in their homes and have rented bedrooms to short-term occupants. Neither of their homes is in the STR Zone or within a zoning district in which STRs

are allowed. Another owns a property in the STR Zone and another property that is not.

The Homeowners sued the City and its mayor seeking declarations that (1) the STR Ordinance violates STR tenants' freedom-of-assembly rights under the Texas Constitution; (2) the Zoning Ordinance and the STR Ordinance violate the Homeowners' substantive-due-course-of-law rights under the Texas Constitution; (3) the STR Ordinance violates STR tenants' freedom of movement rights under the Texas Constitution's substantive-due-course-of-law clause; (4) the Zoning Ordinance and the STR Ordinance violate the Homeowners' equal-protection rights under the Texas Constitution; and (5) the Zoning Ordinance and the STR Ordinance are ultra vires acts that exceed the City's and the mayor's zoning powers. The Homeowners also sought to enjoin the City from enforcing both ordinances.

The trial court denied the Homeowners' temporary injunction request and the Homeowners appealed.

To obtain a temporary injunction, an applicant must plead and prove (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. The applicant has the burden of production to offer some evidence on each of these elements, but he is not required to prove that he will ultimately prevail at trial on the merits, only that he is entitled to preservation of the status quo until then. A probable right of recovery is shown by alleging a cause of action and presenting evidence tending to sustain it. To prove probable injury, an applicant must show that he has no adequate remedy at law.

The Homeowners argue that they are likely to prevail on their request for a declaration that as applied to them, the Zoning Ordinance violates their substantive-due-course-of-law rights under Article 1, Section 19 of the Texas Constitution because (1) the Homeowners have a vested right to lease their property and (2) the Zoning Ordinance is not rationally related to a legitimate governmental interest, The Homeowners pleaded that the City's claimed legitimate interest in establishing noise and occupancy regulations simply does not justify the wholesale elimination of the Homeowners' right to rent their homes for less than thirty days (in the case of rentals outside the STR Zone) and that the Zoning Ordinance's blanket prohibition on rentals outside of the STR Zone is not rationally related to the protection of public health, safety, or welfare, and is unduly burdensome when considered in light of the alleged government interests it is designed to address. On appeal, the Homeowners do not argue that the Zoning Ordinance is unduly burdensome, but they maintain that its STR limitations are not rationally related to a legitimate governmental interest. Because whether the Zoning Ordinance rationally relates to a legitimate governmental interest is dispositive of the Homeowners' first issue, Court of Appeals address that question first.

Ordinances are presumed to be constitutional. To overcome this presumption, the Homeowners—in advancing an as-applied challenge under the Texas Constitution's substantive-due-course-of-law requirement—must prove either that the statute's purpose could not arguably be rationally related to a legitimate governmental interest" or that when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to the governmental interest.

Texas due course of law protections in Article I, § 19, for the most part, align with the protections found in the Fourteenth Amendment to the United States Constitution. An ordinance violates due process if it has no

foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. To pass constitutional muster, an ordinance must be designed to accomplish an objective within the government's police power and be rationally related to the ordinance's purpose. If it is at least fairly debatable that the ordinance was rationally related to a legitimate government objective, the ordinance must be upheld. Whether an ordinance violates due course of law is a legal question, but "the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties.

The City argues that the Zoning Ordinance is related to the following governmental interests: (1) safeguarding the life, health, safety, welfare, and property of STR occupants, neighborhoods, and the general public and (2) minimizing the adverse impacts resulting from increased transient rental uses in neighborhoods that were planned, approved, and constructed for single-family residences. These purposes are legitimate governmental interests.

The Homeowners assert that the City introduced no evidence demonstrating that STRs cause residential disharmony to a different extent than other properties and that unspecified state laws and local ordinances already prohibit all of the conduct the City cites to justify its ban. Even if the latter is true, the City did present evidence that STRs can disrupt residential neighborhoods and that restricting STRs to the STR Zone and certain zoning districts is rationally related to the City's objectives.

The court held that the Homeowners failed to present evidence tending to prove that the Zoning Ordinance violates their substantive-due-course-of-law rights and thus failed to show that they were likely to prevail on their request for a declaration that the Zoning Ordinance violates their substantive-due-course-of-law rights under Article 1, Section 19 of the Texas Constitution.

The Homeowners also contend that they are likely to prevail on their claims that the STR Ordinance unconstitutionally restricts their tenants' freedoms of assembly and movement because the ordinance unilaterally prohibits assembly on private property at certain times. The City questions the Homeowners' standing to bring their assembly-clause claim, presumably because the Homeowners' assembly-clause challenge is based on an alleged violation of their tenants'—not the Homeowners'—assembly rights. The court agreed with the City that the Homeowners lacked standing.

The Homeowners further argue that they are likely to prevail on their claim that as applied to them, the Zoning Ordinance and the STR Ordinance violate their equal-protection rights under the Texas Constitution by treating STR renters and landlords differently from those in long-term rental situations without compelling evidence justifying this disparate treatment.

A colorable as-applied equal-protection claim requires that the government treat the claimant differently from other similarly situated landowners without any reasonable basis. Unless the challenged ordinance discriminates against a suspect class, the ordinance generally must only be rationally related to a legitimate state interest to survive an equal-protection challenge. Economic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause.

Here, the Homeowners assert that the

ordinances plainly treat them differently from property owners leasing their properties to tenants for more than 30 days. But the Homeowners offer no argument or authority or point to any facts demonstrating that they are similarly situated to property owners who lease their properties long-term. Even if they had, the Homeowners' equal-protection claim still requires them to show that the Zoning Ordinance and the STR Ordinance are not rationally related to legitimate state interests. As noted, the City's stated legitimate governmental interests are (1) safeguarding the life, health, safety, welfare, and property of STR occupants, neighborhoods, and the general public and (2) minimizing the adverse impacts resulting from the increase in transient rental uses in neighborhoods planned, approved, and constructed for single-family residences. The Homeowners argue that there is no evidence demonstrating a rational basis between these interests and the two ordinances.

Based on the evidence presented at the temporary-injunction hearing, the court held that the Homeowners failed to offer evidence tending to prove that either the Zoning Ordinance or the STR Ordinance violates their equal-protection rights and thus failed to show that they were likely to prevail on their request for declarations that both ordinances violate those rights under Article 1, Section 3 of the Texas Constitution.

PART XIV
CONSTRUCTION ISSUES

James Construction Group, LLC* v. *Westlake Chemical Corporation, No. 20-0079 (Tex. May 20, 2022). This case arises out of a construction contract dispute between an owner and contractor; the principal issues are: (1) whether the owner was required to strictly (or only substantially) comply with a written-notice condition precedent to recover damages in a termination for default; (2) whether the owner could substantially comply with the written-notice requirement absent a writing; and (3) whether a provision barring recovery of consequential damages merely waived liability for such damages or constituted a covenant not to sue.

Westlake, the owner, replaced James, the contractor, for safety violations following a fatal accident involving a James employee. The contract allowed Westlake to assign work to James and other contractors at Westlake's discretion. Westlake was entitled under to intervene and require James to improve its safety at James's cost if James was performing work unsafely. Westlake was also entitled to terminate the contract with James for convenience or default.

To terminate for default based on safety violations and recover associated costs, Westlake was required to give James three notices in writing: (1) that Westlake had reasonably determined there were serious safety violations; (2) that Westlake was not reasonably satisfied with the pace and quality of James's remediation efforts; and (3) that James was terminated for default. The contract also included an indemnity provision and a waiver of consequential damages.

Westlake sued James for breach of contract to recover the costs of hiring a replacement contractor. James counterclaimed, alleging Westlake breached by improperly terminating James for default and seeking contractually prohibited consequential damages. The jury found that Westlake substantially complied with all three notice conditions, and that James violated the agreement by failing to pay Westlake's costs associated with transferring the work. It also found that James failed to indemnify Westlake in litigation following the worksite fatality and that Westlake's claims for consequential damages also violated the

agreement.

The trial court rendered judgment largely on the jury's verdict, awarding both parties damages and attorney's fees. The Court of Appeals affirmed the judgment as to the award of damages and attorney's fees to Westlake and reversed as to the award to James on its counterclaim. The Court of Appeals held that the doctrine of substantial compliance applied to the notice requirements and that the evidence was legally sufficient to support the jury's findings that Westlake substantially complied. It also held that Westlake did not breach the contract by seeking consequential damages because the provision barring such damages was merely a liability waiver, not a covenant not to sue.

The Supreme Court affirmed in part, reversed in part, and remanded to the trial court for further proceedings on Westlake's attorney's fees. The Court first held that substantial compliance was the appropriate standard when evaluating compliance with a contractual notice condition. However, the Court explained that without a writing in some form, a party does not comply, substantially or otherwise, with a written-notice condition. The Court concluded that at a minimum, Westlake failed to provide two of the three required written notices. To the extent there were writings from Westlake to James, they failed to provide the requisite notice, and it was undisputed that there was no writing whatsoever giving the final notice terminating James. The Court therefore held Westlake did not substantially comply with the written-notice conditions precedent to termination for default and was not entitled to contract damages under that provision.

The Court further rejected Westlake's argument that another contract provision which had no notice requirement provided an independent ground for the same damages award, holding that such a provision could not be used as an end-run around the more stringent requirements under the contract's termination-for-default section.

However, the Court affirmed as to James's failure to comply with its indemnity obligations. The Court rejected James's argument that Westlake's failure to provide the requisite notices of default constituted a material breach that excused those obligations because the written-notice requirement was a condition precedent to termination for default, not a covenant.

The Court further affirmed the take-nothing judgment on James's counterclaim for breach of contract, interpreting the provision to constitute a waiver of liability for consequential damages, not a covenant not to sue. Construing the provision's language as a whole and considering the nature of the waiver—which bars only a type of damages—the Court held that the provision did not subject a party to liability merely for seeking damages that are ultimately classified as consequential rather than direct. Accordingly, while James could not be held liable for Westlake's consequential damages, Westlake did not breach the contract by seeking them.

Chief Justice Hecht, joined by Justice Devine, Justice Busby, and Justice Bland, dissented in part, opining that Westlake substantially complied with the contract's written-notice requirements. The dissent would have held that a writing was not required to substantially comply in light of evidence of actual notice. The dissent also would have held that there were writings supplying notice from Westlake as to the first two requisite notices and that a writing from James supplied the final required notice.

Justice Boyd, joined by Justice Blacklock and Justice Huddle, dissented as to James's

Section 26 counterclaim, opining that the provision unambiguously created a covenant not to sue and that the trial court's judgment in James's favor on that claim should be reinstated.

In re *Custom Home Builders of Central Texas Inc.*, 647 S.W.3d 419 (Tex. App.—San Antonio 2021, no pet.). Civil Practice & Remedies Code § 15.011 states that "Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located."

Custom Home Builders build a custom home for some folks in Guadalupe County. The homeowners then sued for construction defects, filing the suit in Bexar County. Custom Homes filed a motion to transfer venue to Guadalupe Count, claiming that the suit is for recovery of damages to real property and that § 15.011 mandates venue in the county where the house is located. The homeowners argued that § 15.011 applies only to suits involving title to or possession of land. The trial court denied the motion. Custom Homes filed this mandamus action.

The Court of Appeals held that the common and ordinary meaning of "damages to real property" is money claimed for loss or injury to land or anything attached to the land. After a lengthy and scholarly discussion, the court held that § 15.011 mandates venue in the county where the land is located.

CCC Group, Inc.* v. *Enduro Composites, Inc., 637 S.W.3d 153 (Tex.App.—Houston [14th Dist.] 2021, no pet.). CCC Group was the general contractor for improvements to Mosaic Fertilizer's facility. It hired J.P. Mack as a subcontractor for part of the work and materials. J.P. Mack started using Enduro as a supplier. When J.P. Mack asked for a credit increase, Enduro determined that it didn't meet its standards, so CCC Group, J.P. Mack, and Enduro entered into a Joint Check Agreement. Based on the Joint Check Agreement, Enduro increased J.P. Mack's credit line.

In the Joint Check Agreement, CCC Group agreed to issue checks made jointly payable to J.P. Mack and Enduro in accordance with monthly progress payments to J.P. Mack under the Subcontract, but only for goods or services supplied to the project by Enduro for which CCC Group has been provided with complete invoices, delivery tickets, and such other documentation as may be reasonably requested by CCC Group.

Both before and after execution of the Joint Check Agreement, Enduro sent invoices to J.P. Mack, but Enduro did not send these invoices to CCC Group. J.P. Mack did not send CCC Group the invoices that Enduro sent J.P. Mack for the siding Enduro supplied. J.P. Mack sent invoices to CCC Group under the Subcontract, but none of these invoices mentioned Enduro or stated an amount attributable to siding. J.P. Mack's invoices to CCC Group instructed CCC Group to make payment to J.P. Mack. CCC Group did not issue any check jointly payable to J.P. Mack and Enduro. J.P. Mack did not make a payment on any of the invoices that Enduro sent J.P. Mack after execution of the Joint Check Agreement.

JCCC Group received its final payment from Mosaic before August 6, 2012. On that date, a representative of CCC Group executed a "Contractor's Affidavit and Final Waiver of Lien," in which the representative stated that CCC Group had been paid in full with respect to its work under its contract with Mosaic Fertilizer, LLC.

After not invoicing CCC Group for four

months, in October 2012, J.P. Mack sent an invoice to CCC Group. Enduro filed suit in the trial court asserting various claims, including claims for breach of the Joint Check Agreement and for fraud against CCC Group, and for breach of contract against J.P. Mack. J.P. Mack filed a cross-claim against CCC Group for breach of the Subcontract. The case was tried to a jury, and the jury found in favor of Enduro.

CCC Group argues that the Joint Check Agreement's requirement that CCC Group be provided with complete invoices and delivery tickets is a condition precedent to any obligation under the agreement that CCC Group issue a joint check. Enduro argues that the provision of complete invoices is at most a covenant, rather than a condition precedent.

A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. To determine whether the provision of complete invoices and delivery tickets is a condition precedent to any obligation on CCC Group to issue joint checks, the court must ascertain the intention of the parties, and that can be done only by looking at the entire Joint Check Agreement. To make performance specifically conditional, a term such as "if," "provided that," "on condition that," or some similar phrase of conditional language normally must be included. If no such language is used, the terms typically will be construed as a covenant to prevent a forfeiture. Though there is no requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made, rather than a condition imposed. The use or absence of such phrases is probative but not dispositive. In construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible. When the intent of the parties is doubtful or when a condition would impose an absurd or impossible result, the agreement will be interpreted as creating a covenant rather than a condition. Because of their harshness in operation, conditions are not favored in the law.

The court noted that the parties agreed that CCC Group had an obligation to issue checks made jointly payable to J.P. Mack and Enduro in accordance with monthly progress payments to J.P. Mack under the Subcontract, but the parties agreed that CCC Group had this obligation only for Goods or Services supplied to the Project by Enduro: (i) that J.P. Mack ordered pursuant to the Subcontract; (ii) that comply with the Subcontract documents; (iii) that are incorporated into the project; and (iv) for which CCC Group has been provided with complete invoices, delivery tickets, and such other documentation as may be reasonably requested by CCC Group establishing and evidencing the debt of J.P. Mack to Enduro. The parties did not use "if," "provided that," or "on condition that" in the Joint Check Agreement. Nonetheless, under the only reasonable construction of the "but only for" language, CCC Group had an obligation to issue checks jointly payable to J.P. Mack and Enduro only if (1) Enduro supplied Goods or Services; (2) J.P. Mack ordered the Goods or Services pursuant to the Subcontract; (3) the Goods or Services complied with the Subcontract documents; (4) the Goods or Services were incorporated into the Project; (5) CCC Group had been provided with complete invoices and delivery tickets for the Goods or Services; and (6) CCC Group had been provided with any other documentation as may have been reasonably requested by CCC Group establishing and evidencing the debt of J.P. Mack to Enduro for the Goods or Services.

It would not be reasonable to construe the language "but only for materials, services, labor and/or equipment for which [CCC Group] has been provided with complete invoices [and] delivery tickets" as imposing on CCC Group an obligation to issue checks jointly payable to J.P. Mack and Enduro as to Goods or Services for

which complete invoices and delivery tickets had not been provided to CCC Group.